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Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



INSIDE

Managing EEOC protected classes

Harassment case costs firm \$500K

Key steps to lead through a crisis

Novel approach was also illegal

Supervisor's promotion decision gets tested in court for age bias

Did she make the right call on who gets the choice slot?

“You wanted to talk to me?” Mel asked, poking his head in the doorway of Andrea’s office.

“Yes, have a seat,” she said as she motioned toward a chair. “We’re making some changes, and I wanted to talk to you about where you might fit in and where I need someone right away.”

“I’m all ears,” Mel said.

“I need someone to handle a job that mainly involves training new people,” she explained. “I figured with all your 40-some years of experience, that would be perfect for you.”

Mel rubbed his chin, then replied: “Well, I guess I’ll take it if that’s what you’re offering. Really, though, it’s not my ideal job.”

Assumed interest

“Oh,” Andrea said in mild surprise “I suppose I just assumed you’d be pretty interested in this.”

“I’m not ruling it out,” he said. “But let me ask: Are there other positions coming up, maybe something that’s a promotion?”

“I don’t have everything nailed down

Please see Gets tested... on Page 2

Sharpen Your Judgment

ADA dispute puts manager in tricky legal spot

HR manager Lynn Rondo had just finished yet another virtual interview when company attorney Eric Bressler interrupted.

“Got a minute?” He asked.

“Sure,” Lynn replied, switching screens. “I just interviewed a promising candidate for Yvonne’s open position.”

Eric frowned. “I actually wanted to talk to you about Yvonne,” he said. “She’s suing, saying we violated the ADA.”

Wouldn’t come back

Lynn sighed. “How? She wouldn’t come back to work after her FMLA leave. We had no choice but to let her go.”

“The devil’s always in the details,” Eric quipped.

“Yvonne got injured and went on FMLA leave,” Lynn explained. “When her leave was up, she said she couldn’t come back.

“So I let her take another month,” Lynne said, “but she still wasn’t able to return and she refused to get examined by her doctor. She was taking advantage. That’s when I let her go.”

“Yvonne is saying we should’ve accommodated her instead of firing her,” Eric replied.

“I don’t see how I could’ve accommodated her when she just kept refusing to come back,” Lynn said, exasperated.

When Yvonne sued for an ADA violation, the company fought to get the case dismissed. Did it win?

This regular feature sharpens your thinking and helps keep both you and your firm out of trouble. It describes a real legal conflict and lets you judge the outcome.

Make your decision, then please turn to Page 4 for the court’s ruling.

Gets tested ...

(continued from Page 1)

yet,” she noted. “There probably will be a new position in a few months that’ll act as my assistant and most likely would involve a promotion. To be fair, I’m going to let everyone apply and then make my choice. It could even be someone from outside the company.”

“Your assistant?” he said. “That sounds interesting. Maybe I’ll apply for it.”

“If you want, but to be honest, I’ll be looking for someone with heavy experience in our new software,” she explained.

“That’s not one of your strengths, which is why I’m asking you about the training position instead.”

“Hmm, OK,” he nodded. “I guess I’ll take it and forget about applying for the other job.”

“Great,” she smiled. “You start Monday. We’ll go over all the details then.”

Younger person promoted

Two months later, Mel stormed into Andrea’s office and said, “I just heard Amy got the assistant’s job. “She’s what, 26 years old and only been here two years?”

“That’s right,” Andrea affirmed as she closed the office door to keep from being overheard. “She

actually was the most qualified applicant we got because she had a little software experience as an intern in college. Why are you so upset about it? You didn’t even apply for the job.”

“I’m upset because you discouraged me from applying, making me think I had no chance at the assistant’s job,” he answered. “Then you go ahead and hire someone who’s barely qualified.”

Age bias?

Mel sued his employer for age discrimination. He said his supervisor discouraged him from applying for a promotion to clear the way for a younger person.

The supervisor said she slotted him into a job for which he seemed suited. She acknowledged that while she did imply he wasn’t fully qualified, she never stopped him from applying for the other slot.

Decision: The company won.

A judge agreed the supervisor simply gave the employee the facts about the job. And while those facts may have been discouraging, they didn’t bar the employee from applying.

Key: The boss’s actions couldn’t be interpreted as bias. While she did hire a younger person, there was no evidence that she sought to exclude the older employee.

Case: EEOC v. Audrain Health Care, Inc.

What you need to know:

When choosing employees for a promotion or what’s viewed as a favorable assignment:

- Use only criteria directly related to job performance – and not factors such as age, gender or race
- Make sure all relevant employees are reasonably aware of the opportunity and how to apply for it, if application is required, so that no one feels shut out of the process, and
- Check with HR before making the final selection or ruling out certain employees; that’ll help ensure you’ve followed procedures and the law.

TEST YOUR KNOWLEDGE

Stay legal when managing EEOC protected classes

It is illegal to discriminate against someone because of that person’s race, color, religion, sex, national origin, age, disability or genetic information.

These groupings are generally referred to as “protected classes.”

To test your knowledge of general EEOC rules, respond *True* or *False* to the following:

1. It’s OK for an employer to publish a job advertisement that shows a preference for a job candidate based on their education, such as “must hold a bachelor’s degree.”
2. It’s perfectly legal (and a smart businesses policy) to rely solely on word-of-mouth recruitment by your current employees.
3. There are some situations where it is perfectly legal to reduce benefits of older workers.

ANSWERS

1. *True.* It is perfectly legal to require a college degree for a job and to inform potential applicants in the job posting that a degree is required. What’s problematic is to suggest the applicant “must be a recent college graduate,” because that could lead to claims of age bias.
2. *False.* You want to be careful about word-of-mouth recruitment. For example, an employer’s reliance on word-of-mouth recruitment by wages or employee benefits on the basis of age, in some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.
3. *True.* While it is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the basis of age, in some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

Answers to the quiz:

Where other supervisors went wrong

News you can use to head off expensive lawsuits

This feature highlights violations of workplace laws. You can learn how other supervisors got off track, what the mistakes cost and how to avoid them.

Firm pays \$500K to settle sex harassment lawsuit

What happened: Some female employees of The Bay Club Company, which operates 24 resort/athletic facilities and country clubs in California and Oregon, were subjected to sexual harassment by management and customers.

The EEOC complaint also alleged that managers retaliated against employees who complained about the harassment.

Decision: Along with paying \$500,000 to settle the claim, the firm agreed to retain an external EEO monitor, review and revise its policies and procedures regarding discrimination, harassment and retaliation, and maintain an effective reporting structure for employees to report discrimination and harassment, which will include a complaint hotline number.

Bay Club will also provide training to all employees on federal anti-discrimination laws, with an emphasis on sexual harassment, and must track discrimination complaints and keep records.

Cite: EEOC v. Bay Club, Inc.

Island resort pays big for sexual harassment

What happened: Imperial Pacific International, LLC, which operates the Best Sunshine Casino in the Northern Mariana Islands, permitted its customers to sexually harass its employees, including sexual advances, demands for sexual favors, and sexual physical touching.

According to the suit, an Imperial Pacific executive instructed a female employee to escort a drunk male customer to his villa, where she was forcefully kissed and subjected to unwelcome sexual propositions. The EEOC also charged that Imperial Pacific retaliated against female employees for complaining about sexual harassment by terminating them or forcing them to quit.

Decision: Along with agreeing to pay \$105,000 to settle the claim, Imperial will revise its employment practices to ensure it is in compliance with federal law.

Cite: EEOC v. Imperial Pacific, LLC.

Food supplier hit with \$130K retaliation claim

What happened: Wild Fork Foods, a meat, fish and poultry supplier based in Miami, violated federal law when a Hispanic female employee in its corporate office was subjected to a hostile work environment based on her national origin and race and subjected to retaliation for complaining and ultimately forced out of her job.

Decision: Along with agreeing to pay \$130,000, Wild Fork also will provide specialized training on national origin and race discrimination and harassment to all managers and employees to ensure that employees are aware of their rights and complaint procedures and that management and human resources personnel are aware of their obligations to prevent workplace discrimination and how to address complaints.

Cite: EEOC v. Food Ventures.

STOP, LOOK, LISTEN ...

4 key steps for leading through a crisis

HR leaders and frontline managers will have to lead teams through many crises of different forms – from downsizing and layoffs to natural disasters and personal or departmental tragedies.

Here are four keys to lead employees through any kind of a crisis.

Communicate

Share updates on how your organization and team are affected by the crisis and what everyone needs to do. More importantly, you want to give employees an opportunity to share how they feel about the situation, plus best practices and hacks they've found to work through it.

Imagine and act

Everyone will likely need to adopt new roles and/or work strategies because of the situation. To determine the best route, create a vision so everyone can get a grip on what needs to be done to manage the crisis.

Clarify, adjust, adapt

Leaders need to prepare employees to make quick pivots.

Explain early in the crisis that roles, duties and tasks can change day-to-day based on the current needs.

Set up a communication protocol. Define the quickest way to send and receive messages (likely phone calls) descending to the slowest (perhaps, IM to social apps to email). Also create priority guidelines on actions and subjects (for instance, emergencies on the phone and task reports in email).

Communicate as needed.

Show empathy

Leaders who get through crisis most effectively also show calmness, courage and empathy

Share a story of a personal struggle and the fears you had throughout it – and even some you have now. Then talk again about your confidence in everyone's ability to adjust, adapt and overcome.

SUPERVISORS SCENARIO

Supervisor tries novel approach to rein in roaming employee: Will it backfire?

A manager's lesson is in equal treatment

“What in the heck is this?” asked Sue, pointing to the silver tape on the floor that ran down the middle of the aisle and behind her workstation.

“I put it there as a reminder to spend more time at your station,” said Rhonda, her supervisor.

“You’re saying I’m not allowed to cross this line?” Sue said.

“What do you think I am, 12 years old?”

“I often have to tell you to get back to your workstation,” Rhonda said. “I thought you’d get the message if I tried something else.”

Out of bounds

Later, Sue wasn’t at her workstation when Rhonda was looking for her – again.

Rhonda wrote her up.

“This because I went out of bounds?” Sue asked when Rhonda saw her.

“After all, you made it clear where we Black people are supposed to stay.”

“I was making a point,” Rhonda said. “It didn’t have anything to do with race.”

The next day, the tape was gone, and Sue’s station was empty when Rhonda went looking for her, so Rhonda left a note: “I need to talk to you.”

About 20 minutes later, Sue returned.

“You writing me up again for not being at my station?” she said sarcastically.

“Without that tape on the floor, I didn’t know where I should be!”

A hostile environment?

Sue was fired. She fought the firing, saying she’d been subjected to a hostile work environment because of her race.

Decision: The company lost when the judge sent the case to trial.

Singling out one Black employee for this treatment and no one else established a hostile work environment based on race, the judge said.

Key: The supervisor may have seen her actions as a novel approach, but it’s clear the employee perceived it differently.

Case: Crosby v. Premier Entertainment Biloxi.

What you need to know:

People need to believe they’re being treated fairly, especially when it comes to enforcing the rules.

Some ways to do that include:

- Reviewing company policies in group settings, so no one feels singled out.
- Establishing where employees are expected to be and what to do if they need to step away for any reason.
- Explaining the “why” behind the rules. When employees know the reasons, they’re more likely to respect the rules.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a court dismissed the case.

Yvonne’s attorney argued the company fired her too quickly without going through the interactive process to find a reasonable accommodation, thereby violating Yvonne’s ADA rights.

The court disagreed. It said Yvonne didn’t do her part by getting evaluated by her doctor to see if she could return to work. Instead, Yvonne kept insisting she wasn’t well enough to return.

The court said the company tried to be flexible by offering her more leave once the FMLA leave was exhausted, but wasn’t obligated to continue holding the job open for Yvonne when she wasn’t able to work.

This case demonstrates how the ADA only protects employees who are qualified for their job, with or without a reasonable accommodation.

Accommodation a two-way street

Since Yvonne said she wasn’t able to come back to work at all, the company wasn’t obligated to try and find an accommodation that would allow her to.

Her refusal to be examined by her doctor further interfered with her own ADA claim. The interactive process works two ways, and both the employee and employer must participate.

Cite: Williams v. Pinnacle Health Medical Services.

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