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August 2, 2021

OUR TOP STORY

Did boss's 'drama queen' comment prove bias?

ONLINE

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Management Minutes

6-point checklist to document better



Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



INSIDE

Workplace retaliation

Race & religious bias costs \$5.5M

Communicating post-COVID

Health status rules under ADA

Supervisor's slip-up sinks firm in court: What did he say?

Was it harassment, or that they just couldn't get along?

“We’ve looked into your complaint about the harassing and hostile treatment from your co-workers, and we’ve decided there’s nothing there, except you and they can’t seem to get along,” Jeff said to Anna as they both sat down in a quiet conference room.

Anna frowned. “So that’s it?” she said. “You’re just dropping the whole thing?”

“I didn’t drop anything,” Jeff replied. “There was a fair and full investigation, with HR, that showed you’ve been as much at fault as they have.”

She folded her arms and sat silently,

so he continued: “And now’s probably a good time to talk about your performance and behavior here. As your reviews show, you’ve missed some important deadlines, and you’re going to have to improve on that – and your attitude.”

‘Leave me alone’

“Or what?” she asked.

“Or there’s a chance we could end your employment here,” he answered.

“OK,” she said. “You tell everyone here to leave me alone, and I’ll be just fine. Can

Please see Sinks firm ... on Page 2

Sharpen Your Judgment

Facebook posts cause workplace civil war

HR manager Lynn Rondo was just locking up her office for the day when she saw company attorney Eric Bressler hustling toward her.

“Hi, Lynn, I was hoping to catch you,” Eric said, out of breath. “This should only take a few minutes.”

“Come on in,” Lynn replied, reopening her door.

“I wanted to talk to you about Amy Gilbert’s firing,” Eric said. “She’s suing us for gender discrimination.”

Immediate termination

“Wait! Why?” Lynn asked. “Amy put posts on Facebook supporting the Confederate flag. That offended a lot of people around here, including many she supervised. She had to go.”

“The thing is, Amy has had a spotless record for a lot of years here,” Eric explained.

“She’s saying she should’ve been giving a warning instead of immediate termination.”

“We have a policy stating we’re permitted to fire employees immediately for harassment,” Lynn pointed out.

“And Amy’s own staff said they felt harassed and very uneasy by the views she shared online.”

“We’ve also never had any complaints about gender discrimination before,” Eric said. “Amy’s grasping at straws. I think we should fight this.”

When Amy brought the lawsuit to court, the company fought to get the case dismissed.

Did the company 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.

Sinks firm ...

(continued from Page 1)

you promise me that – that they won't bother me?"

"As I said, there's fault on both sides," he explained. "They've been warned, too, but all of you will have to work together and at least be courteous and businesslike.

"But don't forget what I said about your performance," he added. "That's going to have to get better, too."

"I get it," she said firmly.

"Good," he said. "You have another review coming up in a month. Let's see if things improve by then, OK?"

"OK," she said.

One month later

A month later they sat together again as Jeff spread some paperwork on the table. He began:

"As you can see from the copy of the review I gave you, your work has gotten worse, not better. You've missed more deadlines.

"I'm letting you go."

"Let me ask a question about the review," she said.

"Sure, go ahead," he replied.

"It says here that part of my problem is that I 'create too much drama' at work. What's that mean?"

"We talked about this, and you not getting along with people," he reminded her.

"No, we talked about how there was fault on both sides," she insisted. "But now I'm reading this, and it makes me sound like a drama queen for filing a complaint."

"Well, there was nothing to the complaint you filed," he said.

The lawsuit

"So what?" she shot back. "Does that mean I don't have a right to complain when I think I'm being harassed by my co-workers?"

After the firing, Anna filed a lawsuit charging the employer with illegal retaliation.

She said the "drama" comment showed Jeff's anger over her complaint and a tendency to retaliate against her for it.

The company said she was fired for documented poor performance.

Decision: The company lost, based on two factors:

1. The firing came right after the boss's "too much drama" comment.
2. A judge said the comment could be viewed as evidence that the supervisor was, in fact, penalizing the employee for filing a complaint. That's illegal.

Key: The critical comment lacked backing or real meaning, since there was no proof for it or its effect.

That showed evidence of bias.

Case: *Baez v. Anne Fontaine USA Inc.*

What you need to know:

When there's a complaint, it's important to be aware that:

- An employee can claim illegal retaliation even if the initial complaint was ruled to have no merit; the outcome of the initial complaint is irrelevant
- Illegal retaliation can come in many forms – firing, suspensions, reprimands, failure to promote, or a transfer to a less desirable assignment, and
- Other people such as witnesses or anyone else who takes part in an investigation of an initial complaint have the same protections as the person who filed the initial complaint.

TEST YOUR KNOWLEDGE

Know the ins & outs of workplace retaliation

Retaliation is when an employer takes an adverse action against an employee because that person engaged in a protected activity.

The protection extends to third parties who experience reprisals for someone else's complaint.

Identify which of these is an example of retaliation (Yes) or is not likely an example of retaliation (No).

1. A woman files a gender bias complaint with the EEOC. Three weeks later, her fiance – a co-worker – is fired without cause.
2. An employee's safety complaint is found to be without merit. He is demoted, as a message to others.
3. An employee raises a controversial, genuine workplace concern – and is advised by his manager to be sure he has all the facts before speaking up again.

ANSWERS

1. Yes. An employer cannot act against a third party in reprisal for a protected action taken by another person. This was decided by the U.S. Supreme Court in *Thompson v. North American Stainless, LP*.
 2. Yes. Federal laws protect employees who complain about bias, safety or health – even if it's determined the charges are groundless. Otherwise, employees who raise concerns in good faith wouldn't be protected from actions such as demotion or transfer to another department.
 3. No. It always pays to encourage people to speak up – without repercussions – about bias, safety or health concerns, and it's even more helpful if they speak up with the right facts.
- Think about it: Wouldn't you rather hear a complaint from an employee than from that person's lawyer?

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.

Beef plant pays \$5.5M for racial and religious bias

What happened: JBS Swift &

Company, which operates a beef processing plant in Greeley, CO, discriminated against employees because they were Muslim, immigrants from Somalia, and Black.

According to the EEOC, JBS denied Muslim employees the ability to pray as required by their religion, and Muslim employees were harassed when they tried to pray during scheduled breaks or even on bathroom breaks.

JBS managers and other employees threw meat or bones at Black and Somali employees, according to EEOC allegations, and JBS employees regularly called Somali employees offensive names because of their race, national origin and religion.

Decision: Along with settling the complaint for \$5.5M, JBS agreed to take a number of actions intended to correct and prevent further discrimination, as well as make all former employees covered under the agreement eligible for rehire.

Cite: EEOC v. JBS Swift & Company.

Walmart pays \$410K in sexual harassment case

What happened: A male employee of a Walmart store in Geneva, NY, regularly made unwelcome sexual comments and advances to female co-workers and touched numerous female co-workers without their consent.

When a female employee reported the incidents of

misconduct to management, she was forced to resign when store managers failed to stop the harassment and instead advised her to “stand up” for herself and put her “big girl panties on.”

Decision: Along with paying \$410,000, Walmart will provide training at its Geneva store to prevent future harassment and to ensure that workers understand their right to be free from sexual harassment on the job

Cite: EEOC v. Walmart Stores East.

Pain center out \$75K for disability bias claim

What happened: National Spine & Pain Centers, a Rockville, MD-based medical practice with over 60 offices in the Mid-Atlantic and Northeast, denied leave to a patient services coordinator who had breast cancer.

The EEOC alleged that when the employee notified the company that she would require several weeks of medical leave so that she could undergo and recover from a lumpectomy, she was let go.

The Americans with Disabilities Act requires employers to provide reasonable accommodations, including medical leave, to employees with disabilities unless doing so would create an undue hardship for the employer.

Decision: Along with paying \$75,000, the firm will provide compliance training on the Americans with Disabilities Act, and provide regular reports to the EEOC.

Cite: EEOC v. National Spine & Pain Centers

STOP, LOOK, LISTEN ...

Communicate post-COVID

Technology let people communicate during the pandemic and helped businesses stay open. But it's not always the most effective way.

“One of the fundamental components to successful teamwork is communication,” says Clint Padgett, president and CEO of Project Success Inc. and author of *How Teams Triumph: Managing By Commitment*.

Padgett suggests leaders help employees maintain a balance to be effective because “communication and conversation aren't the same thing.”

Overcome tech limits

Technology is good for exchanging information. But many people use as few words as possible to convey important information or emojis to replace real emotions. That creates unclear messages.

“How many times have you misinterpreted the tone of an email or a static document?” Padgett asks.

To communicate ask yourself if you received the text or email you've composed, would you understand the content without more explanation?

Set up 2-way communication

If leaders don't make asynchronous communication a priority, who will?

“It's OK to text or email questions before a conversation takes place or for follow-up responses afterward,” Padgett says. “Conversations don't need to be the only form of communication, but they are the most important by far.”

Value people

“Technology isn't the answer. It's the tool,” Padgett says. “If you choose technology over people, your project won't be successful. While your communication may be fast, you'll sacrifice quality, clarity, accountability, and ultimately, success.”

Have people share stories about successful meetings or overcoming problems when they talked through it all – rather than exchange dozens of messages.

SUPERVISORS SCENARIO

Employee starts using handicapped parking spot: Can you ask about their health status?

Worker insisted his medical condition was none of his boss's business

“What’s up with you parking in the handicapped spot?” Supervisor Rich Colley asked.

“Are you OK?”

Charlie Walls closed his car door, nodded toward Rich and kept walking straight into the building.

“Whoa,” Rich said. “You can’t just park there without a sticker, ya know.”

“There really are handicapped people who come here and need that spot.”

“My doctor told me I qualify for a handicapped parking permit,” Charlie said, placing a handicap placard on his dashboard.

“Well, what’s wrong with you then?” Rich insisted.

“That’s between me and my doctor for right now,” Charlie told him.

“Not if you’re going to park in that handicapped spot,” Rich said.

“And if you have a medical problem that affects how you do your job here,” Rich went on, “I need to know that, too.”

“It’s a matter of safety that could

affect everyone here.”

“I have a right to some medical privacy,” Charlie said. “I can assure you I’m not a risk to myself or anyone else here.”

Privacy rights

“How do I know that if I don’t know what’s the matter with you?” Rich asked.

Rich went to HR. The firm’s policy required employees to be 100% able to work – without any accommodation.

Since the worker lacked proof he didn’t need an accommodation, he was fired.

Charlie, backed up by the EEOC, sued for disability bias and for firing him for being disabled.

Decision: The firm lost and was ordered to pay the worker \$82,000. It also had to revise its accommodation policy.

Key: Employers can legally inquire about a person’s medical condition after that person has requested an ADA accommodation. Until then, it pays to steer clear.

Case: EEOC v. Sysco Oklahoma LLC.

What you need to know:

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA. They must be able to:

- satisfy job requirements for educational background, employment experience, skills, licenses and any other qualification standards that are job related, and
- perform those tasks that are essential to the job, with or without reasonable accommodation.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a court dismissed Amy’s discrimination lawsuit.

Amy’s attorney argued that her termination was too hasty, and that with Amy’s very clean employment record, she should’ve at least been given a warning before being fired.

The company’s treatment of her pointed to gender bias, her attorney said.

But a court disagreed.

It said there were no reported incidents of the company mistreating Amy or other female employees in the past.

Additionally, the company’s own harassment policy said immediate termination was permissible – and the workers under Amy’s

supervision no longer felt comfortable working for her upon learning her opinions through her social media posts. Case dismissed.

Social media tiffs

Many employees assume what they post on their private social media accounts won’t affect their work lives, but this case suggests otherwise. And if subordinates take offense to a manager’s views, it can veer into harassment territory, like it did in this instance.

It’s a good idea to remind your employees about your company social media policies and to fully investigate complaints about workers’ social media habits.

Case: Patterson-Eachus v. United Airlines Inc.

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