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November 1, 2021

OUR TOP STORY

3 bases to cover before giving a poor performance review

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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

Properly respond to harassment

Temp agency loses \$3.52M case

5 must-have manager traits

Time off for religious needs causes conflict

Poor performance review put worker on notice, boss in court

Was review unfair, or on the money?

Anna had an angry look as Ben wrapped up her performance review.

“... And so you’re going to have to improve quite a bit, especially in how you cooperate and deal with others,” he said.

“Does any of this have anything to do with my complaints about how you treat women?” Anna fired back.

“I treat everyone equally,” Ben replied. “This is your first year here, and maybe I should explain I’m a little rough around the edges, but I’m rough with everyone. My concerns with your performance have nothing to do with your complaints.

“The reasons are all right there in black and white.”

The real problem

“That’s the problem,” Anna countered. “It’s not there in black and white. I don’t see any complaints from anyone here about my cooperation.”

Ben explained: “I’m basing the review on my observations as your supervisor, not on what others say or think.”

“I understand,” she answered. “But I also understand you need some proof of what

Please see Poor review ... on Page 2

Sharpen Your Judgment

3-strike policy: Was it the right one for this case?

“Tell me how you went about dealing with the sexual harassment complaints against Ed,” said HR manager Gina Turetti.

“It was pretty straightforward,” Pete replied. “We use three strikes and you’re out. So after I got three complaints against him, I was going to show him the door.”

“And Ed knew that?” Gina asked.

“Absolutely,” said Pete. “I told him after the first complaint, that was strike one.”

“And when he got another complaint against him, what then?” Gina asked.

“I told him he was down to his last strike and he shouldn’t expect anything short of being fired,” Pete said.

“Well, we have a problem,” Gina explained. “The two women he harassed are ready to quit.”

“Why?” Pete asked. “I was doing all I could.”

Some slack

“They claim giving Ed three strikes was just another way to let him know he had some slack to play with,” Gina said. “It just encouraged him to do it a second time.”

The two women quit and sued, claiming their supervisor didn’t do enough to control Ed’s sexual harassment of them, and prevent it from happening in the future.

The firm said it had taken the proper steps with a well documented, three-strike approach.

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.

Poor review ...

(continued from Page 1)

you say; otherwise, you could just say anything you want.

“I’ll be up front with you,” she continued. “I’m going to talk to others here and ask them to verify I’m cooperative. I’ll ask them to put their ratings in writing, too.”

Ben sat silently for a moment, and then said, “Go ahead, and let’s see what they have to say.”

He amends it

Two weeks later, they sat across from each other again.

Ben began: “So everyone here thinks you’re cooperative and a good employee, according to their letters. “And based on that, I’ll amend your appraisal to make it better.”

“I wish I never had to go through all that,” she said. “Plus, I was wondering the whole time if I’d be fired.”

“Well, I’m not happy about this, either,” he said. “I don’t like changing performance ratings and people going outside my authority. But, OK, you win.”

“That wasn’t what I was shooting for,” she said. “I’d hoped you’d listen to my complaints about how you treat women here, and the only other thing I wanted was a fair and honest appraisal.”

“So you got a ‘fair and honest’ appraisal,” he said. “But let me tell

you something,” he added. “I don’t like it when some rookie like you walks in here and tells me I treat people unfairly.”

“Can we just move on, Ben?” Anna asked.

She sues

After several more arguments with Ben, Anna sued the company.

In court, she said her supervisor tried to use vague performance standards to punish her over an honest complaint about his treatment of women.

The company argued the supervisor had made amends for the poor appraisal, so the employee had no complaint.

Decision: The company lost. A judge ruled an undocumented poor performance review could be viewed as retaliation, especially for a newer employee whose early reviews might be damaging.

And doing a “make-up” review didn’t necessarily clean the slate.

Key: Performance reviews and other supervisory actions will always go under a microscope when they involve employees who’ve had disputes with or complaints about supervisors.

That doesn’t mean you have to give such employees good reviews. It does mean you better have the documentation to back up whatever you say.

Case: Oliva v. State of New Jersey.

What you need to know:

You never want to come in second in a contest over who has the better documentation – you or the employee. So:

- If you’re about to give an employee a poor review or take other adverse action, go over your documentation with HR first
- Try to get things right the first time. Legally, that’s always better than to try to fix mistakes later, and
- If an employee has shortcomings in performance, clearly explain what they are and the steps the employee must take to improve.

TEST YOUR KNOWLEDGE

Responding to harassment complaints appropriately

Over time, court decisions have created a guide for an adequate and legal response to complaints about harassment. To test your knowledge of how to respond to such complaints, 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.

Fermilab settles \$100K retaliation complaint

What happened: Fermi Research Alliance, LLC, which operates the world-renowned particle physics research center in Batavia, IL, allegedly violated federal law when managers there failed to promote a female engineer in retaliation for her complaint of sex-based discrimination.

Decision: Along with paying \$100,000 to settle the claim, the 18-month consent decree requires that Fermilab display a posting regarding the resolution of the lawsuit to its employees, provide training on retaliation under Title VII to its employees, and make regular reports to the EEOC regarding its compliance with the decree.

Cite: EEOC v. Fermi Research Alliance, LLC.

Restaurant out \$65K for harassment, retaliation

What happened: The owner of American Glory Restaurant Corp., Hudson, NY, subjected Black employees to racist comments and slurs.

The owner also assigned Black employees to less desirable job duties, on one occasion saying that such work was “what a Black man should be doing.” When one of the affected employees complained, American Glory cut that employee’s hours drastically, forcing his resignation.

It was also alleged the owner subjected female employees to sexual harassment, which included leering, unwelcome physical contact, and crude

sex-based comments.

Decision: Along with paying \$65,000, the restaurant must provide anti-discrimination and harassment training, including intensive interactive training for its owner.

Cite: EEOC v. American Glory Restaurant Corp.

Temp agency pays \$3.52M to resolve claims

What happened: Aerotek, a global temp agency headquartered in Hanover, MD, in numerous instances failed to recruit and denied assignments, placements and/or hiring to individuals based on age (over 40), sex and race, according to the EEOC.

Decision: Under the agreement, half of the \$3.52M will provide relief to two charging parties for alleged violations of Title VII and a class of select older individuals in Illinois who worked as contract employees of Aerotek between October 1, 2012, to March 14, 2014, for alleged violations of the ADEA.

The EEOC and Aerotek agreed the remainder of the funds will be donated to organizations that foster education and employment opportunities for underserved communities, including helping individuals to improve or acquire new skills for second careers.

Aerotek will also continue to conduct annual company-wide training for its employee relations and human resources personnel and client recruiters on the requirements of Title VII and the ADEA

Cite: EEOC v. Aerotek.

STOP, LOOK, LISTEN ...

5 must-have manager traits

Employees must work together. However, inspirational leaders bring them together to build a successful team. Here’s 5 ways to do that.

Make connections that last

The best bosses make it a point to remember people they’ve met and worked with, plus details about them. Then they periodically check in.

Tip: Maintain connections with current and past colleagues and employees to show you’re interested in their lives and success.

Believe people are good

Inspirational bosses come into most situations believing those they deal with are good and are working to be better.

Tip: Start negotiations and other difficult conversations with that in mind.

Invite disagreement

Because inspirational bosses believe people are good, they invite and consider different points of view. They listen to understand and don’t spend the bulk of their time trying to convince others that they’re right.

Tip: Recognize that the best outcomes start with discussions, not arguments.

Act fearlessly

The best leaders move forward even-keeled, even when they’re scared of unknown outcomes and failure. Having a plan helps them be the calm in a storm.

Tip: When faced with complications, identify the goal, take small steps, evaluate the outcome of each, adjust if necessary and move on.

Dedicate yourself

Inspirational leaders stay confident in their beliefs, explain why those are important and act in ways that reflect those beliefs.

Tip: Regularly remind your team and yourself of the current and long-term goals, why they’re important and how you’ll achieve them.

SUPERVISORS SCENARIO

She demands time off for religious reason: What’s the supervisor’s obligation?

Legitimate request for accommodation causes big scheduling headaches

“I’ve looked over your request to leave three hours early on Fridays, and I’m afraid I’m going to have to say no,” Supervisor Sandra Holmes said.

Maria’s shoulders slumped.

“That leaves me no room but to choose between my job and my religion,” she said.

“It is certainly not my intention to force you to have to choose between the two,” Sandra explained. “But it might help if you saw my point of view.”

“If I let you leave early on Fridays to attend a religious service, I’m going to have to find and schedule someone to cover for you,” Sandra said.

“That creates all sorts of scheduling problems, especially since making any new hire is out of the question.”

‘God Squad’

“But you have let other people leave early,” Maria said.

“Well, I only let them leave early on a limited basis, one-time-only,” Sandra said. “It’s not a regular thing like you want.”

“I can’t say I’m surprised by this,” Maria said. “You’ve stood by and looked the other way when people co-workers made jokes about my religion. Like the time they asked if I was playing on the ‘God Squad.’”

“You never complained about that,” Sandra said. “I know it was meant as a joke and I thought that’s how you took it.”

“A joke!” Maria exclaimed. “Let’s see if my lawyer thinks it’s a joke.”

Maria sued for religious bias, claiming she was denied an accommodation to attend a religious service, and that her employer ignored ridiculing comments.

Decision: The company won. The court said the supervisor had a legitimate business reason for denying the request, and the single incident Maria cited failed to show any real hostility toward the employee or her religious beliefs.

Key: It’s important to be flexible when accommodating religious requests. But it’s OK to strike a reasonable balance between the request and the organization’s needs.

Case: Marchant v. Tsickritzis.

What you need to know:

A religious accommodation is any adjustment to the work environment that will allow an employee to practice their religious beliefs. You may justify a refusal to accommodate a religious request if the accommodation would cause an undue hardship.

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Sharpen Your Judgment – THE DECISION

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No, the company lost.

The firm’s attorneys argued that the three-strike policy was a well established, reasonable and fair approach to dealing with unacceptable behavior and poor performance. The claimed the supervisor’s efforts were appropriate.

The judge didn’t see it that way.

The court questioned why any organization would give an employee three chances to commit the same illegal behavior before taking a definitive action to put a stop to the offending behavior.

The judge said letting the employee know he had three chances to do the same thing almost guaranteed the behavior would be repeated and that put other employees at further risk.

While three strikes is clearly an appropriate policy in some situations, the court said, such as poor job performance, it unreasonable to think it’s a blanket approach to all problems.

Different situations

Different situations require different approaches to dealing with them.

But harassment and similar intimidating behaviors virtually lock you into – at best – a two-step approach:

- First offense: Discipline and a warning of dismissal if it happens again.
- Second offense: Immediate dismissal.

Cite: Engel v. Rapid City School District