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November 15, 2021

OUR TOP STORY

**Sex harassment
complaint tests
boss's ability to
iron things out**

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6-point checklist to
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7 questions to ask
yourself before deciding
whether to fire someone



INSIDE

**Turn arguments
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**Disability bias
costs firm \$85K**

**Onboarding isn't
back to normal**

**58-year-old gets
axed: Age bias?**

Did supervisor move quickly enough to prevent harassment?

Boss needed another week to set things straight

“You’re quitting?” Gary exclaimed. “Why would you leave now?”

“I’m surprised you even have to ask,” Ava responded. “You’re my supervisor, and you know what I’ve been going through with Eddie.”

“Sure, I know,” Gary nodded. “I guess I thought we had a plan we agreed on for dealing with Eddie.”

“I don’t know what the plan was, other than him continuing to make crude remarks to me,” Ava said. “You know he told some other people here that I’m a lesbian. Well, I can tell you I’m ...”

“Hold on,” Gary interrupted. “I don’t want to know your sexual orientation, and I don’t care. What I care about is getting this thing straightened out.”

Done nothing?

“OK, then why haven’t you done something about him?” Ava asked.

“Let’s go over this again to make sure we’re clear on where this is headed,” Gary suggested.

“I warned Eddie once, about two weeks ago, and you told me he didn’t stop,” Gary

Please see Move quickly ... on Page 2

Sharpen Your Judgment

Worker out skiing while on FMLA: Is that OK?

HR manager Lynn Rondo frowned as she reviewed the video. Then she picked up her phone and dialed company attorney Eric Bressler.

“Hi, Lynn,” he answered. “What’s up?”

“I wanted to talk to you about Jeffrey Tolliver,” Lynn replied.

“I’m looking at a video he posted on Facebook, and he definitely doesn’t look incapacitated to me,” she said.

“HmMMM,” Eric mouthed.

“A month ago, Jeffrey asked to go on FMLA leave to help manage the physical symptoms of his diabetes,” Lynn said. “He had all the paperwork, and we granted his leave request, no problem.

“But then one of his co-workers made a

comment to me, asking if Jeffrey was on vacation because this is the same time of year he always goes on his annual ski trip. So I did some digging.”

“And you found the video,” Eric concluded.

“Yes,” Lynn replied.

Talk to employee?

“Did you ask Jeffrey about this?”

“I tried to,” Lynn said. “But he suddenly needed to extend his leave, and he’s been dodging my calls. I think we need to fire him.”

“I think so, too,” Eric said.

When Lynn fired Jeffrey, he sued for retaliation under the FMLA. The company fought to get the case dismissed. Did it 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.

Move quickly ...

(continued from Page 1)

said. "From there, I told you I made the decision he had to go."

"So why's he still here?" she replied. "Get rid of him."

"Work with me on this," he pleaded. "It's just not that easy. He has a lot of contact with customers, and I have to figure out how to transition those contacts to other people here without disrupting our relationships."

"That sounds like an excuse," she retorted.

Gary went on: "Can I have your promise of confidentiality before we discuss this further?"

"Sure," Ava agreed.

"OK, good. Then here's what we can do. I can reassure the two of you temporarily so that you have almost no contact with him.

"Then, when I've ironed everything out – in no more than a week – I'll let Eddie go."

Another week?

"You want me to give you another week?" she said. "You're really stretching this out."

"I've explained to you why I need the time," he said. "And I've given you my guarantee that I'll take action. That seems fair, right?"

"Not really," she shot back.

"Because there's something else. In the last week he's asked me to come to his apartment after work at least three times, even though I told him to stop bothering me after the first time he asked."

Gary responded: "But I never heard anything about ..."

Sexual harassment

"You've heard about it now," she said. "It's called sexual harassment, and I'm not going to put up with him for one more minute."

Ava quit almost immediately and then filed a lawsuit charging that she was forced to resign because her supervisor hadn't taken quick action to stop hostile treatment and sexual harassment.

Decision: The company won. A judge ruled the supervisor's delay was reasonable, given the circumstances and the fact he had guaranteed he would separate the two employees and

was working on a resolution.

Further, the employee had made a separate charge of sexual harassment and quit without giving the supervisor a chance to act on the charge.

Key: The supervisor had kept the employee informed of the plans for dealing with the hostile treatment and had set up a reasonable time line and circumstances for taking action.

Case: *Anda v. Wickes Furniture Co.*

What you need to know:

There's a lot going on in a busy day, and it can be even more challenging with so many people working remotely.

Still, if an employee files a complaint – any complaint – and you can't investigate and take action immediately:

- Let the employee know the reason(s) for the delay
- As much as possible, provide the employee with a reasonable deadline for when you'll take action, or at least begin the investigation, and
- Keep the employee informed about the progress of the investigation, especially if there are further unavoidable delays.

TEST YOUR KNOWLEDGE

Turn arguments into positive growth sessions

Arguments are inevitable. So rather than avoid them, why not make them productive arguments?

Conflict often spurs creativity and better ideas. Test your knowledge of transforming empty arguments into useful workplace growth sessions by answering *True* or *False* to the following statements:

1. When employees argue over core areas of performance, such as dropped sales leads, it's best to not get involved and let the disagreement burn itself out.
2. To be successful, supervisors should simply accept the reality that there will be winners and losers when it comes to workplace arguments.
3. Invite people to "be human first," by sharing a story, not just an opinion, about how the issue impacts them.

ANSWERS

1. *False.* Jump right into these kinds of trays by sharing what's known by everyone about the issue (context), its impact on those involved (culture) and anticipated result (needs). For instance, if Sales and Marketing argue over dropped leads, you'll want to share data on leads and how those affected the bottom line. Make the need (converting more leads) the focal point.
2. *False.* Arguments should be made for the greater good, not to defeat others. Try to take winning off the table by refocusing on creating relationships that can build connections (and) support.
3. *True.* To help keep arguments productive, you can work to connect people and confirm they're listening to each other by asking, "What is something someone else said that you appreciate?" and "How has others' thinking connected to, extended or challenged your own?"

Answers to the quiz:

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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 discrimination costs firm \$85,000

What happened: A sales representative employed by Spike Electric and Controls, LLC, Houston, was diagnosed with liposarcoma, a form of cancer, and was scheduled to have surgery to remove a tumor. The employee notified the company of his diagnosis and the vice president of sales attempted to reduce the employee's pay by almost half two days later.

Approximately one month later, and one day prior to the employee's surgery, the employee was informed he was being terminated. The company also interfered with the employee's subsequent efforts to find employment in the same industry.

Decision: Along with paying \$85,000 in compensatory damages, the firm agreed to conduct training regarding the ADA's prohibition against disability discrimination, update its disability accommodation policies and post a notice prohibiting discrimination.

Cite: EEOC v. Spike Electric and Controls, LLC.

NYC distributor pays \$300K in age bias claims

What happened: AZ Metro Distributors, LLC, a distributor of Arizona Iced Tea products, discharged the two oldest sales employees in their department – at the ages of 64 and 66.

On the day the employees were fired, a supervisor at AZ Metro's Brooklyn location said that the company wanted to hire younger

workers and move the sales force in a "different direction," according to trial testimony.

Decision: Along with settling the case for \$300,000 in lost wages and damages, the firm agreed to train its Brooklyn and Queens branch employees about federal anti-discrimination law. The company must also report to the EEOC any internal complaints of age discrimination or retaliation it receives in the next two years.

Cite: EEOC v. AZ Metro Distributors, LLC.

Chicago Meat Authority pays \$1.1M for race bias

What happened: Chicago Meat Authority, a Chicago meat processing plant, discriminated against Black applicants in hiring, subjected Black employees to racial harassment, and fired a Black employee because of his race and in retaliation for complaining about racial harassment.

The EEOC's investigation revealed that the company favored hiring Hispanic employees over African American employees, even though the company is located in a largely Black neighborhood on Chicago's South Side.

Decision: The firm agreed to pay \$1.1 million in monetary relief to the discrimination victims, to hire any rejected Black applicant who still wants a job at the company, and to make a good faith effort to reach enhanced hiring goals for Black workers.

Cite: EEOC v. Chicago Meat Authority.

STOP, LOOK, LISTEN ...

Why onboarding shouldn't be 'back to normal' yet

While it might seem natural to work and interact remotely nowadays, it's not ideal for new employees, not yet.

And when you find ideal new hires, you want to do everything to keep them, considering about 60% of employers have a difficult time keeping employees, according to a Willis Towers Watson survey.

"Employers are in the middle of an intense war for talent that's not likely to let up anytime soon," said Adrienne Altman, managing director and North American head of Rewards at Willis Towers Watson. "The challenge of hiring and keeping employees has now spread from isolated industries and skill sets to most industries and workforce segments."

The hybrid work model feels almost natural now. So many front-line managers are tempted to onboard exactly the same as they did before the pandemic – all in hopes everything seems "back to normal."

But a hybrid or fully remote situation calls for different approaches – and it presents an opportunity: More than half of employees believe hybrid work can improve their well-being, an Avaya study found.

So you might as well start improving it during onboarding, even if you plan to bring new hires fully on-site. Try to:

- Communicate daily so they never feel like they aren't in the loop
- Remain fluid and transparent. Let new hires know circumstances can and will change – and you'll let them know immediately
- Set a schedule so at least one team member or colleague interacts with the new hire every day
- Involve them in meetings. Invite them to all relevant Zoom meetings and give them a role so they interact, and
- Regularly update new hires on the well-being benefits at their fingertips, such as access to online meditation and yoga, telehealth and your Employee Resource Groups (ERGs).

SUPERVISORS SCENARIO

Was mandated job test an excuse to avoid hiring older workers? Court weighs in ...

Policy dispute erupts after 58-year-old employee is laid off

“We need to go over the details of your layoff – severance, unemployment comp and so on,” Preston said, opening the folder on his desk.

“You should know the layoff is dictated by a shift in business, and I’m prepared to give you a strong reference.”

Jerome rolled his eyes. “Will your reference say that at 58, I was too old to keep a job here?” he said.

Preston let the question hang for a moment as he tried to keep his composure. Then he responded.

“We’ve discussed this. You were on the layoff list because the task you did was being eliminated. It had nothing to do with your age,” Preston said.

What about a switch?

“And why wasn’t it possible to switch me to another position?” Jerome asked. “Like the job I wanted in the warehouse? You’ve done it for others.”

“We’ve been through that, too,” Preston said. “Anyone who’s hired for that job is required to take a test to lift at least

50 pounds. You couldn’t even come close to passing it.”

“Sure,” Jerome said. “You dream up this test for the old guy who has some joint problems. What better way to make sure you don’t have to keep me on?”

After he was let go, Jerome sued his employer for age discrimination.

He charged that his boss mandated a contrived test designed to shut out older workers.

The company explained in court that the test was a standard one based on the type of work required of the job. Anyone who passed it was eligible for hire, irrespective of age.

Decision: The company won. The judge said there was obvious justification for the job test and noted that all applicants for the position – no matter their age – had to pass the test.

Key: The supervisor based the hiring decision strictly on a requirement related to the job.

Case: Green v. Township of Addison.

What you need to know:

Job tests can sometimes be called into question if they:

- are administered only to certain groups of workers, such as women or older people, instead of to all applicants for the position
- involve requirements that aren’t relevant to the job; for instance, a lifting requirement in a position that doesn’t involve lifting, and
- don’t use the same standards of success for all applicants; in other words, some people are required to achieve at a higher level than others.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a judge dismissed the employee’s lawsuit.

The attorney argued the employee was fired too hastily and hadn’t been given a chance to defend himself.

The company should’ve spoken to the employee before firing him, the attorney said.

But the court disagreed. It said the company had good reason to suspect FMLA abuse, and it conducted an investigation in an attempt to confirm its suspicions.

The company even reached out to the employee to discuss the issue, but he didn’t return the calls. The company had a non-discriminatory reason to fire the worker, the court ruled.

This case serves as a reminder that, under the right circumstances, an employee can be fired legally while they’re on FMLA leave.

Abuse suspected?

If FMLA abuse is suspect, an employer must conduct an investigation before making termination decisions.

It’s also important to remember that not all “fun” activities are considered FMLA abuse. If the employee is caught doing something but it doesn’t contradict doctor restrictions, it’s likely not FMLA abuse. In this case, skiing was an activity this worker shouldn’t have been safely able to do.

Case: Botelho v. U.S. Secretary of the Department of Homeland Security.

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