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August 16, 2021

OUR TOP STORY

Performance review never quite hit the nail on the head

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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

Avoid mistakes when firing

Race, sex bias cost firm \$125K

Helping with student debt

No witnesses to racist comment

Supervisor learns tough lesson after dishing out poor review

Avoiding bias claims from disgruntled employees

George waited for Joyce to finish reading her performance review and then said, “OK, any questions?”

“Yes, and it’s a big one,” Joyce replied. “Why is my rating so low?”

He leaned back and said, “Sometimes, it’s hard to put your finger on reasons, but there are a few.”

“Like what?” she asked.

“Well, being on time, for one,” he explained. “You were late a bunch of times, and we discussed it.”

“Yes, but I explained to you that my mother was ill and sometimes I needed a

little extra time in the morning to help her out,” she noted. “You said it was OK, that it wasn’t a problem.”

Not a ‘monster’

“Well, I didn’t want to sound like some kind of monster who’s stopping someone from helping her sick mother,” he said. “Still, you can see how not showing up on time can be a problem, right?”

“Now that you say it is, maybe,” she responded. “But let’s talk about something else – the fact that I’ve worked here almost

*Please see **Poor review ...** on Page 2*

Sharpen Your Judgment

Asthma ‘accommodation’ lands boss in court

“My asthma is out of control today,” Evie Hartley said slowly when she spotted her manager, Lynn Rondo.

“I feel like I can’t take a breath half the time,” Evie added.

“I’m sorry to hear that,” Lynn replied. “Is there something I can do to help?”

“I was thinking I’d like my desk moved farther away from the door,” Evie replied.

“Every time it opens, I get all that dirt and pollen from outside right in my face.”

Not an option

“I’m sorry, but we can’t move you,” Lynn said. “A major part of your job is greeting guests and clients

as soon as they come in.

“What we could do is get a better air filter system where you sit now,” Lynn went on.

“We could also figure out a way for you to take more breaks and get some fresh air.”

Evie shook her head. “I’ll still be very uncomfortable most the day. My desk needs to be moved to get the best results.”

“That’s just not possible,” Lynn replied. “It’s essential for you and your desk to stay right where it is now.”

Evie later sued the company for failing to accommodate her disability. The company fought to get the case dismissed.

Did the firm 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.

Poor review ...

(continued from Page 1)

30 years and you, yourself, said I had some of the best productivity and quality numbers in the group. How does that translate into such a low performance rating?"

"We already talked about the on-time problem," he said. "Another thing: You spend too much time socializing."

"George, I'm the oldest and most senior person in our group," she said. "And you told me I should take a role in explaining things and helping some of the younger people. How else do I do that if I don't spend time talking to them?"

"Yes, I get that," he nodded. "But you spend a lot of time talking about hairstyles and restaurants."

"OK," she said. "I'm really not seeing the problem, but I can change that."

One month later ...

A month later, Joyce had a stunned look as she sat in George's office and said, "I'm being laid off? I can't believe it."

"I am sorry about it," he said. "Please understand, you're one of four people I had to let go, and it was a tough decision. To be fair, I based it totally on performance ratings. The lowest had to go."

Joyce's voice took on a harder

tone as she said, "I'm starting to wonder if that review you gave me was just a setup to get rid of an older worker,"

"No way," George protested. "The other three who got laid off were all under 40. That proves age didn't factor into the decision."

Not satisfied

Not satisfied with the response, Joyce decided to sue for age bias, claiming that her review ratings – and the basis for her layoff – didn't accurately reflect her performance.

The company argued that the ratings were based on real-life factors. Plus, the layoff of younger workers at the same time showed age wasn't a reason.

Decision: The company lost. A judge noted that the "problem" areas of the employee's rating were never discussed prior to the review – meaning the employee had no chance to change or improve prior to receiving the low

rating. That and the fact that the employee had good numbers on the only real measurable factors showed that the ratings and layoff were suspect.

Key: This case is an example of a surefire formula for a lawsuit: failure to inform an employee of performance problems early on and citing vague issues as the basis for a poor review.

Case: *Rachells v. Cingular Wireless Services LLC*.

What you need to know:

Remember, positive and negative feedback is an important part of a performance evaluation.

Effective and legally sound performance reviews consist of at least three main elements:

- ratings that are documented and backed up by measurable performance factors
- if there are problem areas, a record of those problems and attempts to help the employee improve prior to the review, and
- a post-review "road map" that lays out areas of required improvement, the strategy for achieving improvement and the consequences for failing to improve.

TEST YOUR KNOWLEDGE

Avoiding legal mistakes when letting people go

When people get fired, they're naturally emotional and hostile – and that can set the stage for litigation. To protect yourself and your company, test your knowledge of terminating properly by responding *True* or *False* to the following:

1. The term "at will" indicates that an employee can be fired for any reason and without giving the employee the reason(s).
2. Courts have OK'd terminations where the cause was a violation of a supervisor's individual policy that wasn't necessarily part of a company-wide policy.
3. If an employee is terminated for suspected theft or other suspected illegal activity, you legally can mention the reason for the termination if you're asked for a reference by another employer who's considering hiring your former employee.

ANSWERS

1. *False*. The term indicates an employee can be fired for any legal reason.
2. *True*. But the supervisor in such cases bears the responsibility of showing why the individual policy is so important. For example, the head of a unit that conducts crucial business with customers at the start of the day might have stricter penalties for being late.
3. *False*. Even though you may be dead-certain that the employee committed the offense and even if the employee admits it to you, it would be legally risky to mention the conviction in a court of law.

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.

Race and sex bias costs baggage handler \$125K

What happened: A supervisor at Engie Services, Inc., a Canadian firm that provides baggage handling at airports across the United States, engaged in unwelcome sexual touching of employees and sexually assaulted one employee at the airport in Birmingham, AL.

The same supervisor and another supervisor also made racially offensive comments during the same time period and subjected two African American male employees to sexual harassment and also subjected one to racial harassment.

Decision: In addition to paying \$125,000, the firm agreed to provide training to its employees on its obligations under the law and develop, implement and maintain anti-harassment and anti-retaliation policies. The decree also prohibits the company from engaging in any discrimination, harassment or retaliation because of sex or race in the future.

Cite: EEOC v. Engie Services, Inc.

Farming retailer settles disability claim for \$40K

What happened: A warehouse worker at the Poplarville, MS, facility of Agri-AFC, LLC, an agricultural retailer, disclosed to Agri's district manager that he was taking medication for a back injury he had suffered during military service.

The company demanded a list of the employee's medications and then fired him, telling him

the district manager felt he was a liability to the company because of his back injury and feared he would injure himself further.

Decision: Along with paying the worker \$40,000, Agri agreed to provide training to its employees on its obligations under the law and develop, implement and maintain anti-discrimination and anti-retaliation policies.

The decree also prohibits the company from engaging in any discrimination or retaliation because of disability.

Cite: EEOC v. Agri-AFC, LLC.

AR hospital pays \$52K for age discrimination

What happened: White River Health System, Inc., which operates a hospital in Batesville, AR, fired four employees because White River's insurance policy excluded anyone over the age of 72 from driving.

The employees, all over the age of 72, had driven for several years without incident. The company made no attempt to secure alternative driver's insurance that would cover the employees

Decision: Along with providing \$52,500 in back pay, White River is enjoined from terminating or failing to hire any employees with driving responsibilities because of the individual's age and must contact a minimum of three insurance companies to ascertain whether it can obtain policies which do not exclude from coverage any drivers age 40 or older based on their age.

Cite: EEOC v. White River Health.

STOP, LOOK, LISTEN ...

Student debt is crushing many of your employees

Your workforce carries higher education debt than you think.

Sixty-five percent of college-educated Americans are managing student loan payments right now.

On average they owe \$39,351 each, according to First Republic Bank.

Carrying a financial burden that heavy can impact employee well-being and productivity.

Especially when COVID-19 federal relief benefits eventually will expire.

What employers can do

It's time to keep an eye out for employees who are struggling.

Provide them with counseling and other support services to help them improve their financial (and mental) wellness.

What does your Employee Assistance Program have to offer?

Something that may help identify who needs help: an employee survey! Ask about their level of participation in the company retirement plan.

Employees may be delaying retirement investment due to student loan debt. Or their focus may be on paying down debt and they aren't thinking about retirement.

Create a partnership

Another solution is to partner with a student loan benefits provider.

Many allow employers to make direct payments to employee loans or contribute to a 529 education savings plan.

Also, options exist for employer contributions to pay that debt down even faster and for employees with unused paid time off to convert it into a student loan payment.

A student loan assistance benefit can reduce turnover and absenteeism. That positively impacts your company's bottom line. Because when employees aren't worried about their finances, they can focus on their work and do a better job.

SUPERVISORS SCENARIO

He says co-worker made racist comments, but he has no witnesses: What's next?

Did supervisor do enough to untangle this problematic situation?

“Drew has failed to meet the most minimum expectations at this point in his training,” lead supervisor Sarah Howe read aloud from the report.

Sarah put down the paperwork. “So, going by what Ben wrote in here, I’ve decided to let you go,” she said. “His evaluation is very well documented.”

Drew shook his head. “Of course Ben’s going to say I’m not cutting it. He’s a racist. How did I get stuck with him?”

“This isn’t fair.”

“Those a pretty serious charge you just made against Ben,” she said.

“I know he’s a little rough around the edges and can be tough on new people, but a racist? I can’t say as I’ve seen that.”

Not innocent?

“You know he called me the N-word twice?” Drew blurted out. “That’s not being a racist?”

“Hold on,” Sarah replied. “You accused Ben of saying that. He said he never did. And there were no witnesses to back you

up. I thoroughly looked into that.”

“Ben’s not stupid,” Drew said. “He doesn’t say those things with other people around. But he’s not innocent.”

“Well, in a sense he is,” Sarah pointed out. “It’s your word against his. I can’t assume you’re right and he’s wrong.”

“Right,” Drew fumed. “Go ahead and take his side.”

Drew sued his employer for race discrimination, based on his claim that his trainer’s language combined with a poor evaluation was evidence.

The company said the evaluation was fair and documented, and that Drew had no conclusive proof of Ben’s bias.

Decision: The company won when a judge dismissed the case.

Key: The judge noted that Drew never refuted the poor evaluation, nor could he produce any evidence to counter the finding of Sarah’s bias investigation – that no witnesses could be found to substantiate Drew’s claim.

Case: Roberts v. Fairfax County Public Schools.

What you need to know:

Bias claims can be fraught with emotion, so it’s important not to jump to a conclusions. Instead, supervisors should:

- Go over any documents pertaining to the charge, such as performance reviews.
- Investigate the charge by speaking with both sides and with any witnesses or anyone else who may have been involved.
- Consult with HR or upper management to ensure that all bases have been covered during the investigation.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a court dismissed the employee’s claim that her manager failed to provide her an accommodation.

The employee’s attorney argued the only thing that would help her asthma was to be moved, and that the company’s alternative suggestions wouldn’t work.

That meant the firm failed to fulfill its duties under the Americans with Disabilities Act, the attorney said.

The court disagreed. It said it wouldn’t be reasonable for the firm to move the employee away from the door, as it was an essential part of her job to greet people at the front door.

Furthermore, the company fulfilled its responsibilities under the ADA by offering

reasonable alternatives, which the employee didn’t accept. Employers aren’t required to alter essential job duties for those with disabilities, the court said.

Handpicked accommodations

This case shows that employees don’t get to handpick any accommodation they fancy. It has to be reasonable, and in this instance, the worker’s request would interfere with an essential function of her job.

Employers still should make a good faith effort to accommodate an employee. For even if the accommodation doesn’t work out – a court will typically find the firm fulfilled its legal duties.

Case: Rodda v. University of Miami.

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