SupervisorsLegalUpdate.com

Supervisors LEGAL UPDATE™

A fast-read source of information to help managers understand and comply with federal and state employment laws

May 2, 2022

OUR TOP STORY

Making the right decision when juggling job duties can create legal headaches

ONLINE

Check out this exclusive online content:

www.SupervisorsLegalUpdate.com

Management Minutes

6-point checklist to document better

Stay Legal!

7 questions to ask yourself before deciding whether to fire someone

INSIDE

Boss hired younger worker to do 'new' job: Was it age bias?

60-year-old was sure she was being pushed out

"Hey Kelsy," Jack Lawler called out. "If you still plan on applying for the new position, today's your last chance."

"Oh yes, how could I forget," Kelsy sighed, looking up from her desk.

"I don't have an application from you yet," Jack said, "so I wasn't sure."

"Why should I apply for a job I already have?" Kelsy remarked.

"C'mon Kelsy," Jack said. "We've been over this before.

"This is a brand new job and a brand new position with new responsibilities. It's not the same as the job you have now.

"So, if you want a go at it, you have until the end of today to apply, just like everybody else."

Turns 60 next month

"But it IS my job," Kelsy said. "It's the same job I've done for years – and gotten great reviews from you – I might add.

"Be honest, this is all just a big ruse to get rid of me before I turn 60 next month."

"Nobody is trying to get rid of you," Jack tried to assure her.

"Then tell me, how exactly does this new

Please see ***New job …*** *on Page 2*

Sharpen Your Judgment

Did supervisor favor one religion over another?

HR manager Rey Gomez offered a sheet of paper to Nan Sullivan and said, "That's Obaid's complaint against you for religious discrimination."

Nan read it carefully.

"It's not true," she said. "I didn't give him time off that day because we couldn't get anyone to cover for him. It had nothing to do with religion.

"Even you told me once I'm not required to grant time off on days we must be fully staffed," she said.

"True enough," Rey agreed. "But there's a wrinkle here. Obaid claims you grant time off and even adjust workloads and schedules when Christian employees need time for observances."

"That's twisting things a bit," Nan said. "Sure, some people got time off during slow periods, when we could afford to have them out. It just happened that his request came at the busiest of times."

Coincidence?

"I'm not sure Obaid, or his attorney, are going to buy that explanation, as much as I believe you," Rey said.

Obaid ended up suing over the matter, saying the pattern of allowing time off for some employees but not him was a clear proof of religious bias by his supervisor.

The company said it was all a matter of coincidence, and not bias. It said the other employee's requests happened to come at more convenient times.

Did the firm win the case?

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.

New job …

(continued from Page 1)

position differ from what I'm doing now?" Kelsy asked.

New computer system

"It does have some of the same responsibilities, but there are some new ones, too," Jack said.

"And there are some pretty important new responsibilities that we both know you are not qualified to do."

"Such as?" Kelsy asked.

"Such as being able to work with a state-of-the-art computer system," Jack said.

"That seems to be the only 'new' part of this so-called 'new' position," Kelsy said, "a new computer system.

"I can learn to run that."

"But you don't have any experience with it," Jack said.

"Who does?" Kelsy exclaimed. "Nobody here, that's for sure."

Someone outside

"We have someone applying from the outside who has the experience we need," Jack said.

"A younger person, no doubt," Kelsy said.

"Well, he may be younger than you, but he has the experience," Jack said.

"How would you know he does when you don't even know what the computer system entails?" she said.

"I asked you if you could get the specifics from the vendor so I could learn more about it, and you turned me down."

Nothing more to say

"If you want a shot at this new position, I'll need your application by the end of today," Jack said, walking away.

"I don't know what else to tell you."

When Kelsy didn't apply for the spot, she was let go.

She sued for age bias, claiming her boss created a big ruse to eliminate her position and get rid of her because of her age.

The company maintained that Kelsy's job was being eliminated and she was let go when she failed to apply for the new opening.

Decision: The company lost in a jury trial and Kelsy was awarded $1.5 million in damages and fees.

The jury agreed only one part of Kelsy's job was being changed, and her boss didn't really know the details of the change, either.

That made her firing look suspicious.

Key: Failing to apply careful planning and clear standards to job changes can be a costly oversight.

Case: Garcia v. Pueblo Country Club.

What you need to know:

Age discrimination involves treating an applicant or employee 40 years of age or older less favorably because of his or her age. It pays to remember:

- It does not protect workers under the age of 40, although some states have laws that protect younger workers from age discrimination.
- It is not illegal favor an older worker over a younger one, even if both workers are age 40 or older.
- The law covers any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment.

TEST YOUR KNOWLEDGE

Terminating without fear: Pitfalls to watch for

It's understandable that fears of potential legal problems often cloud managers' judgment about pulling the trigger on terminations.

To test your knowledge of the potential for wrongful termination claims, respond *True* or *False*:

1. The majority of states operate under the "at-will" doctrine, which gives employers the right to terminate a working relationship at any time, for any reason – or for no reason at all – so fire away!
2. One way to avoid costly lawsuits is to simply ask the employee to resign. If he or she does, your problem is solved, lawsuit-free.
3. Well-defined and enforced probationary periods provide absolute protection for employers from legal trouble when dismissing employees who clearly don't live up to job expectations.

ANSWERS

Answers to the quiz:

1. *False.* That's only true up to the point when an employee sues for discrimination or retaliation, or any number of other possible violations of federal, state and even local laws. Employers cannot fire an employee for any number of "illegal" reasons.
2. *False.* While on the surface this seems like the humane way to go, it can lead to legal problems down the road. And if asking an employee to resign is viewed by courts and juries as an "adverse legal action," it can buttress an employee's case for claiming illegal dismissal.
3. *False.* Probationary employees have exactly the same legal protections as someone who has been there 20 years. And if their termination doesn't conform with the law, they can bring a lawsuit just like everybody else. Probationary periods are one of the pitfalls around letting an employee go.

Supervisors Legal Update (ISSN 1521-8066), issue date May 2, 2022, Vol. 24 No. 568, is published semi-monthly, (24 times a year) by Progressive Business Publications, 384 Technology Drive, Malvern, PA 19355; PHONE: 800-220-5000. FAX: 610-647-8089. Periodicals Postage Paid at West Chester, PA 19380. Postmaster: Send address changes to **Supervisors Legal Update,** 384 Technology Drive, Malvern, PA 19355.

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.

Long John Silver's settles sex bias suit for $200K

What happened: Long John Silver's failed to stop harassment by two adult male managers and retaliated against a teenage employee at its Centralia, IL, location when she objected to the harassment.

The alleged sexual harassment by the two adult male managers included lewd comments, unwanted touching, propositions for sex, and sexually explicit text messages and videos.

The teenage employee alleged that Long John Silver's refused to investigate her complaint and reduced her hours in retaliation.

Decision: Along with agreeing to pay the former employee $200,000 to settle the claim, the popular seafood chain agreed to implement harassment prevention policies and provide training on Title VII's prohibition on sex harassment and retaliation.

Cite: EEOC v LJS Opco Two, LLC dba Long John Silver's Store #70250.

Gaming software giant sets up $18M claim fund

What happened: Activision Blizzard, Inc., a Santa Monica, CA based video game development and publishing company, agreed to establish an $18M fund to provide monetary relief for employees and former employees claiming sexual harassment, gender bias, pregnancy discrimination and related retaliation.

Individuals who were employed from Sept. 1, 2016 to the present and experienced sexual harassment, pregnancy discrimination, or related retaliation, are encouraged to make a claim by contacting the EEOC.

Decision: The firm also agreed to make considerable changes and improvements in the ways it handles any future Title VII complaints from employees.

Cite: EEOC v. Activision Blizzard, Inc.

Trucking firm pays $75K for disability bias claim

What happened: A job applicant for Stevens Transport Inc., of Mesquite, TX, disclosed during pre-employment interviews that he was hypertensive and under medical care for his blood pressure.

The applicant also revealed that he had to take a leave of medical absence from his prior employer because of this condition.

A hiring manager at Stevens then informed the applicant he wouldn't be hired because he had used prior medical leave.

Decision: Along with agreeing to pay $75,000 to settle the Americans with Disabilities Act claim, Stevens also agreed to train managers on the legality of disability-related questions at each stage of the hiring process, including that an applicant may not be asked about their use of medical leave during the recruitment and interview process.

Cite: EEOC v. Stevens Transport, Inc.

STOP, LOOK, LISTEN ...

UCLA posts job with no wage: Is that legal?

Most job ads include a description, qualifications, company benefits and sometimes a salary range.

Something most companies don't advertise is that they expect the new employee to work without pay — but that didn't stop one employer from trying it!

'A without salary basis'

A job posting from the University of California, Los Angeles (UCLA) went viral on Twitter recently due to a bizarre section on salary.

Here's what the posting said:

The Department of Chemistry and Biochemistry at UCLA seeks applicants for an Assistant Adjunct Professor on a without salary basis. Applicants must understand there will be no compensation for this position.

This had both job seekers and HR pros scratching their heads in disbelief. "This can't be legal, right?"

And the answer is no, according to employment law attorney Jon Hyman who chimed in. In almost all cases, he said, free work is illegal.

The Fair Labor Standards Act clearly states that employers must at least pay employees minimum wage for all hours worked.

Charitable v. commercial

There are always exceptions. Nonprofit organizations, which UCLA is, are permitted to use volunteer work for their charitable endeavors.

However, a nonprofit is not permitted to use volunteer work for commercial endeavors.

"If, for example," Hyman said, "the university was filling a position for someone to go into the community to offer educational services for at-risk youth, I could envision an argument for charity over commerce."

But since UCLA sought a professor it would be hard to argue the job advanced the school's charitable endeavors. UCLA pulled the ad after it went viral.

SUPERVISORS SCENARIO

Will supervisor's reasons for firing stand up against pregnancy discrimination claim?

Worker released just as she requested maternity leave

"I hear you want to see me?" Jenny said, peeking her head into supervisor Jake Moyer's office.

"That's funny," she said, "because I was already on my way to see you. I'm …"

"Pregnant!" Jake said, finishing her sentence. "I just got a copy of your request to HR for maternity leave after delivery."

"But there's something else," he said, pausing, "and there's no sense of me beating around the bush. I'm going to have to let you go."

Improvement needed

"Let me go?" Jenny said, sitting down hard on a chair. "Why?"

"I think you know, Jenny," Jake said. "Two bad performance reviews in a row. And now we're at the end of your improvement plan time frame and your progress has only been minimal."

"So you agree that I have improved?" she said, challenging him.

"Sure, a little, but not nearly enough," he answered. "Look, we're short-staffed already and I can't afford to keep someone who's not pulling their weight."

"Don't you mean, being short-staffed you can't keep someone who's about to take time off to have her baby?" she said.

"I wish things were different," Jake said.

Jenny ended up suing for pregnancy discrimination, noting her termination came right after she had announced her need for leave.

She said her boss's own words about being short-staffed proved her case.

The company argued in court that the termination and the leave request had nothing to do with one another. The company had documented the employee's struggling performance.

Decision: The firm won. The judge said two performance reviews were enough documentation to establish that the dismissal was justified.

Key: Firing a pregnant employee will lead to many questions of fairness. That's why solid documentation is essential.

Case: Esquivel v. IUOE.

What you need to know:

Courts do get suspicious when an adverse action seems to coincide with a medical problem or related request for leave.

To stay legal:

- Document any prior problems and go over the documentation with HR to make sure you've got things buttoned up properly.
- Make sure the employee is aware of any problems and gets written notices and warnings at the appropriate times leading up to the anticipated termination date.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No, the company lost the case.

The court refused to be swayed by the "coincidence" argument.

Such an argument sometimes is believable, the judge noted. Usually, however, it's made over a case involving a single instance when one employee got the time off and another didn't. That could happen without any obvious bias.

But the case is harder to make when one employee routinely gets denied time off while others get the OK.

Patterns of bias

The law generally notes that supervisors should make all reasonable efforts to meet religious request, though you're not obligated to grant every request for time off for a religious observance. Courts realize businesses have a job to do and need people to do it.

But courts also look for patterns of treatment. Do you almost always grant the request for one group and generally say "No" to the other?

That's a problem. Because even if the pattern is unintentional, which it sometime can be, the pattern is enough to swing the case in the employee's favor.

The warning about patterns applies for most types of discrimination claims, not just religious ones.

Case: Siddiqi v. New York City Health & Hospitals Corp.

EDITOR: RICH HENSON

MANAGING EDITOR: TOM D'AGOSTINO

PRODUCTION EDITOR: JEN ERB

EDITORIAL DIRECTOR: CURT BROWN

Subscriptions: 800-220-5000