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7 questions to ask  
yourself before deciding  
whether to fire someone



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**Guarding against  
retaliation claims**

**Disability bias  
costs firm \$60K**

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**Constant prayers  
cause a flap**

## Boss had many reasons to fire worker – and that got him sued

### Claim of gender bias complicates firing decision

“We’re letting you go immediately,” George said after he and Mandy sat down in the conference room.

She nodded and said, “I guess the next question is ‘Why?’”

“Our business is changing,” he explained. “The skills you have aren’t the ones we’re going to be needing.”

“Hold on,” she protested. “I told you several times that I wanted to get trained in the new procedures, but you never let me do it. And now you’re telling me I’m out because I don’t have up-to-date skills? And didn’t you arrange for training for

two of the men here, while I never got a shot at the training?”

### Performance-based?

“That’s true,” he agreed. “Maybe I should explain: I felt a couple of them were more ready to take the training than you were, just based on their performance.”

“OK, but can we talk about that for a minute?” she asked.

“If you want,” he said.

“I’ve had one performance review with

*Please see **Many reasons ...** on Page 2*

## Sharpen Your Judgment

### Fired employees sues, claims she wasn’t warned

“We need to talk about the circumstances of Michelle’s firing,” HR manager Ben Rosen began. “We got a letter from her lawyer saying she’s suing for race discrimination.”

Jim sat up and said, “I fired her because she shouted at a customer and cost us his business. What’s that got to do with discrimination?”

“I know why you fired her,” Ben nodded. “Still, there are complications. Did you give her any sort of written warning first?”

“No,” Jim replied. “I have one unbreakable rule, and everyone on our staff knows it: Customers get treated politely and with respect. Violate that, and you’re out – no warnings.”

“I understand,” Ben said as he made some notes. “From what I can tell, she’s charging that you

let other, white employees off with a warning, but she got fired for that one offense. Is that accurate? Is that what happened?”

“Not entirely,” Jim explained. “Others have gotten off with just a warning for small stuff like being late or using a computer for personal business. I never let anyone slide for being rude to a customer.”

### Not a minor offense

Michelle went ahead with her lawsuit charging her supervisor with race discrimination. The company fought the suit by arguing that her offense was so serious – compared to minor offenses committed by others – that it didn’t require a warning prior to termination.

Did the company win?

*Make your decision, then please turn to Page 4 for the court’s ruling.*

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.

# Many reasons ...

(continued from Page 1)

you, and we both know it wasn't a good one, and we both know I disagreed with it," she said. "And in the three years before you became my boss, I always got good reviews. Doesn't that seem odd?"

"Not at all," he countered. "Either we disagreed about your performance or your performance got worse after I took over the job."

"Or maybe it's because I didn't get the training I needed to keep up," she shot back. "It's a no-win situation for me."

"We're talking in circles here," he said. "The bottom line is that your performance wasn't good and you don't have the skills we need."

## 1 bad review

"That's your version," she insisted. "And to tell you the truth, your version isn't very clear."

"Am I being fired because I got one bad performance review?"

"Am I being fired because I don't have up-to-date skills?"

"Or am I being fired because I didn't get the right training?"

He broke in: "I don't blame you for being angry and bitter ..."

"Or am I being fired because I'm a woman?" she added sharply.

"Oh, wait a minute," he protested. "I explained the whole

situation to you. Maybe it's not perfect, and maybe some of the issues overlap, but there's no way any of this has to do with you being a woman."

"We'll just see what a lawyer has to say about that," he said.

## Stacked deck?

Mandy followed through on her threat. She sued for gender bias.

She claimed her supervisor had stacked the deck against her by withholding training and basing his decisions on one performance review.

That gave the men an unfair advantage.

The company said the decisions were based on results and skills, not on gender.

**Decision:** The company lost.

A judge said there was a strong case that the supervisor had an illegal motive because of:

- the multiple and conflicting reasons for the firing, and
- the raining and advancement of the men.

That combination weighted the case in the employee's favor.

**Key:** The supervisor couldn't draw a straight line from the termination to the cause(s). His reasons weren't totally clear or convincing – at least not enough so to refute the charge of bias.

Case: *Kwan v. Andalex Group LLC*.

### What you need to know:

Many lawsuits over gender bias get filed when a supervisor appears to:

- favor one gender over another for training and advancement when the two have roughly equal qualifications and experience
- discipline one gender more readily or more severely than another for essentially the same offenses, or
- make comments that can be interpreted as showing one gender is less able or somehow limited in ability, purely on the basis of gender; example: "She's probably not strong enough for a job that requires lifting."

## TEST YOUR KNOWLEDGE

### Guarding against retaliation claims

Let's say an employee files a complaint for some perceived unfair treatment. One thing to guard against is the appearance that you're retaliating against the employee.

Courts can get tough when they think an employee is getting a raw deal for filing a complaint. To learn how to avoid claims of retaliation, respond *True* or *False* to the following:

1. An employee you supervise has filed a complaint and asks you to go to lunch to discuss it. You're not obligated to go.
2. You can't be charged with retaliation for giving a poor reference for an employee who has quit and applied with another employer.
3. An employee who has filed a complaint then breaks an unrelated company rule. You should delay discipline until after the complaint is resolved.

## ANSWERS

1. *True*. Retaliation generally rests on how the employee is treated at work. Social situations, such as lunch, usually don't figure into retaliation claims unless the situation has a direct impact on the employee's pay, opportunity or advancement.
2. *False*. Numerous court cases have shown that post-employment activities, such as giving bad references, can come under claims of retaliation. If you're asked for a reference regarding a former employee who had filed a complaint, check with HR before replying.
3. *False*. There's no requirement to give special treatment to an employee who has filed a complaint. If that employee breaks a rule, you can hand out discipline. Just be sure it matches the offense and is generally in line with how others have been handled for the same offense.

### 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.*

### **Disability bias costs transport firm \$60K**

**What happened:** A job applicant recovering from opioid addiction sought a van driver's position at the Bluefield, WV, facility of Professional Transportation, Inc. (PTI), headquartered in Evansville, IN.

PTI offered the applicant a job, but later withdrew the offer after the job applicant informed the company she was receiving Suboxone treatment, the EEOC said. The firm acknowledged the applicant was let go without considering whether she actually experienced any side effects from the medication.

In fact, the job applicant did not experience side effects from Suboxone affecting her driving ability, the EEOC said.

**Decision:** Along with paying \$60,000 to settle the ADA lawsuit, PTI was enjoined from any future violations of the ADA regarding workers with substance use disorders such as opioid addiction or who are receiving medical treatment for the disorders.

**Cite:** EEOC v. Professional Transportation, Inc.

### **Chipotle franchise out \$60K for sex harassment**

**What happened:** A male Chipotle crew person repeatedly made sexually offensive remarks about the body of a female Chipotle service manager at its International Plaza Mall restaurant in Tampa, FL.

The harassment escalated to inappropriate touching,

including the crew person thrusting his genitals toward the service manager's face, the EEOC charged.

The service manager was fired after she reported the harassment to the store's management and threatened to report it to corporate headquarters.

**Decision:** Along with paying \$70,000 to settle the claim, Chipotle agreed to institute policies and practices that prevent and eliminate sexual harassment in its workplace.

**Cite:** EEOC v. Chipotle Mexican Grill, Inc.

### **Staffing firms pays \$40K to settle pregnancy claim**

**What happened:** Wise Staffing, of Oxford, MS, interviewed an applicant for a clerk position with a client company. The applicant informed the hiring manager about her pregnancy. The hiring manager told the applicant after a second interview that it had decided to hire other applicants, but that Wise Staffing would reach out to the applicant later.

The EEOC said that Wise Staffing hired less qualified individuals instead of the pregnant applicant. Further, the hiring official never reached out to the applicant although she continued to inquire about the position.

**Decision:** Wise Staffing agreed to pay the applicant \$40,000 in damages and provide discrimination training, including training on Title VII.

**Cite:** EEOC v. Labor Source, L.L.C. d/b/a Wise Staffing.

## STOP, LOOK, LISTEN ...

### Help prevent burnout

Many employees have struggled to separate work life from home life and feel obligated to respond to work, no matter the time of day.

It's a recipe for burnout, one employers to address straight away.

### 3-step approach

Here's how you can help ensure your employees disconnect while working from home, according to leadership coach Lisa Schmidt.

**1. Address everyone personally.** You could make a blanket statement encouraging employees to disconnect, but it'd be much more effective if you spoke to employees on a personal level.

Ask if the current goals and objectives are reasonable, and see what other home responsibilities they're juggling. Ask how much time they're spending on the job, and make personalized suggestions to help ease the load.

**2. Emphasize a healthy balance.** Tell the employee how important it is to find the right balance, and work with them to come up with some kind of schedule. Pick designated work hours, or agree on a set of daily tasks.

**3. Recognize their hard work.** Reassure the employee that you know it's a difficult time, and thank them for their hard work. Be sure to make yourself available to them to discuss any future work/life balance issues.

Here are a few bonus ideas from HR leaders on Namely blog:

- create a policy prohibiting work emails between 5 p.m. and 9 a.m.
- ban emailing employees during their vacations
- encourage employees to take breaks during the work day and pursue hobbies
- lead by example and don't perform any work outside of normal work hours, and
- encourage employees to remove work communication apps from personal devices.

**SUPERVISORS SCENARIO**

# She meant well, but her co-workers found her constant prayers were unwelcome

*How far must you bend to accommodate religious expression at work?*

“**M**aureen just complained that you trapped her in the break room this morning and prayed for her,” said Supervisor Cindy Nelson.

“I’ve told you before that not everyone appreciates that – so don’t do it.”

“I was only trying to help,” Alice said. “Maureen is struggling with so much lately, with her health and her problems at home.”

“She said she didn’t ask you for help,” Cindy said, “and she doesn’t like you nosing around in her business.”

“You made her real uncomfortable when you grabbed her hand and wouldn’t let go,” Cindy said.

### Checked with EEOC

“I checked with the EEOC and was told there’s no law requiring me to leave my religion at the door,” Alice said.

“But there are laws about how much you can push your religion onto other people,” Cindy said.

“You’ve crossed that line with this.”

Maureen’s complaint was the last straw.

“This is your third strike in our ‘three strikes and you’re out’ discipline policy.”

“I wrote you up twice for substandard work, and now you’re getting a write-up for harassing one of your co-workers.”

“We have to let you go.”

“You’re firing me?” Alice said. “I’m trying to help people.”

“You’re only doing this because I complained to the EEOC.”

Alice fought her firing, saying it was unlawful termination.

**Decision:** The court upheld the company’s decision to fire Alice.

**Key:** The employee couldn’t prove there was a link between her complaint to the EEOC and the company’s decision to fire her.

Since the company enforced an existing rule and prior performance problems were documented, it was judge that the termination was not retaliation.

*Case: Bailey v. Dolgencorp, LLC.*

### What you need to know:

Religion at work is tricky. To determine whether permitting an employee to pray, proselytize, or engage in other religious expression in the workplace poses an undue hardship, employers should consider:

- Potential disruption in the workplace, and to what degree.
- Whether and how the religious expression infringes on the rights of other employees.
- Whether other employees find the activity unwelcome and whether it persists in spite of that.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

Yes, the company won.

A judge ruled that informing all employees that termination will result from one instance of one type of violation is, in fact, a type of warning. The employee couldn’t say she hadn’t been warned.

And the judge agreed with the supervisor that different violations can call for different levels of discipline. The only sound argument the employee could have made would be that others got off easy for the same violation that got her fired. That was never argued in the case.

### Better in writing

If you have ironclad policies, it’s always better to put them in writing and get your employees to sign off and acknowledge they’re aware of

the policies. That way, there’s little room for questions or misunderstandings.

As this case shows, you can also announce the policies to employees, but you have a stronger case if you take the route of writing them down. In court, a piece of documentation is always stronger evidence than “I said ...”

No matter how you inform employees, you must also be sure to enforce the policies fairly and equally.

You’re asking for trouble if you let one employee off with a slap on the wrist and then resort to harsh penalties for another employee who commits the same offense.

*Case: Hamilton v. AVPM Corp.*

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