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March 1, 2022

OUR TOP STORY

She claims her firing came out of nowhere: Was it illegal?

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Management Minutes

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Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



INSIDE

Adjusting to an older workforce

Dollar Tree settles bias claim: \$50K

Onboarding? Don't let up now

Firing blamed on gender bias

How sugarcoating poor job performance caused headaches

Good one day, bad the next – what's an employee to think?

“You called Sue at home and chewed her out?” said supervisor Olivia Cox.

“What possessed you to do that?”

“Somebody had to tell her how badly she screwed up yesterday,” replied Judy.

“Who better than me to do it?”

“Well, it's my job,” Olivia said. “I'll talk to her when she comes in.

“I don't know what made you think that you should cut in here.”

“I'm giving you a hand,” Judy said. “The way I always do.”

“Thanks, but no thanks,” Olivia said.

“You rub people the wrong way.”

“They just don't like my style,” Judy shrugged. “I've heard 'em say I'm rude, I'm bossy, whatever.

“What else do you expect when people don't do their jobs – and I have to set them straight?”

Nothing in the record

“I gotta tell you,” Olivia said, “you've been so disruptive I decided to pull your last few performance reviews.”

“And ...” Judy challenged her.

Please see Sugarcoating ... on Page 2

Sharpen Your Judgment

Retaliation claim puts firm on the defensive

“Someone doesn't look very happy this morning,” HR Manager Lynn Rondo said when she bumped into the company's attorney walking down the hall. “Why the frown?”

“We're being sued for retaliation,” Eric said with a sigh. “Danielle Livingston claimed she got fired because of that incident that happened between her and Hudson.”

“What?” Lynn said, incredulous. “Danielle herself said that wasn't harassment. How can we retaliate against someone who claims she was not actually sexually harassed?”

Strange encounter

“Tell me more,” Eric said.

“One of our employees witnessed a strange

encounter between Danielle and Hudson,” Lynn replied.

“Apparently Hudson grabbed her hand and held onto it, looking at her engagement ring and asking questions about her romantic life.”

“I see,” Eric said, still frowning.

“While Danielle said it was a bit uncomfortable, she didn't feel like she was harassed,” Lynn explained. “I investigated this, but Danielle wanted to drop it, so we did. Later, she was fired for performance issues. End of story.”

“Well, since Danielle didn't claim to be harassed, it'll be hard to prove retaliation,” Eric opined. “We'll fight this.”

When Danielle sued for retaliation, 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.

Sugarcoating ...

(continued from Page 1)

“And your last supervisor did mention you had an attitude problem from time to time,” Olivia said, “but nothing like I’ve seen since I’ve been here.”

“All my reviews were pretty good,” Judy said, “until you got here. Now I get criticized for everything. It seems like ever since I complained that I felt I didn’t get a promotion because of my race, I’ve been in your crosshairs.”

“This is strictly about your performance,” Olivia replied.

“Remember yesterday, when you copied me on an email you sent scolding someone?”

“She deserved it,” Judy said.

“You can’t do that,” Olivia told her. “That’s not the way we work here.”

“It’s the way I’ve always worked,” Judy said, “and no one complained before, and I don’t know why someone would start now.”

Changing the rules?

“You can’t treat co-workers like that,” Olivia said.

“My last boss didn’t have a problem with it – he never said a thing to me,” Judy said.

“Then you came along. Are you changing the rules?”

“No, I’m enforcing them,” Olivia said sternly.

Attempts to convince Judy to stop overstepping her boundaries were unsuccessful.

She was eventually let go for violating workplace policies.

Retaliation?

Judy filed suit, saying the firing was in retaliation for her filing a racial bias claim with the EEOC.

Decision: The company won when the court dismissed the Title VII retaliation claim.

There was no evidence linking the company’s treatment and subsequent termination of the employee to her EEOC claim.

The bias claim itself was dismissed later, too.

Key: Failure to use a performance review as an honest assessment of someone’s strengths and shortcomings delayed resolution of this problem –

and put the next supervisor in a tough spot.

One cautionary note:

While the company prevailed, it wasn’t reimbursed for its legal costs – so it still had to dig deep into its pockets to defend itself.

In Title VII cases, courts may order one side to pay the other’s attorneys’ fees if the claims are found to be unreasonable.

Case: Jordan v. Kohl’s Department Stores, Inc.

What you need to know:

Supervisors sometimes inherit a problem that’s been sugarcoated in the past.

That usually happens because someone else decided to avoid a confrontation or hurting an employee’s feelings.

Eventually, the situation must be dealt with, so it’s best to approach it in a positive manner:

- Before talking to the employee, bring your documentation, your suspicions and your options to HR, to get an assessment of where you stand now and what you might need to do, and
- Once the problem is identified, discuss a plan of action to address it with the employee.

TEST YOUR KNOWLEDGE

Are you adjusting to an older workforce?

The workforce 50 years ago looked very different than it does today. Back then, the average life expectancy was 67 for men and 74 for women. But the influx of Baby Boomers turned workplace demographics on its head. To test your knowledge of the impact this has had respond *True* or *False*:

1. The most dramatic changes in the age of the labor force occurred in the last 25 years, as the share of workers age 55 and older doubled.
2. Increased participation by older women is a significant factor in this growth of the older workforce.
3. People are working longer today because they are generally healthier and have longer life expectancy than previous generations. Also, eligibility for full Social Security benefits starts at later ages and the demise of traditional pensions has meant individuals are in need of increased retirement income.

ANSWERS

1. *True.* One of the most notable changes in the American workforce over the past 50 years is that it has aged significantly. Along with the share of workers over 55 doubling, the number of workers age 65 and up is projected to grow by 75% by the year 2050.
2. *True.* Women ages 55 and older are projected to make up over 25% of the women’s labor force by 2024, which is almost double their share from 2000. Also, twice as many women over 55 will be in the labor force as women ages 16-24 by 2024.
3. *True.* People are working longer today because they are generally healthier and have longer life expectancy than previous generations. Also, eligibility for full Social Security benefits starts at later ages and the demise of traditional pensions has meant individuals are in need of increased retirement income.

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.

Dollar Tree settles hiring bias claim for \$50,000

What happened: Dollar Tree Distribution refused to hire a deaf applicant for a general warehouse associate position at its Ridgefield, WA, facility in June 2019, and instead hired less qualified applicants without hearing impairments.

Under the Americans with Disabilities Act (ADA), it is illegal to refuse to hire an applicant because of disability. After first attempting to reach a voluntary prelitigation settlement through conciliation, the EEOC filed the lawsuit.

Decision: Along with agreeing to pay the applicant \$50,000, Dollar Tree agreed to ensure its policies and procedures at the Ridgefield facility provide the necessary protection for applicants and employees with disabilities. The company will also train its managers, supervisors, HR staff and employees on the ADA and the rights of individuals with disabilities at its workplace.

Cite: EEOC v. Dollar Tree, Inc.

Senior living facility out \$31K for disability bias

What happened: A caregiver at Charter Senior Living, LLC, a family-owned business based in Naperville, IL, that operates senior living communities primarily in the Midwest and South, passed her pre-employment physical and worked for weeks without incident until the director discovered the caregiver had some nerve damage in her right hand.

A second examiner concluded that the caregiver met the physical standards of the job but declined to pass the caregiver unconditionally due to her nerve damage. As a result, Charter Senior Living fired the employee without ever evaluating whether her nerve damage would affect her ability to do her job.

Decision: The company agreed to pay \$31,750.

Cite: EEOC v. Charter Senior Living, LLC.

Food retailer pays \$67K to resolve race bias claim

What happened: The general manager at Don's Specialty Meats, Carencro, LA, routinely referred to an employee as "Black boy," "the Black boy" and "little Black guy," and he regularly used the n-word in the employee's presence.

When the worker's supervisor repeatedly called the worker the n-word in front of managers and other employees, the worker was dismissed for the day, but not the supervisor.

Soon after, the employee said he found the conditions so intolerable that he quit.

Decision: Along with agreeing to pay the worker \$67,500 in back pay and damages, the employer also agreed to conduct training, revise policies, provide regular reports to the EEOC, and post a notice that affirms its obligations under Title VII and states that employees can report violations to the EEOC.

Cite: EEOC v. Don's Specialty Meats, Inc.

STOP, LOOK, LISTEN ...

Getting onboarding right is more important than ever

Only one in 10 employees say their employer did a great job at onboarding, according to a Gallup study published before the pandemic hit the U.S.

That explains why so many new hires bolt in their first year.

With the "Great Resignation" in full swing, it's more important than ever to make onboarding a priority.

Employers must give new hires a bang-up first impression and experience that compels them to want to stick around.

Avoiding pitfalls

Here's where companies go wrong, according to Gallup.

They fail to connect

Nowadays, people want to connect with their new employer's mission and purpose. And just telling newbies about your company's mission and purpose isn't enough. You must connect with them on a personal level. Let them know how their specific position helps attain the company's mission. Connect them with others – not just from their level/position but from all levels – so they can share how the company has affected them.

They overload them

New hires don't have to know everything about the company in their first week. Spread the information out over the span of a month or so. Let them digest little chunks at a time.

They overwhelm them

Being the new person on the block is overwhelming as is.

Start off with what they need to get started. Then add in other tech issues as needed.

Some old aspects of your in-person onboarding program may work fine, like the paperwork and distribution of compliance information. However, many aspects of your program will be lost. The point isn't to recreate your company culture remotely by always seeking to impart company values at every opportunity.

SUPERVISORS SCENARIO

After employee fails to improve performance, she blames ‘gender bias’ for her firing

Employee was advised to be ‘more girly-girl’

“Cathy, we are extending your probation another month,” Supervisor Faye Miller said.

“You still haven’t caught on to lots of our routines, and we want to give you enough time to show you can improve.”

“Improve?” Cathy repeated. “I’ve done everything you told me to do. If you think I need to improve, that’s news to me.”

“I’ve been working with you on your time management problems,” Faye said. “I’m trying to help you be more efficient when others depend on you.”

“But that’s supposed to be your job,” Cathy exclaimed.

A timetable

“I put together a timetable,” Faye said.

“And what happens if I don’t make it?”

“If you can’t bring your performance to the level we expect, I’ll have no choice but to let you go,” Faye explained.

“I’ll do my best,” Cathy assured her.

“I’m not working hard to help you just so I can let you go next month,” Faye

replied. “I know you can do this.”

But one month later, Faye called Cathy into her office.

“I’m truly sorry this hasn’t worked out.”

A stupid remark

“I should’ve made it,” Cathy said, “and I would have if you treated me fairly.”

“Whatever do you mean?” Faye asked.

“One of the trainers here told me I needed to be more sensitive and more feminine when I do my work,” Cathy told her. “You know, be a girly-girl.”

Faye look at her, puzzled.

After she was let go, Cathy sued the firm for gender bias.

Decision: The company won after a judge dismissed the case and said it was clear Cathy had failed to meet her targeted job duties.

The court said a single remark wasn’t enough to prove the supervisor was biased in this particular case.

Case: Mascone v. American Physical Society Inc.

What you need to know:

It’s not uncommon for people to try to shift the blame for their own poor performance.

That’s why smart managers keep the responsibility on the employee by:

- Clarifying expectations
- Providing needed training
- Stating and enforcing the appropriate consequences
- Providing useful feedback, and
- Identifying and removing any obstacles to improvement.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No, the company was not able to get the case dismissed, which often results in a hefty out-of-court settlement.

The company argued that Danielle didn’t engage in a protected activity, since she never claimed that sexual harassment occurred. Therefore, her firing wasn’t retaliation because she never made a claim.

But a circuit court disagreed. It said the fact that Danielle denied sexual harassment occurred is irrelevant. She still took part in a sexual harassment investigation, which is a protected activity.

Therefore, retaliation is still possible, despite the outcome of the investigation, the court said.

“The plaintiff’s description of the behavior and

participation in the investigation could support a retaliation claim under Title VII,” the court wrote.

Know what’s protected

This case acts as a reminder that there is a wide range of protected activity an employee can engage in.

According to EEOC guidance, if a worker is involved in a complaint about discrimination or harassment, or requests an accommodation, they have engaged in protected activity.

This means employers must proceed with caution, and always be mindful of the timing of any termination.

Case: Archuletta v. Corrections Corp. of America Inc.

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