

# Supervisors LEGAL UPDATE™



Get More  
Online

Check out our  
ready-to-use  
training  
materials today.

A fast-read source of information to help managers understand and comply with federal and state employment laws

July 1, 2021

## OUR TOP STORY

**Boss learns a tough lesson for not stepping into workplace problem**

## ONLINE

Check out this exclusive online content:

[www.SupervisorsLegalUpdate.com](http://www.SupervisorsLegalUpdate.com)

### Management Minutes

6-point checklist to document better



### Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



## INSIDE

**The ins & outs of internship rules**

**Pregnancy bias costs firm \$120K**

**Keys to boosting happiness at work**

**Promotion denied; was it retaliation?**

## Boss declined to tell worker to stop 'flirting' – lands in court

*Supervisor felt co-worker interaction wasn't his business*

“Maybe don't try to make too big of a deal out of it,” Supervisor Mike Trainor said.

“Everybody runs into this sort of thing at some point,” he added. “Just ignore it.”

“Ignore it?” Sheila echoed. “Are you kidding me? You expect me to ignore some pervert co-worker pawing at me and following me around drooling?”

“You're being a little melodramatic, aren't you?” Mike asked. “Barry is just flirting with you.”

“I mean, he's single. You're single. This happens everywhere, even at work.”

“I've known Barry for a few years,” Sheila said. “Why all of a sudden this, now?”

“What do you want me to say?” Mike replied. “He likes you.”

### Who talks to Barry?

“Well, I still want this to stop and I expect you to do something about it,” Sheila insisted. “This is my workplace, too.”

“Now you're making a mountain out of a molehill,” Mike said.

“I have an idea,” he said. “Why don't you go to Barry and ask him to sit down with

*Please see **Flirting ...** on Page 2*

## Sharpen Your Judgment

### Pregnant worker put on leave: Was it bias?

**H**R manager Lynn Rondo was taking a walk around the office building, taking advantage of the warm weather, when she saw company attorney Eric Bressler doing the same thing.

“Hey, Eric,” she said. “I see you managed to get outside, too.”

“I needed to clear my head,” he replied with a weak smile. “Lila Garrity is suing us for discrimination.”

#### Placed on temporary leave

Lynn's face fell. “Are you joking? We went out of our way to accommodate Lila!”

“Remind me of everything you did,” Eric said.

“Lila was having some pregnancy complications,”

Lynn began. “She requested a schedule change which I gladly gave her.

“But then Lila's doctor said she couldn't lift more than 10 pounds,” Lynn went on. “Which conflicts with an essential function of her job.”

Eric frowned. “She's supposed to be able to lift 50 pounds.”

“So I had to put her on temporary leave, which Lila didn't want,” Lynn said.

“I told her she can come back after she has the baby, but she wasn't happy.”

“I'm wondering if we should've tried harder to find an accommodation,” Eric said.

When Lila sued for pregnancy discrimination, the company fought the lawsuit. 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.*

# Flirting ...

(continued from Page 1)

you for a little chat?

“Then you can explain to him, on your own terms, that you don’t like the way he goes about flirting.”

“Wait, you want me to go to him?” Sheila asked. “Barry is the last person around here I want to talk to right now.”

“You’re certainly not helping matters,” Mike said.

“Put yourself in Barry’s place. I’m sure he never intended to upset you and he’d be totally embarrassed to learn you and I are even having this kind of conversation about his behavior.”

“That’s not my problem,” Sheila said. “I want you to tell him to stop.”

“To tell you the truth, Sheila, I’m not convinced this is the kind of complaint that

even warrants a response from me.”

“Well I am certainly not going to talk to him,” Sheila said.

“So then, neither will I,” Mike chimed in.

## Second complaint filed

A while later, when Sheila filed yet another complaint, Mike called her to his office.

“I thought we agreed this matter was resolved,” he said. “Why am I hearing about it again?”

Because no one spoke to Barry,” Sheila said, “and his behavior hasn’t changed. “He still stares at me when I walk by. He makes me uneasy being near him.”

## Adverse actions taken

“YOU need to do something about this,” Mike said. “It’s affecting your performance.”

Over the next few months, Sheila was put on probation, her scheduled salary increase was denied and her overall job performance rating fell.

Sheila hired an attorney and sued her employer for retaliation, claiming the adverse actions were taken against her because she filed a protected complaint.

The employer insisted its actions were lawful.

**Decision:** The company eventually agreed to settle the claim for \$17,500, for retaliating against the employee.

It also agreed

to implement training on equal employment opportunity issues related to harassment and illegal retaliation.

**Key:** Federal employment discrimination laws protect workers by allowing them to challenge illegal discrimination without fear of punishment or reprisal.

Supervisors should take all harassment complaints seriously.

Case: *US DoJ v. Franklin County, NC.*

## What you need to know:

A retaliation claim challenging an action taken by an employer against an employee has these three elements:

- Protected activity: the employee has taken part in an action or process that is legally protected by federal law.
- The employer takes an adverse action against that employee often in a time frame very close to when the protected activity was taken.
- There is a fairly obvious and clear causal connection between the protected activity taken by the employee and the materially adverse action taken against the same employee.

## TEST YOUR KNOWLEDGE

### Internship rules haven’t changed with COVID

Bringing in an unpaid intern – usually a student – for the summer has its advantages for an employer, including getting an early look at someone you might want to hire someday on a permanent basis.

To test your knowledge of the U.S. Dept. of Labor laws governing the use of unpaid interns, respond *True* or *False* to the following:

1. If a regular full time employee quits, you can bring in an unpaid intern to fill that spot until you’re able to hire a replacement.
2. As an incentive, you can promise an intern first crack at the next opening for a paid position.
3. The training interns receive at your place of employment must closely match the training and education they receive in their formal education programs.

## ANSWERS

- To download a copy of the DOL’s Internship Programs Under The Fair Labor Standards Act, go to: [www.dol.gov/agencies/whd/fact-sheets/7-1-flsa-internships](http://www.dol.gov/agencies/whd/fact-sheets/7-1-flsa-internships)
1. *False.* Labor laws strictly prohibit employers from using unpaid interns as replacements for employees who normally would be paid for the same type of work.
  2. *False.* There can be no *quid pro quo* promise of hiring to entice an intern to sign on with your company. In fact, to make sure you’re in compliance, you may want to tell interns that there is no such guarantee or promise involved.
  3. *True.* The training must parallel what the intern is studying in school. For instance, if you took on an intern who was studying IT, you wouldn’t place that person in a training position involving sales (unless, maybe, it was sales of IT software or equipment).

## 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.*

### **Ambulance firm pays big for pregnancy bias**

**What happened:** Two pregnant women were training to become customer service reps at LogistiCare Solutions, LLC, a non-emergency medical transportation company with a call center in Phoenix.

After less than one week in the training class, LogistiCare learned they were pregnant and fired both of them.

**Decision:** LogistiCare agreed to pay the women \$120,000 and issue a letter of apology to both. The settlement also requires the company to review and revise its EEO policies and requires LogistiCare to train its supervisors, employees and human resources personnel on Title VII and other anti-discrimination laws.

**Cite:** EEOC v. LogistiCare Solutions LLC.

### **Construction firm out \$725K for racial bias**

**What happened:** Black and Hispanic workers at San Francisco-based Hathaway Dinwiddie Construction Company were exposed to racially offensive remarks and graffiti.

According to the EEOC, Hathaway failed to take effective corrective action to remedy the racial harassment.

**Decision:** Along with paying \$725,000, the firm agreed to retain an EEO monitor to review compliance with Title VII; to review and revise its harassment and retaliation policies and procedures; provide training

to all employees on racial harassment and retaliation; and to establish a centralized tracking and monitoring system for racial harassment complaints.

**Cite:** EEOC v. Hathaway Dinwiddie.

### **Insurance firm pays \$90K for disability retaliation**

**What happened:** An employee in the Little Rock, AR, offices of USable Life, an insurance company based in Florida, was discriminated against based on for her anxiety and postpartum depression.

She was fired her as retaliation for her complaints.

**Decision:** Along with paying \$90,000 to settle the lawsuit brought by the EEOC, USable agreed to amend and enforce its written policies prohibiting discrimination; electronically disseminate a copy of its anti-discrimination and harassment policy to all employees and provide training to its human resources, management and supervisory employees within 90 days.

It also agreed to have the highest ranking company officer electronically record a publicly available statement attesting that the firm does not retaliate against employees who complain about discrimination and the consequences for managers and others who engage in illegal retaliation; and provide all future complaints of retaliation, as well as the company's responses to those complaints, to the EEOC.

**Cite:** EEOC v. USable Life.

## STOP, LOOK, LISTEN ...

### **Boosting happiness**

Employee happiness clearly isn't one-size-fits-all.

What makes each employee tick? While managers can't cater to everyone's whims, you want to gain a clear understanding of employees' motivations.

You can learn what brings them happiness by asking in one-on-ones what they love about their job and what they'd change. Then do all you can to align their work with their motivations.

### **Help them succeed**

Most people are happiest when they do well. And most employees want to perform well.

Identify and eliminate roadblocks to success. Ask employees what gets in their way of:

- getting work done
- doing higher quality work, and
- achieving professional goals.

Then work with them to get rid of deterrents to success and happiness.

### **Create a sense of belonging**

You can't make employees become friends, but you can give them opportunities to build relationships as deeply as they want them to be.

Create time weekly for employees to socialize, perhaps before or after a standing meeting.

### **Eliminate negative energy**

You can't allow jerk behavior on your watch. Make collegiality a behavioral expectation for all employees – and enforce consequences for failure.

### **Consider your reach**

You can be happy. You can plan to spread happiness. But you might not be able to achieve it always.

Although employees change, some people will never choose to be happy. And if you can't help them, at least don't hurt them.

**SUPERVISORS SCENARIO**

# Employee says she’s the victim of retaliation – and sues for it 3 years later

*Denied promotion triggers a complaint over an old problem*

Paula burst into Tim’s office and said, “So, I see I didn’t get promoted again.”

Tim put down the report he was reading and replied, “No, I thought Linda was the better person for the job.”

“Even though I’ve been doing the job for three months?” she asked. “And even though you told me I was doing it – as you said in my performance appraisal – ‘like an expert?’”

“I was trying to be positive,” he said.

“You sure you weren’t trying to get revenge for the sexual harassment complaint I filed?” she shot back.

### ‘Not against me’

“That was three years ago,” he noted. “It’s not as if you filed the complaint against me. It was against someone in our unit, wasn’t it?”

“Right, but when I told you about it, you told me not to go to HR with the complaint because it would make you look like a bad supervisor,” she said.

“Yes, and you went right ahead and filed

the complaint,” he sighed. “And I never said another word about it.”

“No, you didn’t,” she agreed. “You just refused to promote me, over and over.”

Paula sued for retaliation, saying her boss kept her from a promotion for which she was qualified, as revenge for her filing the harassment complaint.

In court, the company said that the supervisor simply chose the best candidate and that it was unlikely he would penalize Paula three years after the incident.

**Decision:** The company lost. The judge said elapsed time was no defense against a retaliation charge, especially when the supervisor had given the employee high marks for filling the job she eventually was denied.

**Key:** The supervisor in this instance made at least two mistakes: (1) trying to discourage an employee from filing a legitimate complaint and (2) giving the employee a strong appraisal while limiting her job advancement.

*Case: Malin v. Hospira.*

### What you need to know:

When an employee comes to you with any sort of complaint, especially one involving harassment or other illegal activity:

- Conduct and cooperate with a thorough investigation of the complaint
- Apart from the complaint, treat the employee just as you would any other employee who never filed a complaint, and
- Continue with the fair and equal treatment once the findings are in and a decision’s been made on the merits of the complaint.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

Yes, the company won when a court dismissed Lila’s discrimination suit.

Lila’s attorney argued she was placed on leave against her will because she was pregnant, which is a violation of the Pregnancy Discrimination Act.

The company should’ve given her an accommodation instead of preventing her from working, the attorney said.

But the court disagreed.

It said the company did initially try to accommodate Lila by adjusting her schedule. But when Lila wasn’t able to lift the required 50 pounds anymore, she couldn’t complete an essential function of her job.

The company was within its rights to find a temporary replacement until Lila had her baby, the court said.

### Essential job functions

Employers generally must provide reasonable accommodations to a pregnant worker. In this particular case, Lila’s inability to lift more than 10 pounds without an accommodation made her ineligible for the position.

The company needed an employee who could do what Lila couldn’t, with or without an accommodation.

Generally, pregnant employees must be able to perform essential job functions.

*Cite: Ogendo v. Costco.*

**EDITOR: RICH HENSON**

ASST. EDITOR: RACHEL MUCHA

MANAGING EDITOR:  
TOM D’AGOSTINO

PRODUCTION EDITOR:  
P.J. FRONZEO

EDITORIAL DIRECTOR:  
CURT BROWN

**Subscriptions: 800-220-5000**

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal or other expert assistance is required, the services of a competent professional should be sought. — From a declaration of principles jointly adopted by a committee of the American Bar Association and a committee of publishers.

♻️ Printed on recycled paper.

Copyright © 2021 Progressive Business Publications. Please respect our copyright: Reproduction of this material is prohibited without prior permission. All rights reserved in all countries.