



In The Trenches

By Daniel C. Carr

Practical Answers to Your HR Questions

Q *We terminated two employees (a male and female) that were caught doing inappropriate things together in an empty room on company property. Now, some members of management would like to rehire the man. Do we have a problem with doing this? My better judgment says that this could get us in HOT water. What do you think?*

A You should trust your better judgment. Rehiring one employee fired for violating company policy while not rehiring another former employee of the opposite sex for the same violation is not a good idea and could land your company in court, even if your actions are legal.

As you no doubt are aware, federal and state laws prevent companies from favoring one sex over another with respect to hiring, promotion, or compensation. Simply put, men and women should be judged by their professional performance, not their gender.

It may be that your company is contemplating rehiring the male former employee for a reason unrelated to his gender. For instance, he may possess special skills that the company will have trouble finding elsewhere. If the female employee possesses no such unique skills, your reason for rehiring only the male employee may be legitimate. Or, perhaps your company is a private company with no anti-nepotism policy — and the former employee you want to rehire is the son of the CEO and founder. However, whatever your motives, the female ex-employee may see things differently and decide to file a lawsuit. Even if you prevail, the suit is likely to be expensive, may generate negative publicity about the company, and will undoubtedly distract employees from the business of running your company.

From a practical standpoint, even if no lawsuit results, you have to consider the effect the rehiring may have on your other employees. Some of them may perceive the action as unfair, which could hurt morale, and other male employees may decide they can engage in the same behavior that got the employees fired without suffering permanent consequences. Rehiring the

male employee could even lead to other employees wondering whether they may have been the victim of unfair discrimination.

If the fired employee is simply irreplaceable, the benefit of rehiring him may outweigh the risks of doing so. However, these risks are high enough that you should carefully consider whether the action is legally justified, as well as whether your business need is great enough to outweigh the potential fallout from your actions.

Q *Our company has a policy against sexual harassment, which our employees follow. However, one big customer of the company frequently makes inappropriate remarks to company employees of the opposite sex. Can we be held legally liable for harassment by non-employees that occurs on company property?*

A Maybe. Even though the offensive behavior is not by one of your employees, your company could be liable if you permit a hostile work environment to exist at your place of business, whatever its source. Companies have a general duty to ensure that their workplaces are free from unwelcome sexual advances, requests for sexual favors, and other sexual conduct. Most companies focus their efforts on preventing sexual harassment at deterring inappropriate behavior by employees, but the duty to provide a harassment-free environment extends to customers, suppliers, and independent contractors working on the premises.

Even some law firms have been charged with violating this duty. In a case pending in federal court in New York, an associate at a large New York law firm claims she was fired because she complained about the harassing behavior of three large clients of the firm. Her complaint also alleges that the firm failed to take proper remedial action to prevent a climate of hostility from existing at the firm. While the ultimate outcome of this case is uncertain, it should serve as a wake-up call to any busi-

■ SHRM active in disasters

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Many SHRM chapters and state councils have joined in the relief effort. A couple of examples are:

- The Arizona State Council has voted to donate \$41,000 of their reserve fund to Katrina Relief efforts, half to the Red Cross and half to state and local efforts.
- The Little Rock Chapter is coordinating efforts with the city to determine how they can best be of support. Specifically, efforts include the following: setting up a location for their member volunteers to assist evacuees with resume preparation, interviewing skills, finding interview clothing, locating transportation to interviews; determining how best to get jobs posted so that they will be most accessible; assisting with job fairs in Little Rock and surrounding areas; and creating a packet of information for evacuees to connect with the Chapter for employment assistance, also, housing info, food, communication and other assisting organizations. ■

■ In the trenches

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ness that may have viewed the inappropriate behavior of those with whom it does business as none of its business.

If your company learns that anyone who interacts with your employees at work has engaged in sexual harassment, the company has a duty to investigate the allegations. It must also take reasonable steps to remedy the situation and guard against it happening again. As you show employees, customers, suppliers, and others that your company does not tolerate such behavior, you not only protect yourself against potential lawsuits, but also foster a better work environment.

True, telling a major customer that his or her behavior is inappropriate is not easy. On the other hand, it's a lot better than the possible alternative: trading valuable and productive employees for costly and distracting litigation. ■

In the Trenches is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Daniel C. Carr, a business attorney and a member of Van Cott's Labor and Employment Law Group. You can reach Mr. Carr at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to pamgunnell@pipelinewireless.net

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