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June 13, 2022

OUR TOP STORY

Was it simply a personality clash, or did gender bias play a role?

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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

Knowing what is a protected activity

Bias suit costs dairy firm \$79K

Three benefits employees love

Retaliation claim puts boss in court

Boss bumped heads with female worker and got bruised in court

Comments like 'diva' and 'angry woman' didn't help his case

“Where do you get off thinking it's OK to interrupt me like that during a meeting?” Laura huffed.

“No one deserves to be demeaned like that,” she said, “especially me.”

“I was simply trying to help keep things focused and keep the meeting on track,” said her new boss, Paul Riley.

“I've been running meetings here for many years before you arrived,” Laura told him, “and I don't have trouble keeping people focused and on track.

“But now, in the few months since you've been my boss, all of a sudden

I can no longer keep a meeting on track,” she said.

“I guess this is just another of my many shortcomings you've uncovered!”

A warning?

“People warned me you'd be a handful, and that's sure turning out to be the case,” Paul said, shaking his head.

“Excuse me?” Laura shot back, her voice rising. “What do you mean people warned you?”

“Who warned you and what did they say

*Please see **Bruised ...** on Page 2*

Sharpen Your Judgment

Inconsistent discipline sets boss up for lawsuit

Supervisor Lynn Rondo was scrolling through résumés on LinkedIn when HR Director Eric Bressler walked into her office.

“Got some bad news,” Eric said as he sat down. “Brianna Tarth is suing us. She's claiming we fired her because of her race.”

“That's insane!” Lynn said. “We fired Brianna because she didn't follow our call-out procedures when she missed her shift.”

“Why don't you start from the beginning?” Eric asked.

Lenient in the past?

“Brianna was sick,” Lynn explained, “So she texted me less than an hour before her shift started. But I didn't see that message in time.”

“Well, that's not really her fault you didn't see it,” Eric countered.

“No, but our policy says to call if you can't make it in,” Lynn pointed out. “Brianna ignored that.”

“She's saying in the past you have given other workers a pass when they've texted instead of calling out,” Eric replied.

“Brianna's the only one who's been fired for a one-time offense.”

“Well, I can't remember those other situations off the top of my head,” Lynn said. “But Brianna clearly violated our policy.”

When Brianna sued for race discrimination, the company fought to get the lawsuit dismissed.

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.

Bruised ...

(continued from Page 1)

about me? I've always gotten along just fine with the people I work with," she said.

"You know, I don't think you and I ever got off on the right foot," Paul said. "We have very different ways of doing things."

Clenched fist

"Different?" Laura said, incredulous. "If by different you mean clenching your fist and yelling at me, yeah that's different," she said.

"I have never had a superior treat me that way.

"And the time you put that box on the floor for me to pick up," she added.

"You know I have a bad back and cannot lift that."

"I set the box there only because I needed more space on the table," Paul said. "There was absolutely nothing sinister about it.

The diva

"This must be why everyone tells me they hate you and they refer to you as 'the diva,'" he said.

"You are temperamental, self-important and hard to please," he told her. "You seem to be a very angry woman."

"There you go again," Laura said.

"This really is about me being a woman, isn't it?"

"The reason we have very different ways of doing things is you refuse to treat women fairly."

Complaint ignored?

Laura complained to her employer about her boss's alleged gender bias, but felt she was being ignored.

She eventually quit her job and sued her employer in court. She claimed the comments like "diva" and "angry woman" were clear signs that her boss was intolerant of women.

On top of that, she said, her employer failed to properly investigate her gender bias claim.

Her employer said this was never a case of gender bias, just two people who couldn't get along.

Decision: The employer lost when a jury awarded the woman \$13 million, including \$3 million in lost earnings and \$10 million for emotional distress.

Key: The jury found the employer never properly investigated the complaint largely because the firm was not able to document the steps it took.

This case is a good example that employers must take all bias claims seriously, investigate them fully, take any remedial action, and document it all along the way.

Case: *Pinter-Brown v. UCLA*.

What you need to know:

Courts and juries look to see whether employers make an effort to investigate bias complaints fully and properly.

To keep you – and your company – out of legal hot water:

- Make a genuine effort, and take the time, to fully understand the complaining person's concerns
- Let the employee know you'll relay his or her concerns to HR, and to all the proper people in your organization, and
- Don't just wing it. When you work with people every day, it's easy to get too close to a situation and make the mistake of not fully understanding the interpersonal – and legal – dynamics involved.

TEST YOUR KNOWLEDGE

Do you know what makes up a 'protected activity'?

"Protected activity" refers to types of employee complaints and activities that, by law, are protected from retaliatory discipline by employers. To test your knowledge of what's legally protected, respond True or False to the following:

1. An investigation shows an employee's complaint of sexual harassment against a manager was without merit and maybe filed just to "get even" with the manager. The employee can be disciplined, or even fired, for filing the complaint.
2. An employee who files a complaint also happens to be habitually late for work. That employee cannot be disciplined for the tardiness until the unrelated complaint is resolved.
3. Employees who testify in favor of an employee who has filed a complaint have the same protections against retaliation as the complaining employee.

ANSWERS

1. **False.** The EEOC has stated emphatically that unfounded, false and even malicious complaints are protected against retaliation. Several recent court cases have affirmed those protections for groundless complaints.
2. **False.** An employee who files a complaint is subject to the same rules and discipline as any other employee, as long as the offense is unrelated to the complaint. As a practical matter, to avoid retaliation claims, supervisors should discipline such employees should be doubly-sure of the charges and have strong documentation to back up the discipline.
3. **True.** The EEOC specifies that any employee who gives statements, either in court or as part of an in-house investigation, is protected against retaliation for providing such statements.

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.

Dairy processor pays \$79K to resolve bias suit

What happened: Agropur, Inc., a dairy processor and U.S. subsidiary of Canadian-based Agropur Cooperative, refused to accommodate an employee's severe eczema, a skin condition. While working for Agropur, the employee learned she was allergic to rubber and plastics. She requested a reasonable accommodation, including the ability to wear a different type of glove while working.

Instead of accommodating the employee, Agropur forced her to leave work when she had flare-ups, the EEOC said. When she left work, she was penalized by receiving attendance points, and eventually fired.

Decision: In addition to paying \$79,000 to the employee, the consent decree settling the suit provides for injunctive relief, training on the ADA, and compliance-related reporting to the EEOC.

Cite: EEOC v. Agropur, Inc.

Firm out \$315K for disability discrimination

What happened: A 52-year employee of S&C Electric Company, a manufacturer of switching and control products for power transmission and distribution headquartered in Chicago, was diagnosed with cancer and later sustained a broken hip, for which he took medical leave.

Following a long journey toward healing, the employee sought to return to his former position. The

employee, who lived and worked in Chicago, provided numerous doctors' notes indicating that he was fit to return to his former position as a designer, which was mostly desk-bound. Instead, S&C fired him following a perfunctory medical examination by an S&C contracted doctor.

Decision: Along with paying \$315,000 to the estate of the former employee, S&C will provide training to managers and all employees responsible for human resources and medical evaluations about their obligations under the ADA.

Cite: EEOC v. S&C Electric Co.

Virginia firm pays \$70K to settle pregnancy claim

What happened: DLS Engineering Associates, LLC, a federal contractor based in Virginia Beach, VA, offered a woman a position as an engineering logistics analyst at its location in Jacksonville, FL.

After she told the company's vice president that she was five months pregnant, he rescinded the offer, explaining the company could not hire someone who was pregnant, according to the suit filed by the EEOC.

Decision: In addition to the \$70,000 in damages, the consent decree settling the suit requires DLS to amend its equal employment opportunity policy; conduct training on pregnancy discrimination; provide reports to the EEOC; and post a notice.

Cite: EEOC v. DLS Engineering Associates, LLC.

STOP, LOOK, LISTEN ...

3 benefit ideas you can try

In today's Great Resignation job market, employers need to leverage every competitive advantage they can muster.

Traditional benefits like health insurance and 401K matching aren't enough to attract and secure top-tier talent.

But by leveraging unconventional benefits, your organization can improve retention and attract the next generation of talent.

Here are three ideas:

Charitable involvement

This can include things like volunteer events such as helping to beautify a public park or serving meals at a local homeless shelter. These are things employees can partake in because they care.

While it's true younger employees want to work for companies involved in charity, you'd be hard-pressed to find an employee of any age group who doesn't have a charity favorite.

Midday exercises

Many companies are doing things like holding walking meetings, or offering a desk-side yoga program.

Keep it voluntary, and consider ideas that keep people at their desk, like an affordable under-desk elliptical, where the user can sit and pedal.

Professional development

This speaks directly to the state of the current labor market that employees are seeking out companies that offer professional development as a benefit.

While most employees do want to get better at their jobs, not all employers do a fantastic job of promoting their professional development opportunities.

Professional development benefits don't have to be internal.

You can offer internal management or leadership programs, and you can also create a strategic partnership with a nearby university.

SUPERVISORS SCENARIO

Boss claims he wasn't retaliating, just trying to pick the best person: What did the court say?

Denied promotion triggers a retaliation complaint over a lingering issue

Paula burst into Tim's office and said, "So, I see I didn't get promoted again."

Tim put down the report he was reading and replied, "No, I thought Linda was the better person for the job."

"Even though I've been doing the job for three months?" she asked. "And even though you told me I was doing it – as you said in my performance appraisal – 'like an expert?'"

"I was trying to be positive," he said.

"You sure you weren't trying to get revenge for the sexual harassment complaint I filed?" she shot back.

'Not against me'

"That was three years ago," he noted. "It's not as if you filed the complaint against me. It was against someone in our unit, wasn't it?"

"Right, but when I told you about it, you told me not to go to HR with the complaint because it would make you look like a bad supervisor," she said.

"Yes, and you went right ahead and filed the complaint," he sighed. "And I never said another word about it."

"No, you didn't," she agreed. "You just refused to promote me, over and over."

Paula sued for retaliation, saying her boss kept her from a promotion for which she was qualified, as revenge for her filing the harassment complaint.

In court, the company said that the supervisor simply chose the best candidate and that it was unlikely he would penalize Paula three years after the incident.

Decision: The company lost. The judge said elapsed time was no defense against a retaliation charge, especially when the supervisor had given the employee high marks for filling the job she eventually was denied.

Key: The supervisor in this instance made at least two mistakes: (1) trying to discourage an employee from filing a legitimate complaint and (2) giving the employee a strong appraisal while limiting her job advancement.

Case: Malin v. Hospira.

What you need to know:

When an employee comes to you with any sort of complaint, especially one involving harassment or other illegal activity:

- Conduct and cooperate with a thorough investigation of the complaint
- Apart from the complaint, treat the employee just as you would any other employee who never filed a complaint, and
- Continue with the fair and equal treatment once the findings are in and a decision's been made on the merits of the complaint.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No, the company lost when a judge allowed Brianna's case to continue to a jury trial. It's now facing a long legal battle or a costly settlement.

The company argued that race had nothing to do with Brianna's dismissal.

It said she was let go because she violated a clear policy on calling out of work by texting her manager instead.

But the court wasn't convinced.

Brianna's lawyer was able to come up with examples of other employees who'd been allowed to text their managers instead of calling out of work.

And in those instances, the employees hadn't been fired.

The court said a jury should decide if Brianna was discriminated against because of her race.

Consistent discipline

This case highlights the importance of managers enforcing policies uniformly for all workers and carrying out discipline consistently – or it could look like discrimination.

The company claimed a violation of its call-out policy was grounds for termination, yet it hadn't fired anyone else for it in the past. In fact, it seemed like texting with managers was a fairly common practice.

This inconsistency was enough to land it in legal trouble.

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