

# Supervisors LEGAL UPDATE™



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September 1, 2021

## OUR TOP STORY

**Performance is sagging: What are the best steps to take next?**

## 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

**Can you ban tattoos at work?**

**Pain center out \$75K for bias**

**Common errors leaders make**

**Dos and don'ts of polygraph testing**

## Documenting poor performance: Why it never pays to wait

*He was slow on the job, but was boss too quick to fire him?*

“Hurry it up, Ray,” supervisor Hugh McGinley said. “What, did you switch back to decaf again?”

“Seriously, you gotta pick up the pace.”

“Yeah, yeah, yeah,” Ray sang out, as he sifted through a pile of paperwork. “You always need something else to complain about, don’t you?”

“Besides, it’s always busy around here,” Ray added, “so I’m not about to let you run me ragged.”

Hugh had been trying for quite some time to get Ray to work a little faster. Being slow wasn’t the worst offense an employee

could commit so Hugh tried not to badger Ray too much. But he couldn’t avoid it much longer. Customer complaints were growing more frequent.

### What’s going on?

“We just got a call from a customer who’s threatening to take their business elsewhere if we can’t deliver sooner,” Hugh said. “You have to speed things up.”

“What’s going on with you Ray?” Why do I have to keep bringing this up.”

“I told you I have a lot on my plate

*Please see Never pays ... on Page 2*

## Sharpen Your Judgment

### Were boss’s ‘threatening looks’ retaliation?

“So, what you are telling me is all secondhand information,” HR manager Lynn Rondo said.

“I know from experience that these kinds of situations are hard to get to the bottom of,” Lynn added. “But I will do what I can to find out what’s going on here.”

Employee Greg Mitchell nodded.

“I feel very uneasy about all this,” Greg said. “You know I’m not here just to stir up trouble. But if it’s true Jack was using racial slurs, I don’t want to work for him.”

“I assure you I will do all I can,” Lynn repeated.

A few days later, Greg was back in Lynn’s office.

“You must have really gotten Jack’s attention,” Greg said. “He has been giving me the cold stare

and threatening looks every chance he gets.”

“Jack denies using any racial slur,” Lynn said. “But a co-worker did support your complaint that he heard Jack use racial slurs in the past.”

“It’s one person’s word against another’s,” Lynn explained. “At this point, I put Jack on notice.”

### No evidence

Greg didn’t think Lynn’s actions went far enough, so he sued his employer for retaliation.

The employee claimed his manager looked at him in a threatening manner, which was enough to create a hostile work environment.

The company asked the court to dismiss the lawsuit. Was it successful?

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.*

# Never pays ...

(continued from Page 1)

these days,” Ray said. “I plan on trying out those new processes you showed me. But I have to tell you, I’m working as fast as I can.”

“You know buddy, I think maybe you’ve been here too long,” Hugh said. “You should probably be planning your retirement.”

Ray shrugged.

“Not me,”

Ray said. “I can’t imagine retiring and having nothing to do all day.”

“Well, in any case, you do need to get your work done more quickly,” Hugh repeated.

“This is getting serious when it’s costing us customers.”

Ray’s pace didn’t improve, and complaints kept coming in.

Hugh decided to let Ray go.

Ray didn’t take the news well.

## Getting rid of the old guy

“This makes you happy, doesn’t it?” he said to Hugh. “You’re finally getting rid of the old guy.”

“We’ve worked together for years,” Hugh replied. “Why are you saying this?”

“Because of the comment you made about me needing to retire,” Ray replied.

“Oh, I never said you HAD

to retire,” Hugh said. “And besides, you know as well as I your performance was slipping.”

“But I’ve never had a bad review,” Ray said.

## Just average

“And you haven’t had many good ones, either,” Hugh added. “In fact, I’ve always said ‘average.’”

“Well I don’t see you firing any other ‘average’ employee,” Ray said.

“Ray, you and I have talked about your performance for quite some time now,” Hugh explained.

When Ray learned he’d been replaced by a younger person, he sued for age bias.

He claimed his supervisor’s comment about him retiring was proof.

The firm tried to get the case dismissed.

It said Ray had legitimate performance issues, and his supervisor worked

consistently to try to correct them, without success.

**Decision:** The firm lost when a court decided to send the case to trial. The judge said a jury could find in favor of the employee due to the lack of written documentation about the employee’s shortcomings.

**Key:** Put employee performance problems in writing.

Case: *McDowell v. Axxsys Technologies Corp.*

## What you need to know:

You know documentation is important, and you know you can’t write down everything.

It helps to remember:

- Reviews are a great time to bring up things that otherwise may go unaddressed. You don’t need to belabor an issue, but be sure to get your observation down in writing.
- Don’t forget to get the employee to acknowledge the shortcomings you’ve listed and to sign off on the review. Reviews are not about putting a number on people, but assessing where they are in relation to company goals and values, and how they can best move forward.

## TEST YOUR KNOWLEDGE

### Tattoos are everywhere

According to a Pew Research Center survey, 36% of Americans age 18-25 have at least one tattoo, 40% of Gen Xers have tattoos, and your youngest employees are more likely to have multiple tattoos.

So, what about tattoos at work? Can they be banned? What is and isn’t allowed? To test your knowledge of the legality of restricting tattoos at work, respond *True* or *False* to the following:

1. If you allow one employee to openly display a tattoo at work, you must allow all employees to do it.
2. In a workplace that, by policy, bans the display of tattoos, an employee who has one can request an exemption from the ban based on the employee’s religious beliefs.
3. If your workplace allows the display of tattoos, but one employee protests that another’s tattoo is, for instance, openly racist, you can order the employee to cover up the offending tattoo.

## ANSWERS

1. *False.* Rulings in court cases have indicated that supervisors can use job criteria to determine whether or not an employee can display a tattoo. For instance, you might ban the display for a front-desk person who meets with the public while you allow a display for the warehouse worker who interacts only with co-workers.
  2. *True.* Courts have upheld the legality of religious-accommodation requests involving the display of tattoos. Generally, the employee has to show why the display is part of the religion and why covering it would violate religious principles.
  3. *True.* Bans have often been upheld for tattoos that fall into the general category of “offensive.”
- Note:** Intent doesn’t matter. If the tattoo is shown to be offensive, the tattooed employee can’t argue there is no intent to be offensive.

## 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.*

### **Pain center pays \$75K to settle disability claim**

**What happened:** National Spine & Pain Centers, LLC, Rockville, MD, a 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 the employee notified the company that she would require several weeks of medical leave so that she could undergo and recover from a lumpectomy. According to the lawsuit, National Spine & Pain Centers discharged the employee because she was not eligible for leave under the Family and Medical Leave Act, and never considered any reasonable accommodations.

**Decision:** Along with paying \$75,000 to settle the claim, the employer agreed to provide training on ADA compliance, with an emphasis on providing reasonable accommodations.

**Cite:** EEOC v. National Spine & Pain Centers, LLC.

### **Walmart hit with \$125M verdict in disability case**

**What happened:** A Wisconsin jury found that a Walmart store in Green Bay failed to accommodate a longtime employee with Down syndrome, and then fired her because of her disability.

The jury found that a change Walmart made to the employee's longstanding work schedule caused her significant difficulty.

When she requested her start and end times be adjusted by 60 to 90 minutes and to be returned

to her prior schedule, Walmart failed to act on the request and instead fired her.

The employee had worked for the company for approximately 16 years and had consistently received positive performance evaluations.

**Decision:** The jury deliberated three hours before awarding \$150,000 in compensatory damages and \$125 million in punitive damages.

**Cite:** EEOC v. Walmart Stores East.

### **Pediatric practice out \$50K for retaliation**

**What happened:** A nurse at Pediatric Healthcare Alliance, a Tampa Bay-based pediatric medical practice, reported to her supervisor and to human resources that one of the practice's doctors inappropriately touched her twice.

In response to her complaint, and over her objections, Pediatric Healthcare Alliance transferred the nurse to a different location, causing her personal hardship and resulting in the nurse earning fewer overtime hours.

The company also prevented her from working on the doctor's patient files, the EEOC said.

**Decision:** In addition to the \$50,000 in damages, the three-year consent decree settling the suit requires Pediatric Healthcare to amend its retaliation policy; conduct training on Title VII; provide annual reports to the EEOC; and post an anti-discrimination notice.

**Cite:** EEOC v. Pediatric Healthcare Alliance, P.A.

## STOP, LOOK, LISTEN ...

### Four common mistakes too many bosses make

Even the best bosses make mistakes that lead employees to quit.

HR leaders and front-line managers do all they can to keep employees happy and on the job, but researchers have identified these four common mistakes bosses make that upset employees and drive them to quit.

#### 1. Stifle work

Some leaders hold employees back from doing their best work by not giving them enough information, resources or autonomy.

Perhaps employees have to wait for approval or collaboration. Meanwhile they could charge ahead if permitted. These limitations make people feel powerless and less respected.

#### 2. Inconsistent expectations

Managers sometimes create conflicting expectations, and it stresses good employees.

For instance, a leader tells employees quality is the priority, yet he rewards employees for quantity. Employees want to hand in great work, but they know they'll reap rewards for handing in more work, so their stress rises and they start to look elsewhere.

#### 3. Assign below capability

Good employees excel, but managers sometimes make the mistake of assuming these people are content at their current level.

Meanwhile, easy – or too little – work bores them. So the employees might take longer just to fill the time.

#### 4. Create a bad environment

Managers who fail to create the right work environment lose employees. Extremes are dangerous:

Too harsh. Employees will wither in environments where ideas are shot down with hostility, and aggressiveness is rewarded.

Too safe. Employees won't thrive if they don't feel some pressure and proof that their work matters.

**SUPERVISORS SCENARIO**

# Boss fired three of them for refusing to help with investigation – Was that legal?

*Missing money ends up costing firm big time*

“All I know for certain,” Supervisor Carl Barkley said, “is that an envelope full of money is missing and someone in this room probably knows what happened to it.”

The four employees looked at each other, and then at Carl. None said a word.

Carl next asked each of them, one by one, if they’d either seen the missing envelope, or took it themselves.

Each answered “no.”

“Honesty and trust are essential to the way we do business here,” Carl began to lecture them.

“It is something we stress with every employee from their first day. If none of you will take responsibility for this, I’ll be left with no choice but to dismiss all of you,” he added.

“Now, does the person responsible want that on his or her conscience?”

“This is unfair,” one employee said. “I didn’t do it.”

“Well, neither did I,” said another.

“Me either,” said the third employee.

“I’ll take a lie detector,” said the fourth. When the supervisor insisted all four take a polygraph, only one agreed.

### The 3 were fired

The employee who volunteered to take the test passed it and kept his job.

But the other three were fired for refusing to take the test.

Those three sued the company, claiming it was against federal law to force employees to take polygraphs.

The company said it had a right to find out who stole the money, and it was legal to get rid of those who refused to participate in a legitimate investigation that was necessary for business purposes.

**Decision:** The firm lost big. A jury awarded the three fired employees \$4 million.

Under the Employee Polygraph Protection Act, it is unlawful to require or request any employee or job applicant to take a lie detector test.

*Case: Bonds et al. v. Flagship Resort Corp.*

### What you need to know:

You cannot force people to take polygraphs.

But you can:

- Distribute a written honesty policy
- Lead by example by adhering to the policy
- Be sure you have all the facts correct
- Search company property, including digital property, for missing items
- Insist upon restitution, and
- Always be sure to work with HR when trying to unravel one of these tricky legal situations.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

Yes. The company won when a court dismissed the retaliation lawsuit.

The employee’s attorney argued the manager had clearly demonstrated bias against Greg because of his race.

The use of the racial slurs in the past, followed by the threatening stares after the manager was reported, clearly met the legal standard for retaliation, the attorney argued.

But a court disagreed.

It said that while some of the manager’s behaviors were clearly appalling, “making faces does not rise to the level of retaliation under Title VII.”

The court added that there was no evidence

the employee suffered any adverse employment actions after making his complaint.

### Retaliation wasn’t ‘race-based’

While the threatening stares could be considered harassment in some cases, the court said, “there are no allegations to support a determination that the alleged threat was race-based.”

The court noted that “isolated incidents, unless extremely serious,” are generally insufficient to rise to the level of illegal retaliation and racial bias.

*Case: Fisher v. Bilfinger Industrial Services Incorporated*

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