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Editor's Column: What I'm Looking for in Great Human Resources



I'm in a unique situation: I'm an experienced employment lawyer and an expert in HR practices. I've had the opportunity to give more than 250 presentations to CEOs through the Vistage organization. I also ran a monthly forum for senior HR executives for four years. In this mastermind group, all members had to be SPHRs (a high-end HR designation) make more than \$80,000, and report directly to their CEO for at least seven years. So, given my expert background of knowing the law, the needs of business owners, and the human resource function, what am I looking for in great HR?

To begin with, I want somebody who's excited about the job – who wants to be really good, if not great at it. Someone who's willing to give it their best every day and not settle for mediocrity. In many organizations, the person in the HR role doesn't have a formal HR background. The CFO, bookkeeper, or owner might be managing the basic HR functions such as payroll and benefits administration. As companies grow toward the 100-employee range, they start bringing on full-time HR executives. I know companies with 25 employees that have a full-time HR executive, and I know companies with 300 employees that still don't have one! Regardless of whether the HR person wears three hats or one, I also want them to think and act strategically.

To be strategic, the HR manager should follow these guidelines:

1. **Be clear about ownership's vision and goals for the organization.** In turn, HR will work on those aspects of human resources that will help grow the company toward this vision or goal. Let me give an example: Perhaps cash is tight. There's no forecast for hiring new personnel, at least for some time. Ownership is more concerned about survival than anything else. The main focus then becomes: How can we help our existing workforce become more productive and grow the bottom line? If survival is the primary concern of management, this has to be the primary concern of the human resource executive, too.

On the other hand, perhaps your company is in growth mode – with management focused on bringing on people in the right seat of the bus as quickly as possible to service growing demand. If that's the case, then the HR executive has to focus itself on doing the best possible job of hiring. Quickly.

2. **Focus on constant improvement.** On average, the most educated HR executive is the best HR executive. So, the question becomes: How much time do you spend studying the HR

function? If you're doing HR full time, 50% of your educational efforts should be in this area. If you're doing it a third of the time, then maybe 15% of your learning has to be in this area. So, while I might be preaching to the choir, how many of you read this entire newsletter every month? How many of you attend our excellent monthly Webinars? How many of the Special Reports and White Papers on HR That Works have you taken the time to read? All of the tools necessary to be a learned HR executive are readily available on HR That Works.

Learning requires discipline. I've disciplined myself to read a book a week, review every case that comes out in the employment law field, read the newsletters and blogs of eight different employment law firms, and read a number of HR magazines every month. I do HR full time – and that's what someone who wants to become an expert has to do. To get this volume of reading done, I discipline myself to do it for an hour a night. It's something I look forward to, realizing that, not only do I enjoy learning, but it will have a bottom line impact on my career. The most successful executives I've met over the years are voracious learners. That's exactly what I want my HR executive to be.

3. **Become proactive.** In my experience, most HR functions are "reactive:" We need to do payroll, hire and terminate employees, issue a COBRA notice, etc. Proactively, we should be engaging in compliance, communication, and skills training, surveying, auditing, and similar activities that will help to strengthen and grow the department and company over time. How many proactive projects has your HR department done during the last year? My mantra is simple: Start with one proactive item a month – not something you "have" to do, but something you "should" do to help improve the company.

If you face any challenges in meeting these goals, don't hesitate to contact me. Because I usually spend my time on hotline calls dealing with negative scenarios, I enjoy helping our Members create positive outcomes for their company and careers. Got a bright idea? Want to get your head checked? Then give me a call at (800) 234-3304, toll free.

"Happiness [at work] pays, especially when you are under pressure. It's a valuable resource, which not only generates career success, but differentiates you from your colleagues, too."

- Jessica Pryce-Jones
Author, *Happiness at Work*

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We have also provided you with the [Form of the Month](#)

The Importance of Job Descriptions



A recent case brought against Friendly's Ice Cream in Maine shows the importance of having detailed job descriptions that include physical requirements.

In this case, plaintiff Katherine Richardson alleged that Friendly's violated the ADA by failing to accommodate her shoulder impingement injury, which required her to undergo surgery. Apparently, she never fully recovered from the injury, which limited her ability to do some manual tasks. Even though Richardson was in a management position, she was expected to chip in and help with everything from doing the fries to cleaning up. Because she was limited in her ability to do these jobs, as the court stated, "Even assuming it is true Richardson's 'primary function' was to oversee restaurant operations, the point does not advance Richardson's case. The essential functions of the position are not limited to the 'primary functions' of the position."

The court pointed to evidence showing "there were a limited number of employees among whom the performance of the manual tasks at the restaurant could be distributed ... This evidence supports findings that these tasks were essential to Richardson's position." The court quoted an EEOC guideline, "If an employer has a relatively small number of available employees for the volume of work to be done, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited."

In the end, Richardson's case failed because even with modifications to her work, she remained unable to perform a number of tasks, including mopping the floor, lifting heavy trash bags, scooping ice cream, and unloading supplies from delivery trucks. This left her unable to perform a substantial number of manual restaurant tasks and therefore, her case failed. The court also stated that, "The law does not require an employer to accommodate a disability by foregoing an essential function of the position or by reallocating essential functions to make other workers' jobs more onerous."

Richardson also argued that Friendly's violated the ADA by refusing to engage in an interactive process to determine whether any reasonable accommodations were available. This argument failed too because Richardson was not able to identify any such accommodation that would qualify. The two accommodations she did identify — performing tasks in a modified manner and delegating tasks to others — were inadequate to enable her to perform a sufficiently broad range of manual tasks.

Lesson learned: This is an insightful case, which you should consider reviewing in its entirety. It reviews the battle of job descriptions and accommodations in a way that provides many helpful hints to employers. [Read the full case here.](#) You can also access [free job descriptions that have some physical requirements here.](#)

Got an Opinion?

The DOL has plenty of them, and they can offer great guidance for employers. To learn more, [click here.](#) Note: The Bulletins and Field Operations Handbook at the bottom of this link are also very helpful!

FMLA and Your Personal Exposure as a Manager

The U.S. District Court for the Eastern District of Pennsylvania has green-lighted an employee's FMLA claims against a company president, human resources manager, director, and the plant manager. In [Narodetsky v. Cardone Industries, Inc.](#), the company terminated a 12-year



employee shortly after he requested FMLA leave for surgery to repair a leg injury. The day after learning that the employee needed leave, the company decided to conduct a forensic computer search of his computer and found a pornographic e-mail that he had allegedly forwarded to another employee more than a year earlier. After the company terminated the employee, he sued not only Cardone Industries but also the company president and several individual managers, alleging that they had violated the FMLA. The FMLA defines "employer" as "any person who acts, directly or indirectly, in the interest of an employer," and FMLA regulations explain that individuals such as corporate officers can be found individually liable for any violations of the act. Thus, the Court concluded that the individual defendants were properly named in the lawsuit because each one was alleged to have played a role in the decision to terminate the plaintiff.

Harassment from the Get-Go

The Federal Fourth Circuit Court has ruled that a plaintiff could proceed to trial on her claim of sexual harassment and constructive discharge after she had worked with the alleged harasser for only two days. [Whitten v. Fred's, Inc.](#) involved an employee transferred to the Fred's store in Belton, SC, where she worked as an assistant manager for two days. During those two days, the store manager made it clear he was unhappy that the plaintiff had been transferred to his store, repeatedly called her dumb and stupid, and told her he didn't want her working in his store. He also told her to "be good to [him] and give [him] what [he] wanted," adding that he would make her life a "living hell" if she ever took work matters over his head. On two occasions, he walked behind her and pressed his genitals against her back. Two days after she started this assignment (on a Sunday), the plaintiff told three company officials about the conduct and said she was going to quit. However, she got nowhere, with one manager telling her she had overreacted. She quit that day and reported the matter to the company's corporate office the following day. The company investigated but took no action. Although the district court granted the employer's motion for summary judgment, the Court of Appeals reversed, ruling that the plaintiff had a prima facie case of sex harassment, including her claim for constructive discharge, and remanded the case for trial.

Retaliation and Mixed Motives

The Federal Fifth Circuit Court has held that a plaintiff could use a “mixed motive” theory in a retaliation case under Title VII. In [Smith v. Xerox](#), the employee won a jury verdict against the company for her claim that she was fired for filing an EEOC charge. The employee was disciplined for her failure to meet sales goals and placed on a performance improvement plan. Before the time under the plan expired, she filed a charge of discrimination. The company began the process of termination seven days later. At trial, the jury was given a mixed motives instruction, and found that the company was motivated to terminate her *in part* by the EEOC charge. The jury awarded the plaintiff both compensatory and punitive damages. On appeal, the Fifth Circuit, relying on the U.S. Supreme Court’s *Price Waterhouse v. Hopkins*, reasoned that the mixed motive instruction was proper. A plaintiff can show that an adverse action was “because of” an impermissible factor by showing that factor to be a “motivating” or “substantial” factor in the employer’s decision. In this instance, the plaintiff met her burden of proof, and it was the company’s burden to show that it would have taken the same action even if she had not filed a charge. Xerox did not meet its burden.

ADA - Side Effects of Medication

The Federal Third Circuit Court has held that limitations on life activities caused solely by the side effects of medication do not give rise to a disability claim under the ADA. In [Sulima v. Tobyhana Army Depot](#), the plaintiff claimed that he was forced to accept a voluntary layoff because his employer did not accommodate the side effects of medications he was taking to treat obesity and sleep apnea. The district court ruled that medication side effects may, under certain conditions, constitute a disabling condition under the ADA, but that the side effects experienced by the plaintiff did not rise to that level. The Circuit Court agreed. The plaintiff, who was morbidly obese and suffered from sleep apnea, was taking several medications related to those issues at the time of his layoff. The medication caused the plaintiff to need to use the restroom frequently for extended periods. The employer decided to transfer him, but had no other work available at the time. The plaintiff accepted the voluntary layoff in advance of layoffs scheduled for the following month. He did not present any evidence that his obesity or sleep apnea directly and substantially limited a life activity, and instead focused on the side effects of the medication. To prevail under this theory the plaintiff needed to show that: (1) the treatment is required “in the prudent opinion of the medical profession;” (2) the treatment is not just an “attractive option;” and (3) that the treatment is not required solely in anticipation of an impairment resulting from the plaintiff’s voluntary choices. The plaintiff could not meet this test because his doctor had discontinued the medications, thus refuting part (1) of the test that the treatment be required “in the prudent opinion of the medical profession.”

Article courtesy of Worklaw® Network firm Shawe Rosenthal (www.shawe.com).

Alcoholism No Excuse for Poor Attendance



Managers must often deal with an employee who is chronically absent, and claims that a disability is the cause of the absenteeism. The U.S. Court of Appeals for the Second Circuit (covering Connecticut, New York, and

Vermont) addressed this issue with regard to an alcoholic employee. The Court held that the employee’s repeated absence from work meant that he was not qualified for the job, and that his termination had no relation to his FMLA-protected leave.

Facts of the Case: In [Vandenbroek v. PSEG Power](#), the company fired a boiler utility operator after he violated the employer’s no-call/no show policy. His termination came shortly after he had taken FMLA-protected leave, allegedly to deal with his alcoholism. The employee sued the company, claiming that he was terminated because of a disability (alcoholism) and for taking medical leave to treat the condition.

The Court’s Ruling: The Court upheld the district court finding that the employee was terminated for violating the employer’s attendance policy, and not because of his disability or for taking FMLA-protected leave. The Court, noting that alcoholism could constitute a disability because the employee was substantially limited in his ability to work, found that the employee failed to adduce sufficient evidence to make out a prima facie case under the ADA. To do so, he would have had to show that he was “qualified” to perform the essential functions of the job with or without reasonable accommodation. “Essential functions” are duties that are fundamental to the job in question. In this case, the Court determined that reliable attendance at scheduled shifts was an essential function of a boiler utility operator. The employee had to be present at the plant to monitor the boiler, respond to any alarms, handle any power outage, or (if needed) respond to an explosion. With regard to the employee’s FMLA claim, the employee failed to show that he was terminated for taking FMLA-protected leave. There was no evidence of pretext; rather, the evidence showed that his violation of the no-call/no show policy led to his termination.

Lessons Learned: Most employers would agree that reliable attendance is an essential function of all jobs. While the Vandenbroek case provides a clear example of this principle, other instances might not be so clear. When alcoholism or another disability causes an attendance problem, employers must be able to show that regular and reliable attendance is an essential function for the specific position. One way of doing this is to have clear and detailed written job descriptions that describe the essential functions of the position, including regular and reliable attendance.

Article courtesy of Worklaw® Network firm Shawe Rosenthal.

Form of the Month - Violence Policy (PDF)

According to numerous polls, violence in the workplace is one of the top risk management concerns. Consider using this policy from OSHA as part of your prevention program. [Click here](#) for more information.

(HR That Works Users can access this form in Word format by logging on to the site).