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If you set a higher standard for an older employee, is that age bias?

More was expected of worker who'd spent 40 years on the job

“You have to look at all the circumstances before you write me up for that missed order,” Diana protested to her supervisor, Jerry.

“What circumstances?” Jerry asked. “You were responsible for filling the order, and it never got done. Seems simple to me. Plus, it’s the second one you’ve fouled up this month.”

“I can think of at least two reasons for you to consider,” Diana answered. “One, my workload has nearly doubled since we cut back on people – something’s going to fall through the cracks.

“And, two, Sophia’s missed at least as many orders as I have, and I don’t see anyone warning her.”

Same job – different expectations

“You have 40 years’ more experience than she does,” Jerry pointed out. “We expect more from you because you’re ...”

“Older?” Diana broke in.

“I think I see what this is about,” she continued. “She and I do the same job, and when I foul up it’s a big deal because I’m 61. When someone in her 20s fouls up,

Please see Age bias? ... on Page 2

Sharpen Your Judgment

Was boss offering career advice, or retaliating?

“There’s just no way for me to sugarcoat this,” Supervisor Glenn Leaman said.

“You know we’ve been facing significant cost cuts,” Glenn said. “Orders are down. Revenue is down. We’re going to have to let you go.”

“I know times are tough, but I didn’t think the company was this broke,” Steve Lopez said with surprise. “I figured at least we’d make it through the end of the year.”

“I don’t know what to tell you,” Glenn said. “They don’t share all the financial information with me.”

“It just sort of comes out of nowhere,” Steve said, “So tell me, does the fact that you’re letting me go have anything to do with me testifying at that workers’ comp hearing last month?”

“Absolutely not,” Glenn tried to assure him. “Why would you think that?”

Retaliation?

“Because you warned me not to stick up for Mike and go to that hearing,” Steve said.

“What I said at the time was I didn’t think it would be wise for you to go up against the company,” Glenn said. “I just didn’t see what you would gain from doing that.”

Steve hired an attorney and sued the company for retaliation. He claimed the timing of his firing was suspicious, and that the company let him go for testifying on behalf of a co-worker seeking comp.

The firm fought the lawsuit. 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.

Age bias? ...

(continued from Page 1)

she gets a pass from you. How's that fair to me, Jerry?"

"Here's how," he replied. "You have performance standards you agreed to, including that orders would be filled right and on time."

"And I assumed everyone else in this job had the same standards," she said.

"Damn it, Diana, forget about everyone else,"

Jerry shot back. "This is about your performance."

She clenched her jaw and said nothing for a few moments. Then she broached another subject.

"And when you asked about my retirement plans?"

"What about it?" he said.

Future needs

"I never gave any indication I wanted to retire," she said.

"Are you just trying to replace me with someone younger?"

"I was trying to do a staffing plan for HR," he explained. "You know, future needs, just looking ahead."

"Did you ask Sophia if she'd be leaving anytime soon?" she asked.

"C'mon, you know that's a silly question to ask her," Jerry answered while shaking his head.

"All I know is that you hold me to a higher standard than someone

younger than me, and that you've pushed me about retiring," she concluded. "Is that silly, too?"

She sues

Jerry had about reached his limit, but remained calm.

"By the end of the day, you're going to get a letter from me detailing your performance problems and warning you that continued problems could result in us having to let you go."

Shortly afterward, Diana did

make another mistake, and Jerry fired her for it.

She then sued the company for age discrimination.

Her argument:
1. Younger workers weren't similarly treated. 2. The supervisor had a plan in the works to push her into retirement.

The company countered by saying the issue was strictly about the performance of an experienced employee who was supposed to be reliable. Further, a

question about career plans wasn't proof of a scheme to dump an older employee.

Decision: The company lost. A judge ruled the circumstances were strong enough to raise suspicion about age discrimination. The two factors, taken together, gave the appearance that the supervisor had allowed age to enter into his decision about the employee and the termination.

Case: *Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*

What you need to know:

Certainly, you can hold employees to stated performance standards.

But you always want to avoid any appearance of bias, which isn't always easy. Be sure those standards are

- Equal for all similarly situated employees – those doing the same job under the same circumstances
- Reasonable and fair to all employees, regardless of their age, and
- Up-to-date, reflecting changes in circumstances for the particular employee or for the company in general.

TEST YOUR KNOWLEDGE

Keys to handling a firing without ending up in court

Firing someone is one of the most unpleasant tasks you'll face as a supervisor. On top of that, if you handle it incorrectly, you could be looking at a lawsuit from an angry ex-employee itching for revenge.

To test your knowledge of how to handle a termination properly, respond *True* or *False* to the following:

1. If you work in an at-will state (where employers can fire for any nondiscriminatory reason), you should avoid giving the real reason to the person being terminated.
2. If, during the termination meeting, an employee accuses you of incompetence or misbehavior, don't try to defend yourself; just continue with the termination process.
3. If you have documentation that backs up the termination – such as a failed drug test – don't let the employee know about it.

ANSWERS

1. *False.* Although you're not obligated to give the real reason, if there's a later lawsuit that claims bias, a judge could believe there was some illegal motive for hiding the reason.
2. *True.* You don't want the termination process to turn into a squabble about who's wrong and who's right. If you've done your homework, that's already been decided. You can let the employee vent a little, but responding to accusations will only drag out a difficult process and serve no other purpose.
3. *False.* It's generally OK to confront an employee with documentation that backs up the reason for the termination, especially if the document presents conclusive evidence. The exception might be if revealing the document violated someone else's privacy rights. In that case you'll want to discuss it with HR beforehand.

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.

Firm pays \$75,000 for disability discrimination

What happened: An applicant sought a driver's position with Ashley Distribution Inc., of Arcadia, WI. The applicant was offered the job on the condition that he obtain a Department of Transportation medical certification, meet the physical requirements and show he could perform the required job duties. The applicant successfully completed the DOT medical exam and the company's driving test. However, the company was concerned the applicant could not safely enter and exit a truck due to a rotator cuff injury that was disclosed during the medical exam. Despite being able to perform the job, the company refused to hire the person.

Decision: Along with paying \$75,000 in damages, the two-year consent decree requires that Ashley Distribution adopt and distribute a written anti-discrimination policy which explains the ADA. The company must also provide annual training to all HR employees, managers and supervisors who are responsible for recommending or making decisions to hire and/or fire employees.

Cite: EEOC v. Ashley Distribution.

Verona resort pays out \$16K for pregnancy bias

What happened: Verona Resort and Spa, in Tamuning, Guam, refused to allow its front desk attendant, who had gestational diabetes, to wear open-toed shoes and to sit while fulfilling her duties. Instead

of providing the reasonable accommodation, the resort fired her, claiming her pregnancy impacted her ability to perform the job.

Decision: Along with paying \$15,871.56, Verona is required to designate an EEO monitor to ensure compliance with federal law, and provide training on pregnancy and disability discrimination, as well as retaliation.

Cite: EEOC v. Verona Resort & Spa.

Firm out \$650K for national origin bias

What happened: Paper Material Handling, Inc., a nationwide company that sells, rents and services forklift products, allowed employees at its Fresno, CA, facility to engage in ongoing harassment of Hispanic employees. Such harassment included mocking employees' accents and using derogatory slurs. The EEOC claimed that the company failed to address employee complaints, leaving employees to quit as their only recourse to avoid the misbehavior.

Decision: Along with paying \$650,000, the firm must retain an EEO consultant; conduct internal audits; review and revise its anti-harassment policies; create complaint procedures; develop a centralized tracking system for harassment and discrimination complaints; and implement annual training for its human resources and hiring managers and personnel.

Cite: EEOC v. Paper Material Handling, Inc.

STOP, LOOK, LISTEN ...

Offboarding: Why it pays to make the effort to do it

No doubt you've heard countless times, and know from your own experience, that a top-notch onboarding program is essential to getting the most out of any new hire.

But do you really think it's necessary to properly send off a departing employee?

Offboarding may seem a bit irrelevant – after all, they're leaving.

What does it matter?

But between potentially rehiring an ex-employee and showing your staff you care about them, there are a lot of great reasons to say goodbye the right way.

3 simple steps

David Sturt, executive VP of O.C. Tanner, which offers employee recognition solutions, has three simple offboarding suggestions.

1. Listen to the why. When an employee gives their notice, really pay attention to why they're leaving. It's possible they just got an opportunity they couldn't refuse.

But, they may have been unhappy in their position. If they had an issue with their manager or the company culture, you'll want to know so you can address the problem and stop others from leaving.

2. Appreciate all their work. It's always hard when a great employee leaves, but try not to express any negative feelings. Instead, focus on everything they've done over the years and show your appreciation.

By specifically thanking them for their contributions, the departing employee will leave on a good note.

3. Keep in touch. Once the person leaves, don't let that be the last time you speak. Stay in touch. Not only does this show them the company cares, but by maintaining a relationship the employee could end up returning someday.

If not, at the very least there will be someone out there saying good things about your company.

SUPERVISORS SCENARIO

Former employee sues, claiming poor job reference was slander ... Now what?

Can an honest and accurate reference still be legally defamatory?

Cathy Baker tossed her coat over the back of the chair as she took a seat in supervisor Pete Johnson’s office.

“What’s up?” Pete asked.

“Did you really tell those clients that I didn’t know what I was talking about?” Cathy asked. “Did you really say that?”

“Whoa, slow down,” Pete said. “No, that’s not exactly what I said. I did tell them that since you don’t handle the account directly, you weren’t familiar with it.”

“How’s that for thanks,” Cathy replied. “I go out of my way to help those folks, and you make me look bad.”

“You really shouldn’t have approached them in the first place,” Pete said. “It’s not your account, and it was being handled very well until you turned it upside down.”

“If it were the first time you’d done something like this, I could understand,” Pete added. “I know you meant well, but you’re wearing thin around here.”

“What does that mean, wearing thin?” she shot back.

“It means if it happens again, I’m going to have to let you go,” he said firmly.

A destructive tendency?

In time, Pete got another bad report on Cathy and she was let go.

When the hiring manager at another firm contacted Pete for a reference on Cathy, he said what he knew – that Cathy had a “destructive tendency” to interfere with other’s people’s work.

When Cathy failed to get the new job, in part because of Pete’s unvarnished comments, she sued her old employer for defamation. She claimed the idea of her meddling in other people’s work was simply her supervisor’s opinion.

Decision: The company won when a court dismissed the defamation claim.

The company was able to show that what the supervisor said about the employee was accurate because all the interactions had been thoroughly documented.

Case: Caruso v. St. Jude’s Childrens Hospital.

What you need to know:

Being asked to give a job reference about a former employee comes with the turf. It’s easy if they were a good employee. But what about the tough ones?

It’s important to:

- Say only what’s true and verifiable and stick to the facts.
- It’s probably OK to discuss specific job performance measures. Avoid subjective issues.
- Act in good faith, and when possible, only one person, usually a trained HR professional, should be permitted to provide references.

***Sharpen Your Judgment* – THE DECISION**

(continued from Page 1)

No. The company lost when a judge ruled against it and sent the case to trial.

That frequently puts the company in the costly position of having to settle the case out of court, or face the risk of a large jury award.

The company portrayed the supervisor’s remarks as innocent, if ill-guided, career advice to the employee.

First, it said the comment to not testify at the comp hearing was not a threat. It also argued the employee was at will, and was laid off solely due to budget cuts.

But the court had a difficult time getting past the timing of the layoff.

“The heart of this case is the employer’s

motivation and intent,” the judge wrote in the decision.

And deciding the employer’s intent should be left to a jury.

Words of caution

If, in fact, this supervisor was genuinely trying to give sound advice, he could have used some himself.

It’s illegal to threaten or suggest the possibility of retaliation for employees legally participating in workers’ compensation hearings.

And, as is oft-stated in many walks of life, timing is everything.

Case: Pietruszynski v. McClier Corp. Inc.

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