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February 14, 2022

## OUR TOP STORY

**How documenting weaknesses and strengths can head off problems**

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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

**Make performance reviews useful**

**Fresno pays \$50K for racial bias**

**Bias laws protect gender identity**

**Demoted worker filed bias lawsuit**

## Dealing with difficult people: Key steps supervisors can take

*She couldn't get along with anyone*

**D**id you really write this about me?" Supervisor Nash Simmons asked Carol Johnson as he handed her a printout of an email he'd received.

"I work my fingers to the bone so he can swim in his new pool!" Nash read. "And this is the thanks I get."

"Yes, I wrote that," Carol said. "You took territory away from me. That's like taking money right out of my pocket."

"But you still have plenty of good turn to work with," Nash said. "I thought I had explained to you that I needed to make space for Bonnie."

"Oh yes, Ms. Born-Again," Carol sniped.

"The tone of that remark concerns me greatly," he admonished her.

"No tone, just fact," Carol shot back.

### She drove away two

Carol was among the most difficult people Nash ever managed, or tried to.

She outperformed 80% of the staff. But for every dollar she brought in, she drove two away.

Some managers, co-workers and even customers complained about her

*Please see Key steps ... on Page 2*

## Sharpen Your Judgment

### Did she lose out on merit – or was it her age?

**B**enefits manager Betty Murphy was finishing up the paperwork for the new hire when company attorney Jim Gannon knocked on her door.

"Hey, Jim," Betty said with a smile. "Can't wait for Mary to start on Monday. I think she's going to be a great fit."

"I hope you can prove she's a great fit," Jim said with a sigh. "The candidate you passed on, Jessica Stanton, is suing us for age discrimination."

### Qualified, but bad interviewee

"Are you serious?" Betty asked. "Just because we hired someone younger?"

"Jessica says she was more qualified than Mary," Jim said. "But we passed on her anyway."

"Jessica may have a master's degree, which Mary doesn't, but the bottom line is Jessica just didn't interview well," said Betty.

"She couldn't really answer my questions, and I was told her management style at her last job left a lot to be desired."

"I hear what you're saying," Jim said. "I think Mary's definitely the better fit. But this happens to be the second time Jessica has been rejected for a position here – and both times for a younger candidate."

"Like I said, age had nothing to do with it. Jessica just wouldn't have worked out in either instance," Betty said.

Jessica sued the company for age discrimination. Did the company 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.*

# Key steps ...

(continued from Page 1)

at some time or another.

“This email you wrote takes professionalism to a new low,” Nash said. “Can you explain it?”

“You weren’t supposed to see that,” Carol said. “But you know I didn’t like the changes you made.”

“Your relationships here need to improve,” Nash said. “I have a file of complaints five inches thick.”

“Why are you always singling me out?” Carol asked. “Do you have something against me because I’m Jewish?”

Nash looked surprised.

“Oh, come on,” Carol said.

“This company even gives away baseball tickets as a bonus except it so happens the game falls right smack in the middle of Yom Kippur, our holiest day of the year.”

## Back to the real issue

“I agree that was unfortunate timing,” Nash said.

“Unfortunate! Have you noticed the company calendar doesn’t even list a Jewish holiday?” she said.

“And I hate repeating how many times I’ve heard these morons say ‘jew him down,’” she winced.

“I’ve never heard that,” Nash replied. “And I would never

tolerate that, either.

“The real issue here is your inability to get along with the people you work with.”

## Hit a brick wall

As usual, Nash’s talk with Carol hit a brick wall.

She even declined his offer of a personal improvement plan to help smooth out her many disruptive work relationships.

As things grew more combative, Carol eventually resigned.

Then she sued, claiming he was out to get her not only because she’s Jewish, but also because she’s female, over 40 and has a bad back.

She cited the baseball tickets, and the company calendar, as proof of religious discrimination. The firm said the employee was a good producer, but that her many toxic relationships made it impossible to continue to keep her on board.

**Decision:** The firm won when a court dismissed the case.

The judge said there was ample evidence of the employee’s poor communication skills, poor judgment and lack of professionalism.

**Key:** When dealing with difficult people, prepare for the inevitable by documenting, documenting, and documenting.

*Case: Ungerleider v. Fleet Mortgage Group.*

### What you need to know:

Have a difficult employee? Join the crowd. We all do.

But if you’re getting the person to improve, take a bow.

If not:

- It’s wise to document the employee’s strengths and weaknesses. That keeps a balanced approach.
- Inform the employee of the specific concerns you have and set clear timetables for improvement.
- Work with other managers, and with HR, to be sure the documentation you are compiling is thorough enough to pass muster and withstand challenges.

## TEST YOUR KNOWLEDGE

### Doing useful performance reviews in the age of Covid

The workplace is splintered. Some people come into the office some days, others not at all.

As we move forward in the pandemic, it’s essential for good managers to keep performance reviews top of mind.

To test your knowledge of handling reviews in the age of Covid, respond *True or False* to the following:

1. With all the disruption at work over the past two years, most employees are looking forward to finally having a performance review again.
2. With so many people working from home, or on broken schedules, performance reviews are even more likely to be disastrous and fail.
3. Since all employees have had to adapt to work with Covid hanging over their heads, it’s a good idea to assess how one employee has fared compared to the others.

## ANSWERS

1. *False.* That’s one aspect of doing performance reviews that will probably never change. Few people look forward to them, especially now. No one likes to hear about their shortcomings, then have them written down on paper.
2. *True.* The main reason performance reviews fail: Most managers haven’t properly prepared for them. Many times, the manager has failed to engage the employee day to day throughout the time leading up to the review. That is especially true when interactions are limited to Zoom meetings and just one day in the office.
3. *False.* Avoid comparisons to other people. Instead, focus on the individual, giving an honest assessment of what went right for that person, and what you think were the most important things that could have been done better during the period being reviewed.

### 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.*

### **County of Fresno pays \$50K for discrimination**

**What happened:** The department of human resources for the County of Fresno, CA, did not promote a qualified older Black employee for two promotional opportunities.

When the EEOC investigated, it reported it had found reasonable cause to believe the County of Fresno violated Title VII of the Civil Rights Act of 1964.

Without admitting liability, the County of Fresno agreed to enter a two-year conciliation agreement with the EEOC.

**Decision:** Along with paying \$50,000, the county will require its HR employees to complete anti-discrimination training with a focus on Title VII and the ADEA.

**Cite:** EEOC v. County of Fresno.

### **Vegas club pays \$1M for sexual harassment**

**What happened:** Hyde Bellagio, a former Las Vegas nightclub, subjected female applicants and employees to sexual harassment and created a hostile work environment.

The EEOC also alleges Hyde Bellagio engaged in unlawful retaliation.

“People have the right to apply for a job and to work in an environment that is free from sexual harassment,” the EEOC said, in settling the suit.

**Decision:** In addition to paying \$1 million to those directly involved in bringing the complaint, Hyde Bellagio also agreed to establish

a class fund to compensate female applicants and employees subjected to sexual harassment.

**Cite:** EEOC v. Hyde Bellagio.

### **Ohio auto dealership hit for \$390K for age bias**

**What happened:** Davis Automotive Group, Inc., d/b/a BMW of Cleveland, refused to hire a former employee because of her age (52) and terminated two sales employees because of their ages (67 and 70). Such alleged conduct violates the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits discrimination in employment against people who are age 40 or older.

The EEOC says it brought the lawsuit after failing to reach a pre-litigation settlement through its administrative conciliation process.

**Decision:** In addition to requiring payment of \$390,000 in monetary relief to the three victims of BMW Cleveland’s discrimination, the two-year consent decree resolving the lawsuit enjoins BMW Cleveland from future discrimination against employees on the basis of age.

The firm is also enjoined from retaliating against any person for asserting their rights under the decree, filing a charge of discrimination with EEOC, opposing unlawful age discrimination, or participating in an investigation, proceeding, or hearing under the ADEA.

**Cite:** EEOC v. Davis Automotive Group, Inc., d/b/a BMW of Cleveland.

## STOP, LOOK, LISTEN ...

### **Yes, the Civil Rights Act protects gender identity**

A Walmart store recently learned the hard way that sexual orientation and gender identity are protected under the Civil Rights Act.

Vivian Fulwood, a transgender woman, worked at a Walmart in Georgia. She dressed and presented herself as female, and requested the company call her Vivian. Walmart agreed to this, and her name tag used her requested name.

However, the company used her birth name on official documents.

Fulwood’s direct managers refused to use her requested name and instead made it a point to use her birth name.

Many other employees used her birth name as well. Though Fulwood would correct them, they refused to use her requested name.

Some employees even told Fulwood they “disagreed” with her identifying as transgender and would give her a hard time about using the women’s restroom. Other colleagues would ask inappropriate questions about her transition.

Fulwood filed a complaint, but Walmart did nothing to stop the harassing behavior. Eventually, Fulwood was fired for unexcused absences — though she claimed those had been approved. She then sued Walmart for sex discrimination and harassment.

### **Harassment encouraged**

The district court ruled in favor of Fulwood, stating she was protected under the Civil Rights Act, and the company not only failed to prevent the harassment, but encouraged it.

By permitting managers to use Fulwood’s birth name, it made employees aware of Fulwood’s transgender status, and sent the message it was OK to misgender her, the court said.

“The aforementioned conduct would not have occurred for Plaintiff’s sex, gender identity and identification as a transgender person,” the court added.

**SUPERVISORS SCENARIO**

# Employee sues for discrimination – says he was given impossible task and set up to fail

*‘Problems were there before I ever took the job’*

Rosa handed William a copy of the monthly report and said, “As you can see, your errors are getting worse.”

Without looking at the report, he responded: “I’m trying to fix a lot of problems in that area that were there before I ever took over the job.”

“I get that,” she said. “But because you have 30 years’ experience, I put you in that position to get things straightened out. Instead, as you can see, things are worse than ever. I have to do something about it, so I’m demoting you and putting Rob in charge of that task.”

“Rob?” he exclaimed. “Let me see if I understand this. You’re replacing me, a Black man, with a white man whose performance problems were so severe he had to be put on a performance improvement plan?”

### The full story?

“That’s not the full story,” she insisted. “First of all, I have to replace you because you’re simply not getting the job done. And, yes, Rob has had performance issues,

but he went through his PIP with flying colors and has been a good performer for the last year. He, in my opinion, deserves a chance at the job.”

“But of course I don’t,” he said. “And I’m pretty sure I know why.”

After the demotion, William sued for race discrimination. He said he was given the nearly impossible task of improving an area that had been failing for years. And when he couldn’t do the impossible, he was replaced by a white employee with a record of poor performance.

The company said the move was one made strictly for business reasons, and the replacement employee was deserving of the position.

**Decision:** The company won. A court said there was evidence of performance failures on William’s part, and the replacement was a suitable one.

**Key:** The supervisor took into account all factors and made a decision based on each person’s performance.

*Case: Tennial v. UPS Inc.*

### What you need to know:

Understanding your responsibilities when making promotion decisions can help prevent discrimination.

- Apply the same standards to everyone applying for the same position.
- Be sure those involved are familiar with your promotion policies, including those accepting or denied the promotion.
- Never make decisions based on a protected class, such as race, gender, religion, national origin, disability or family medical history.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

Yes. The company won when a judge dismissed Jessica’s age discrimination case.

Her attorney tried to argue she was more than qualified for this position, yet was passed over twice for a younger candidate.

The fact that she had a master’s degree – something the chosen applicants didn’t have – proved she was more than qualified.

But the court disagreed. While Jessica had a leg up on the other applicants because of her master’s degree, the company had legitimate reasons for not hiring her, the court said.

Jessica didn’t interview well, the court pointed out, and the company had concerns about her management style.

The court said she wasn’t “plainly superior” to the other candidates, and a reasonable employer could’ve passed over Jessica for someone else.

There was simply no evidence that age had factored into the decisions, the court concluded.

### Clear, verifiable standards

This lawsuit is a solid example of how decisions based on clear, verifiable standards can help keep you out of legal trouble.

Managers were able to document the applicant’s shortcomings during the interviewing process, and the poor references she received over her past management style.

*Case: Romano v. Hudson City School District.*

**EDITOR: RICH HENSON**

**MANAGING EDITOR: TOM D’AGOSTINO**

**PRODUCTION EDITOR: JEN ERB**

**EDITORIAL DIRECTOR: CURT BROWN**

**Subscriptions: 800-220-5000**

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