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April 1, 2022

OUR TOP STORY

Employee claimed he was fired because of his national origin

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7 questions to ask yourself before deciding whether to fire someone



INSIDE

Confidentiality and investigations

Racial bias claim costs firm \$58K

How appraisals can get messy

He complained and got fired

One ugly comment gave poor performer all he needed to sue

The termination decision seemed solid ...

“I have some bad news,” Sandy said as Alex sat down. “We’ve decided to let you go.”

“What about my performance improvement plan?” Alex protested. “I thought I was getting a chance to improve my numbers.”

“That’s about run its course,” Sandy explained. “Your performance really hasn’t improved at all, and I think it’s time for everyone to move on. HR will explain your benefits and ...”

“I guess you finally figured out a way to get rid of me,” he interrupted.

Sandy blinked and said, “I’m not following you.”

‘That should tell you something’

He responded: “Well, OK, when your supervisor makes cracks about your heritage, and you complain about it and then get fired, that should tell you something, don’t you think?”

Sandy sighed before replying: “Alex, we’ve been through this, and I thought we’d worked it out. I was angry and said something I shouldn’t have said, and I

Please see Ugly comment ... on Page 2

Sharpen Your Judgment

Fired worker sues for severance: Did he collect?

“Hi, Betty, come on in,” said CFO Joseph Reynolds to Benefits Manager Betty Murphy as she knocked on his door.

“Tell me, Betty, how did our company handle severance pay when Bob Thomas was president?” asked Joseph.

“It was at his discretion, but typically he’d give severance of one month per year of service to those who were terminated in good standing,” said Betty.

“Well, our new president, Kevin Edwards, isn’t following that same policy,” said Joseph.

“A former employee, Martin Samuels, is suing us. He claims we owe him severance, but we don’t have a severance policy now.”

“Yes, that’s correct. Martin was terminated under

Bob’s watch, so he really isn’t owed any severance pay,” said Betty.

‘Others received severance’

“Martin’s claiming that other employees received it, so he should, too. In his lawsuit, he provides a list of people who received severance and the amounts they received,” said Joseph.

“They were all terminated when Bob was president,” said Betty after looking at the list.

“Then we should fight this, since there’s no formal policy in writing now,” said Joseph.

The company decided to fight the lawsuit, based on the fact that there was no policy or employment contract saying they had to pay severance.

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.

Ugly comment ...

(continued from Page 1)

didn't even know you have Mexican heritage until you complained about my comment."

"You bet I complained," he shot back. "You told someone here the people in the warehouse were a 'typical bunch of lazy Mexicans.' Remember that?"

"I do," she admitted. "They failed to get that important order out on time, and I was under a lot of pressure over it. You knew that."

He came back at her quickly: "And that's your big excuse?"

She sensed the conversation was going downhill, and changed course: "I've explained I said something out of line. I apologized to you for it. We have to end this and move on."

"Just move on, huh?" he said through a tight grin. "You insult my heritage and then fire me, and I'm supposed to just move on."

'See the problems for yourself'

She responded by pulling out a stack of papers and saying, "These are copies of the records of your output and productivity during the time we implemented the improvement plan."

She concluded, "You can see the problems for yourself – I have nothing to hide."

He snatched the paperwork but barely looked at it.

Then he said, "You haven't heard the last of this. You insulted me, and I have witnesses to what you said. Let's see what my lawyer has to say about it."

He sues

Alex left without incident, but later sued the company for national-origin discrimination. He said his supervisor's unguarded comment proved she was biased against Hispanics, and that she fired him partly because he was Hispanic.

The company fought the suit by arguing that one wayward comment didn't prove bias. Plus the supervisor had ample documentation to support the action.

Decision: The company won.

A judge said one comment, made under pressure and without any other related offenses or actions, didn't support the bias charge.

Plus, the supervisor had done her homework on documenting the employee's substandard performance.

Key: The supervisor in this case got "bailed out" by good documentation. Without it, her case would have been weak at best.

Of course, the lesson is to refrain from comments that could be interpreted as discriminatory.

Case: Trujillo v. Henniges Automotive.

What you need to know:

Under pressure and in the heat of the moment, people sometimes are tempted to say things they don't mean. Don't do it. Such comments can be deadly when an employee uses them as a basis for a discrimination complaint. To prevent that from happening:

- Avoid references to race, gender, heritage, etc., even "joking" references
- Let HR know if someone has accused you of making such a comment, and
- Keep good documentation on employee performance and behavior so that any action you take against an offended employee isn't seen as part of a pattern of bias.

TEST YOUR KNOWLEDGE

Confidentiality during workplace investigations

The National Labor Relations Board (NLRB) has issued various rulings affecting confidentiality orders during workplace investigations.

To test your knowledge of what these rulings require of employers, respond *True* or *False* to the following:

1. A female employee tells you a male co-worker sexually harassed her and other women in her group. You can tell this person, and the other women involved, to not discuss the case among themselves.
2. An employee tells you a co-worker is using drugs illegally at work. You can bar the person who told you this from discussing it with others.
3. Once an allegation has been thoroughly investigated and resolved to everyone's satisfaction, you can legally stop employees from discussing the case.

ANSWERS

1. *False.* NLRB rulings have fairly consistently barred employers from issuing blanket confidentiality orders to victims who have filed complaints. Supervisors would need to show compelling reasons, such as employee safety or preservation of evidence, to support such an order.
2. *True.* In a case that could lead to criminal prosecution, you would be within your authority to limit talk about it because of the possibility that evidence might be destroyed or an employee might be harmed.
3. *False.* In general, the NLRB has struck down post-investigation orders of confidentiality. Supervisors have attempted to enforce these orders to maintain a harmonious workplace and prevent embarrassment, but the NLRB has ruled those reasons aren't sufficient to require confidentiality.

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.

Manufacturer pays \$250K to settle disability claim

What happened: An employee of Ranew's Management Company, Inc., an industrial supplier based in Milner, GA, informed the company of his diagnosis of severe depression and requested to take three weeks off work, per his doctor's recommendation.

Ranew's CEO told the employee to take as much time as he needed to get well. However, six weeks later, when the employee tried to return to work, presenting a release to return to work from his doctor, the CEO said he could not trust the employee to perform his job duties and instead fired him.

Decision: Ranew's will pay \$250,000 in monetary damages to the employee. Ranew's also agreed to reporting, monitoring, training, creation and distribution of ADA policies, and notice posting.

Cite: EEOC v. Ranew's Management Company, Inc.

Rampant sex harassment costs hospital \$84,481

What happened: The chief clinical officer at Albuquerque-AMG Specialty Hospital, LLC and Acadiana Management Group, LLC, Albuquerque, subjected a female director of case management to a sexually hostile work environment.

The EEOC alleged the employee was subjected to sexual comments, sexually explicit texts to her work cell phone, and unwanted physical touching at work.

In response to her complaint,

AMG did not take timely appropriate action, and the female employee eventually resigned.

Decision: Along with agreeing to pay the employee \$82,481, the hospital also agreed to make training, policy and procedure changes, and to discipline the appropriate people at AMG.

Cite: EEOC v. Albuquerque-AMG Specialty Hospital, LLC and Acadiana Management Group, LLC.

Quarry pays \$58K to settle race bias lawsuit

What happened: An African American heavy equipment operator at Eureka Stone Quarry, Inc.'s Pocono quarry in eastern Pennsylvania was subjected to egregious racial harassment by co-workers for several years.

These included the commonplace use of racial epithets such as "n****r," threats of violence directed at the Black Lives Matter movement, and other offensive statements that reflected racial bias and stereotypes.

The harassment involved the Black worker being threatened with firearms, including an incident in which one of the harassers fired multiple shots from a rifle on company property while the African American worker was nearby.

Decision: The firm agreed to pay \$58,000 in damages.

Cite: EEOC v. Eureka Stone Quarry, Inc.

STOP, LOOK, LISTEN ...

How performance reviews can turn into legal messes

Too often, we hear of employment lawsuits that essentially started the moment an employee walked out of a performance-review session.

How's it possible that an exercise that's supposed to reward employees or help them improve ends up being a source of dissatisfaction and legal problems for employers?

Surveys of employees reveal three review flaws that cause the problem:

Too off-the-cuff and vague. Here's the dangerous scenario: Boss peeks his head into Shirley's cubicle and says, "Hey, Shirl. Stop by my office for a minute."

Next thing Shirley knows, she's in the middle of an impromptu review in which the boss tells her, "Everything's going fine." Except as far as Shirley is concerned, everything isn't fine.

But she hasn't had time or notice to organize her ideas and comments. Plus, she can tell the boss is only half-interested. No big deal. She can always discuss them with her lawyer.

Too much recently. Good, ol' Shirley has been a solid performer for five years, but she's had a rough time of it the last month — made some errors while learning the new system, showed up late a few times because her kid's been sick and maybe burned popcorn in the workplace microwave.

So during the review, the boss leads with and dwells on the last month of foul-ups. Shirley seethes while she ponders all the good, hard work she's done over the years. Shirley isn't happy. She's plotting her legal revenge the next time the boss makes a mildly sexist remark.

Too much Mr. Nice Guy. Shirley's boss, Mr. Pleasant, hates confrontation and doesn't want to upset employees (or himself). That's why he never mentions in a review how a big, important customer called to complain about how badly Shirley handled the customer's order.

But it comes up later when Shirley is fired for fouling up another order. She's surprised. Employees' attorneys just love surprises.

SUPERVISORS SCENARIO

‘Kidding’ gets hostile and ends in firing: Did the decision stand up in court?

Worker who took part in the ‘fun’ complained – and got axed

“This is what I get for filing a complaint about a hostile work environment?” Josh shouted. “I get fired?”

Max kept his voice steady as he replied: “First, you’re not getting fired for complaining. Second, you are getting fired for being part of the problem. Third, you’re not the only one getting fired.”

“What’s all that supposed to mean?” Josh responded.

“I could see what’s been going on around here for a while, with the insults, and I warned you guys about it,” Max said. “So when you complained about the other guys calling you ‘whale’ and other cracks about your weight, I looked into it further.”

‘I have witnesses’

Max continued: “I have witnesses who say, among other things, you made jokes about a co-worker’s dead mother and about having sex with another employee’s wife.”

“I was just kidding,” Josh insisted. “Why should I get fired for that?”

“Well, I warned you and the others to stop that stuff because I knew it would explode some day,” Max explained. “On top of that, production has been way down for your group, and I’ve said the insults are a part of that because feelings get hurt and that hurts cooperation.”

“So I’m letting you and a couple of others go this week. It’s time to stop this nonsense and clean house.”

Josh sued, claiming he suffered illegal retaliation for complaining about hostile treatment, and that he was fired for just minor comments and offenses.

Decision: The company won. The judge said the results of the supervisor’s investigation showed the employee was, in fact, part of the problem. And filing a complaint didn’t give him immunity from the consequences of the investigation.

Key: The supervisor had warned the employee about his behavior and had gathered ample evidence to support the decision to terminate the employee.

Case: Goodale v. Landscape Forms Inc.

What you need to know:

Taking disciplinary action against an employee who has filed a complaint can be risky, but it’s not impossible. You’ll have to be certain you have:

- strong proof, mainly in the form of recordkeeping and documentation, that backs up the disciplinary action
- a documented pattern of poor performance and records of warnings to improve, and
- a course of discipline that’s consistent with what’s been used in similar situations with other employees in your organization.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won. While the employee provided a list of other workers who received severance, there was no consistent basis for who received it and how much they got.

While it was clear some severance was granted prior to the employee’s termination, that occurred under a different management team, the court noted.

The company argued that its policy, under the previous president, had never been formalized in writing and that it had been “discretionary.”

Furthermore, the employee was terminated under a president who did not have defined severance policies.

Since no employment contract existed granting severance, and there was no proof of

a company policy, the court ruled in favor of the employer, noting there was no contract.

Requirements

Severance can be required if it was promised in a worker’s contract or the employee handbook. In many states, timely payment of severance due is mandated by law. Every state has different requirements, so it’s key to have as much lead time as possible to meet them.

For mass layoffs, the Worker Adjustment and Retraining Notification Act has specific requirements that can be found here: <https://webapps.dol.gov/elaws/eta/warn/faqs.asp>.

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