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July 14, 2021

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6-point checklist to document better



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7 questions to ask yourself before deciding whether to fire someone



INSIDE

Addressing harassment

Disability bias costs firm \$50K

Best ways to share tough news

Same title, same pay? Court rules

An old sexual harassment claim comes back to haunt supervisor

Worker lets boss know: 'My lawyer's ready'

“Here’s what we’re looking at, Tina,” Mel said as he spread the documentation on the table.

“At least three times you’ve slipped out of work early without telling me. And twice you lied about completing jobs that never got finished. It’s there in front of you in black and white.”

Tina glanced at the paperwork. She’d seen it all before. Her only response was, “So, now what?”

“Now, I’m forced to give you your last chance,” he answered while handing her another piece of paper. “This is written

notification – one more violation will result in immediate termination.”

She read the document and then said, “When you think about my history here and how I’ve been treated, you’d think you guys would cut me a break.”

The real reason

Her response didn’t surprise Mel. He replied: “I know all about the sexual harassment complaint you had against your old boss here. That was two years ago, and that’s why you were reassigned to me.”

*Please see **Old claim ...** on Page 2*

Sharpen Your Judgment

Worker denied leave extension: Was it bias?

HR manager Lynn Rondo was thinking about her weekend plans when her phone rang.

“This is Lynn,” she said.

“Hi, Lynn, it’s Jake Riley.”

Lynn sat up straight. Jake was an employee currently out on medical leave. “Hi, Jake. What can I do for you?”

“I’m calling because I’m going to need an extension on my leave,” Jake said with a sigh. “I still haven’t recovered fully.”

Lynn frowned. “I’m sorry, Jake, but I can’t grant you an extension,” she said. “We need you here. We were already quite generous with granting you retroactive leave when you first took time off without giving us notice.”

“But I need more time,” Jake insisted. “You can’t say no.”

“Unfortunately, I am,” Lynn said.

Awful comments

“You’re denying this because I’m a transgender man. I know the company has a problem with it. And I recall well how my manager, Steve, made awful, awful comments to me.”

“Now, hold on ... “

“No,” Jake said. “If you won’t grant me more leave, I’m suing for discrimination.”

When Lynn didn’t grant the leave, Jake sued for gender bias. The firm wanted 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.

Old claim ...

(continued from Page 1)

“And he got off with a slap on the wrist,” Tina charged. “Can’t say I was shocked about that.”

“He said it was you who came on to him,” Mel reminded her.

“He was my boss,” she shot back. “I had to be ‘friendly’ to him or lose my job.”

“We investigated. You couldn’t prove it and I took you in my department to try to smooth things over,” he said. “End of story.”

“Until now,” she said. “When you managed to slap together some nit-picky offenses as an excuse to fire me for complaining.”

Mel refused to be drawn in. He turned his attention back to the paperwork as he spoke:

“This can be settled pretty easily. Just follow the rules as they’ve been described here, and everything will be fine.”

‘Where’d she go?’

Two weeks later, an annoyed Mel stood in front of a few people in the department and asked, “Anyone seen Tina this afternoon?”

They just shook their heads.

The next day, he confronted her in his office:

“Can you tell me where you were yesterday afternoon?”

“Some stuff came up at home, so I had to leave,” she said.

“You gotta be kidding me, Tina,” he said. “After the talk we had a couple of weeks ago? You know what this means, right?”

The charge

“It means you’re going to follow the company line and fire me for complaining about that pig who used to be my boss,” she replied while standing up and moving toward the door.

“Well, go for it, Mel,” she added. “My lawyer’s ready.”

She sued, saying her violations were minor and nothing more than an excuse to fire her for complaining about sexual harassment.

The company fought the suit, arguing (a) her documented violations had been major and repeated and (b) there was no connection with her complaint.

Did the company win the case?

Decision:

Yes. A judge dismissed the case, noting the supervisor had a well documented cause for the firing and there was no reasonable connection between the firing and the harassment complaint.

Key: You have to be fair to – but don’t have to tiptoe around – people who have a history of problems or who’ve filed complaints.

Case: *Arnold v. Tuskegee University.*

What you need to know:

No one can supervise in a vacuum. You’re always going to have to deal with people’s pasts. Just remember to:

- Talk with HR when someone tries to use the past as an excuse for poor performance or behavior, and
- Working with HR, give employees fair warning – in writing, if necessary – of your expectations, while explaining that problems in the past have to be put aside and the job has to be done. When dealing with those people, treat them as you would any other employee by documenting problems with performance or behavior and being consistent about discipline.

TEST YOUR KNOWLEDGE

Adequately addressing harassment complaints

Front line supervisors are often the face of their company’s response to harassment complaints.

To test your knowledge of handling complaints adequately, respond *True* or *False* to the following:

1. To fully satisfy an employee who’s lodged a complaint of harassment, you can award the employee a bonus, pay raise or promotion.
2. Courts have deemed that supervisors can settle a complaint by transferring an alleged offender to a position in which there’s no contact with the employee who filed the complaint.
3. When an employee complains about harassment but doesn’t demand that action be taken against the alleged offender, a supervisor still must investigate the charge and discipline appropriately if the facts support the charge.

ANSWERS

1. *False.* While courts don’t prohibit such awards, they cannot be considered as full satisfaction for a complaint. Supervisors still must investigate the complaint and act on it accordingly.
2. *False.* Just transferring an alleged offender is rarely a good idea. Consider the obvious danger: If the transferred employee harasses another victim, the supervisor could be charged with concealing knowledge of a preexisting problem. Note: A transfer can be an interim step, to prevent contact while the investigation is taking place.
3. *True.* Having knowledge of a reasonable allegation of harassment obligates a supervisor to follow the investigative process and follow through with discipline, if warranted. Tip: From the start, inform employees who complain that you’re obligated to fully investigate the complaint.

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.

River transport firm hit with racial bias claim

What happened: A Black deckhand with American River Transportation Co., Decatur, IL, was subjected to racial harassment when a co-worker used racial epithets and brought a rope fashioned into a noose aboard the vessel where they both worked. Despite early complaints to the ship's captain about the verbal harassment, the abuse continued and ultimately resulted in the noose incident, the EEOC said. The harassment continued until the deckhand was able to transfer to another vessel, the EEOC said.

Decision: Under a two-year consent decree, the firm will pay the employee \$40,000 in compensatory damages and will also conduct training regarding Title VII, review and update its policies, post a notice prohibiting discrimination and provide regular reports to the EEOC.

Cite: EEOC v. American River Transportation Co.

Senior care center hit big for sexual harassment

What happened: Caregivers who provided senior care services in the home of two clients of Amada Senior Care, Denver, were verbally and physically harassed by the clients' adult son. The harassment included comments about the caregivers' bodies, non-consensual touching, physically cornering the caregivers, exposing his genitals, and pressing his genitals against them. When the caregivers complained,

they had their hours cut. One caregiver was forced to quit.

Decision: Under the three-and-one-half-year consent decree, Amada will pay a total of \$250,000 to resolve the EEOC's claims. The money will be paid to five former Amada employees whom the EEOC identified before and during the lawsuit.

Cite: EEOC v. Joyvida, LLC.

GA food manufacturer out \$50K for disability bias

What happened: Treehouse Foods, Inc., Forest Park, GA, denied a 19-year employee's request for intermittent unpaid leave as an accommodation to receive treatment for her disabilities.

The EEOC said the company failed to engage in the required interactive process and assessed attendance infraction points to the employee under a rigid attendance policy.

Treehouse Foods then fired the employee for exceeding the permissible number of attendance points.

Decision: Treehouse Foods will pay \$50,000 in monetary damages to the employee. Additionally, the company will award the employee her full pension and retirement benefits.

Treehouse Foods also agreed to regular reporting, monitoring, annual training, updating and re-distribution of its ADA policies, and notice posting.

Cite: EEOC v. Treehouse Foods, Inc./Treehouse Foods Private Brands, Inc.

STOP, LOOK, LISTEN ...

Sharing tough news

It's never fun sharing bad news. Here are a few tips that'll help.

Be prompt

Don't wait. Share unpopular decisions as soon as you know about them. Once you have the decision and needed information, rip off the Band-Aid and share the decision.

Anticipate the reaction

Think about how your audience will feel – initial reactions, concerns and questions. You can't predict what they'll do exactly, but if you have an idea of how they'll feel, you can craft a message that answers their immediate needs.

Be clear

This is no time for wishy-washy language to soften the blow. Avoid "maybe," "might," "kind of," "sort of" and other ambiguous words. Describe the decision, what it means to everyone and the next steps.

Recognize resistance

Despite efforts to be sensitive to their reactions, you'll still get resistance. Avoid pushing back to their pushback.

Give employees a chance to air their resistance. They often lose their anger edge as they share it – and might even start to recognize some positive aspects.

Have a real conversation

Unpopular decisions often come as an edict in an email to the masses. Employees deserve more. They deserve a conversation. Even if the news comes from a cold corporate email, get together with your people quickly to talk.

Look to the future

Let employees air feelings and ask questions, but stop everyone short of wallowing in pity or belaboring the issue.

Describe the future based on the unpopular decision and group and individual roles.

SUPERVISORS SCENARIO

Should same titles add up to equal pay? Employee sues to prove her point

Would your job descriptions withstand legal scrutiny?

“Bill, I appreciate your confidence in me,” Carol said. “I’d appreciate more money in my pay, too.”

Supervisor Bill Wilson had seen this coming and was ready with a response: “Carol, I understand what you’re saying: If I’m going to ‘promote’ you to lead trainer, you should get a raise, too.”

“Exactly,” Carol nodded. “When Sam got the same promotion last year, he brought in pizza for everyone in the group to celebrate his raise.”

“OK, let’s consider a few factors,” Bill replied. “First, Sam has been here two years longer than you. Second, he has more responsibility. He develops our procedures, he doesn’t just teach them, like you. It’s all in his job description.”

“I guess you’re forgetting another factor,” Carol noted.

Man v. woman

“What’s that?” Bill asked.

“Sam’s a man, and I’m a woman,” she shot back.

“C’mon, Carol, you know that’s not how I operate,” Bill said. “I just told you: It’s strictly a question of experience and responsibility. We’ll revisit this sometime in the future to see if you’re up to Sam’s level. If you are, we’ll talk about a raise.”

Carol considered Bill’s offer for a moment, and then spoke: “It seems like all I ever hear is ‘wait, wait, wait.’ I’m tired of waiting. It’s time for action.”

With that, Carol filed a lawsuit against her employer for violating the Equal Pay Act. She argued that equal titles should result in equal salaries.

Decision: A judge ruled in favor of the company, noting that there’s nothing in the law that says equal titles must result in equal pay.

Key: The supervisor in the case clearly laid out the reasons for the differences in pay. And those differences – experience and responsibility – were valid and verifiable reasons for paying one employee more than another.

Case: EEOC v. Port Authority of NY and NJ.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

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

Jake’s attorney argued he wasn’t granted additional medical leave because he was a transgender male. Jake’s manager’s comments proved the company was biased against transgender people, and then the company further discriminated against him by denying him more leave, the attorney said.

But a court disagreed. It said the company initially granted Jake medical leave, but couldn’t make the extension work for legitimate business reasons. Jake failed to prove the denial of the extension had anything to do with his transgender status, because he couldn’t point to a cisgender employee who was treated more favorably.

The manager’s comments may have been discriminatory, but that didn’t prove unlawful denial of more leave.

Follow policies consistently

As this case demonstrated, a key in proving a discrimination case is pointing to an employee who was treated more favorably. Jake failed to prove the company treated him any differently than a cisgender employee who wanted more leave in a similar situation.

Employers should follow their policies and handle worker requests consistently to withstand bias claims like this.

Cite: Olivarez v. T-Mobile USA.

What you need to know:

This case sends a warning to any supervisor who thinks a job description is just a piece of paper; it’s often the legal basis for pay and promotions.

When putting together your job descriptions:

- Make sure they accurately describe employee duties.
- Review them to ensure that major differences are reflected in pay.
- Go over them with HR to compare how you and other supervisors are putting together and using descriptions.

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

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