



July 1, 2022

FOR SUPERVISORS

In This Issue

2 You Make The Call

Was woman terminated because she complained of sexual harassment?

3 News

Supervisor fired staffer right after learning that she was carrying a child.

3 New Legal Rulings

Manager threatened to discipline worker if he took any more leave.

4 Legal Developments

Woman suffering from postpartum depression fired without explanation.

4 Legal Nightmare

The cost of ignoring the warning signs of sexual harassment: \$1.5 million.

Employee called an 'old, white man with not enough runway'

Offensive comments prompt staffer to sue for age discrimination

The scenario

When a 58-year-old white man told his boss that he was thinking about applying for a promotion, he was told that he wouldn't have a shot at the job because he was an "old, white man with not enough runway left in his career."

Nevertheless, the man applied for the job, but he was turned down and told that the person in the position would need to be able to adapt and move, which was "unlikely to happen with a 58-year-old white guy."

Around the same time, the employer instituted a reduction in force (RIF) that led to the man's termination. In fact, all 11 dismissed workers were white, male and more

than 50 years old. The RIF was initiated, said the employer, because of financial difficulties.

However, before the older worker actually left the job, he was included in an email chain that said the employer had a solid third quarter.

Legal challenge

The male staffer sued for age discrimination, pointing out that he'd consistently received positive performance reviews before his dismissal and that the financial difficulties that prompted his termination weren't real.

The ruling

The company lost. The court said the man's lawsuit could proceed. The judge

pointed to the ageist comments endured by the worker as potential proof of bias. Plus, the court shot holes in the stated reason for the termination, noting that the company was claiming financial hardship at the same time it was reporting solid quarterly results.

The skinny

Beware of the risks posed by inconsistent explanations for terminations. In this case, the employer claimed financial hardship to justify the firing, even though it had solid quarterly numbers.

Cite: *DiBenedetto v. AT&T Services*, U.S. District Court, N.D. Georgia, No. 1:21-cv-04527-MHC-RDC, 5/19/22.

Man was unpopular because he wouldn't work Sundays due to his religious beliefs

Colleagues had to pick up the slack when crew member failed to show up for the job

"There were no tears shed after we finally fired Paul," said Supervisor Nathan Hawkins. "He wasn't very popular among his coworkers."

"Was he disliked because he refused to work Sundays?" asked HR Director Carolyn McGill.

"That was a big part of it, for sure," said Nathan. "Paul said that because of his religious beliefs, he couldn't come in on Sunday, his day of Sabbath. It was a big problem

because we didn't have enough other people to cover for him."

"According to Paul," said Carolyn, "we didn't try hard enough to accommodate his religious beliefs. Worse, he just filed a religious-bias lawsuit against us."

Bent over backward

"Oh, brother," said Nathan. "That's very disappointing, because we bent over backward to

accommodate Paul."

"What steps did we take to help Paul?" asked Carolyn.

"We provided him with several options that we thought would work," said Nathan. "For instance, we offered to rearrange the schedule so he could go to church Sunday morning and then report to work in the afternoon, but he wanted no part of that plan."

"Did we offer any other accommodations to Paul?"

asked Carolyn.

"Absolutely," said Nathan. "I sent out emails just about every week asking coworkers to cover for Paul. Sometimes people were able to fill in for him; sometimes no one else could make it work."

Similar restrictions

"Paul's coworkers probably had similar restrictions on Sundays," said Carolyn.

"They did," replied

(Please see *Unpopular ...* on p. 2)

Unpopular ...

(Continued from p. 1)

Nathan. "Paul's colleagues had to give up churchgoing and time spent with family in order to cover for Paul. It created a very tense atmosphere in the department and, like I said, no one was upset after we terminated Paul and hired someone who could work Sundays."

Did try hard

"Paul claims it was our responsibility to manage the negative attitude of his coworkers," said Carolyn. "He says we needed to just try harder to find an accommodation for him."

"We did try hard," said Nathan. "I mean, we asked him whether he could pick another day to observe the Sabbath, but that was a nonstarter for him."

"Did Paul's refusal to work Sundays affect our

operation?" asked Carolyn.

"It did," said Nathan. "When he failed to show up on those few Sundays he was scheduled to work, everything fell behind and the Monday crew had to work twice as hard to get caught up."

Attendance points

"When did we dismiss Paul?" asked Carolyn.

"After he accumulated enough attendance points based on the Sundays he didn't come in, he was terminated," said Nathan. "We made a solid effort to accommodate Paul's religious beliefs. We should challenge this lawsuit."

Result: The company won. The court dismissed the case. The judge said the employer made a good-faith effort to accommodate the man's religious beliefs, but

it was clear that continuing to do so would've created a so-called undue hardship for the employer.

The court noted that coworkers were forced to cover Sunday shifts for the staffer, which created a tense atmosphere in the department.

Weren't feasible

And there was a drop-off in Monday productivity when the worker failed to show up on Sunday. In the eyes of the court, the man needed to accept at least one of the employer's proposed accommodations. His refusal to do so doomed his case, because his employer proved all other potential accommodations created an undue hardship.

Cite: *Groff v. DeJoy*, U.S. Court of Appeals 3, No. 21-1900, 5/25/22.

What it means to you

Of course it can be a pain in the posterior to accommodate a crew member who can't work certain days because of his or her religious beliefs.

However, you're required under the law to work with the person in order to find potential accommodations. Here, the employer provided the crew member with several options, but he said none of them were suitable. By offering the accommodations, however, the employer met its legal obligations, and that's why the employee's lawsuit failed.

Key: You can deny a religious accommodation if providing it would create a so-called undue hardship on coworkers, as happened in this case. Just be sure you can document the level of hardship that coworkers would've endured had the accommodation been provided.

You make the call

Woman fired right after she alleges sexual harassment

"You're not going to believe this," said HR Manager Alan Frankel. "Niki is suing us, claiming that we fired her in retaliation for alleging sexual harassment."

"You're right," said Supervisor Margie Brunton, "I don't believe it, considering that Niki voluntarily resigned her position."

"Niki claims that she didn't actually quit the job," said Alan. "She contends that she was upset after she found out that we couldn't substantiate her claim that a male coworker had sexually harassed her. Apparently, the man

twice rubbed his leg against Niki's leg during a meeting."

Accusation denied

"Yes," replied Margie. "Niki complained about the male coworker, and we investigated her claim, but we couldn't find anyone to substantiate her allegation. Plus, the man denied the accusation, so we concluded our investigation without any proof of harassment."

"How did Niki respond to the results of our investigation?" asked Alan.

"Not well," said Margie. "She said she wanted to talk about a severance

package, which we took as notification that she was quitting. We sent her a termination letter a few days later."

"Niki contends that she had no intention of resigning," said Alan. "She argues that we forced her out in retaliation for alleging sexual harassment. She notes that she was fired just a few weeks after she first claimed harassment."

"We acted in good faith," said Margie. "At most, it was a communication breakdown, which hardly seems like grounds for a lawsuit. We should challenge this."

Did the company win?

■ **Make your call, then please turn to page 4 for the court's ruling.**

HR Manager's **LegalAlert** FOR SUPERVISORS

EDITOR-IN-CHIEF: FIONA MCCANNEY
MANAGING EDITOR: EDWARD O'LOUGHLIN
OFFICE MANAGER: SHARON CONNELL

HR Manager's Legal Alert for Supervisors (ISSN 1557-2102), July 1, 2022, Vol. 18, No. 412, is published 24 times a year by Institute of Business Publications, P.O. Box 1340, Havertown, PA 19083; PHONE: 484-472-8227; FAX: 484-472-8708.

[Click Here to
Subscribe Now](#)

Phone: 866-572-1352

Web: iobp.com

Subscription Rate (for 24 issues):

Users	Annual price	Users	Annual price
1-5	\$265 flat	25-29	\$44/user
6-9	\$53/user	30-34	\$43/user
10-14	\$49/user	35-40	\$42/user
15-19	\$47/user	41+	Call
20-24	\$45/user		866-572-1352

FOLLOW & LIKE US ON:



Copyright © 2022 Institute of Business Publications. Reproduction of this material is prohibited without prior permission. All rights reserved in all countries.

I O B P
**INSTITUTE OF
BUSINESS
PUBLICATIONS**



legal news for supervisors

Boss moved quickly to fire pregnant woman

What's the cost of terminating a female staffer because she's pregnant?

Figure about \$75,000.

That's how much Presidente Supermarket No. 31, Miami, FL, has agreed to pay in order to resolve a pregnancy discrimination lawsuit filed by the Equal Employment Opportunity Commission (EEOC).

According to the EEOC, Yesenia Tirado had been working at the supermarket for a month when she told coworkers that she was pregnant. Word soon spread to her boss, Misleidy Curbelo, who terminated the pregnant woman the next day, telling Tirado that she was no longer needed.

After she gave birth and was refused reemployment with Presidente Supermarket,

Tirado contacted the EEOC, which sued for pregnancy discrimination.

Based on EEOC v. Presidente Supermarket No. 31, Inc.

Sexual harassment to prompt higher fines

Now you have even more reason to root out any hint of sexual harassment among your crew members.

That's because new amendments to the city of Chicago's Human Rights Ordinance have significantly increased the penalty against employers found to have violated the city's sexual harassment regulations.

Previously, violators faced a minimum fine of \$100 and a maximum penalty of \$1,000. Under the new amendments, which took effect July 1, violators will be subject to a

minimum fine of \$5,000 and a maximum penalty of \$10,000 for each offense.

In addition, the revised ordinance now allows victims of sexual harassment to file claims within 365 days of the alleged offense; previously, victims had to complain within 300 days.

The amendments also require employers to have a written sexual harassment policy and to provide worker and supervisor training that includes details on how victims can use an internal form to complain to a boss, a corporate official, or the HR department.

The definition of sexual harassment has also been expanded to include any behavior of a sexual nature that includes coercion, abuse of authority, or misuse of an employment position.

New legal rulings

Worker discouraged from using leave time

Choose your words carefully when responding to a crew member's request for leave.

What happened: A worker who had used 304 hours of his allowed 480 hours of time under the Family and Medical Leave Act (FMLA) asked his boss whether he could take more leave. The manager said he'd already used a lot of leave time and that he'd be disciplined if he took any more FMLA leave. The man retired.

Legal challenge: The worker sued for FMLA interference.

Company's response: He was never denied FMLA leave.

Ruling: The company lost. The court said the employer could be liable for FMLA interference because the crew member was threatened with discipline when he requested more leave.

Cite: *Ziccarelli v. Dart, et al.*, U.S. Court of Appeals 7, No. 19-3435, 6/1/22.

Staffer says unequal pay proved race bias

For a minority worker to prove bias based on unequal pay, he or she has to identify a white worker with similar job duties – and hours – being paid more than him or her.

What happened: A Black man thought a white coworker was making more than he was, so he complained to his boss, but no changes were made to his compensation package.

Legal challenge: The Black worker sued for race bias.

Company's response: The white employee worked more overtime hours.

Ruling: The employer won. The court said the white worker wasn't a suitable comparator because he worked more overtime hours than the Black staffer did.

Cite: *Palmer v. Indiana University*, U.S. Court of Appeals 7, No. 21-1634, 4/14/22.



focus: nonperforming workers

Reduce the amount of time you spend coaching employees who are struggling

You might already suspect that you spend an awful lot of time coaching crew members who aren't meeting performance goals. But did you know that managers spend an average of 10 hours a week helping nonperformers? That's according to a recent study by Robert Half Talent Solutions.

Not only do nonperformers require a lot of time that you don't have, their substandard work could also threaten the morale of your whole crew and possibly lead to a lawsuit from a disgruntled coworker.

That's why it's important to work with staffers who aren't meeting performance expectations in an effort to help them turn it around.

Arrange a meeting with the nonperformer to discuss the situation. Begin the discussion by asking the person about his or her performance. After listening to how the worker grades how he or she is doing, you'll have a better idea of where the crew member is coming from.

Different perspective

If the employee thinks he or she is doing a good job, you can say something like, "I have a different perspective on your performance, and here's why."

Then provide the staffer with specific examples of how and when he or she didn't meet performance expectations. Avoid vague

examples. Instead, offer specific instances of when the staffer's work came up short. Example: "Over the past month, you've missed two different production goals. Can you tell me what's going on?"

If the nonperformer identifies problems that could indicate a lack of training, skills, or resources, arrange for extra coaching and make sure the worker has the skills and tools needed to do the job.

Be sure to set clear expectations of how and when the staffer will get things pointed in the right direction. Then set up a date to meet with the person to review his or her performance against those expectations.



legal developments

Crew member with postpartum depression blindsided by notification of her dismissal

Supervisor’s take-home: Keep in mind that extended leave can be considered a reasonable accommodation for a worker with a disability.

What happened: After she gave birth, a woman began to suffer from postpartum depression. She asked her employer to extend her leave so that she could receive treatment for her condition. Her request was approved.

What people did: The female crew member was still suffering from the condition as her return-to-work date approached, so she asked her employer to extend her leave once again. Her request was OK’d. Over the next few months, the woman requested three more leave

extensions, all of which were granted. Eventually, however, the employer began to wonder whether the woman would ever come back to the job. While she was still on leave, she was terminated without explanation.

Legal challenge: The woman sued for disability discrimination, arguing that the company failed to engage in the interactive process.

The employer said the woman couldn’t perform the essential job function of showing up for work.

Result: The company lost. The court said the woman’s disability discrimination lawsuit could proceed. The judge said the employer failed to engage in the interactive

process in good faith when it fired the woman without letting her know that her leave extensions were creating an undue hardship for the company. If leave extensions weren’t feasible, the employer needed to work with the woman to identify other potentially suitable accommodations.

The skinny: Courts rarely rule in favor of companies that blindsided disabled crew members by failing to provide them with a chance to change their behavior and then terminating them without warning or explanation.

Cite: *Blanchet v. Charter Communications, LLC*, U.S. Court of Appeals 6, No. 21-5073, 3/8/22.

You make the call: The Decision

(See case on page 2)

No. The company lost. The court refused to toss out the retaliation lawsuit.

The judge first observed that the woman didn’t actually quit the job. Rather, she inquired about whether the company would offer her a severance package that might prompt her to leave.

In the eyes of the court, a question about a potential severance package wasn’t the same thing as an official job resignation.

Then the judge ruled that the woman was retaliated against for complaining of sexual harassment, noting that she was provided with a termination notice just a few weeks after she first claimed that a male coworker had sexually harassed her.

What it means: Clarify what workers are saying

Keep in mind that clear communications with your crew members can help reduce the chances of a costly lawsuit. In this case, the supervisor assumed the woman wanted to resign based on her inquiry about a severance package, but that assumption was incorrect.

Make sure you understand what your crew members are asking for when speaking with them. If you’re not sure what someone is requesting, ask the person to clarify the statement. In this case, the lawsuit could’ve been avoided if the supervisor had responded to the woman’s inquiry about a potential severance package with the straightforward question, “Are you resigning from your position?”

Based on *Forsythe v. Wayfair, Inc.*



legal nightmare

Male manager had a bad habit of rating female staffers on a scale of one to 10

Overview

An employer paid a high price for failing to quickly fire a male supervisor who liked to brag about his sexual exploits and rate female employees on a scale of one to 10.

The scenario

After she started working at the McDonald’s restaurant in Mason, MI, Emily Anibal was offended by the inappropriate comments frequently made by shift manager Shawn Banks.

For instance, Banks often judged female crew members using a numerical rating system. He’d say things such as “she’s a 10” or “she’s a two.” And Banks made other offensive comments such as “Your butt’s too flat,” “You’re

very curvy,” “I like how you look in your pants” and “Your boyfriend is lucky.”

Banks also made physical contact with female crew members on a regular basis. Furthermore, Banks liked to brag about his sexual exploits, frequently identifying female staffers with whom he’d had sex.

But Anibal was most upset after Banks physically assaulted her while she was walking past him. Saying he wanted to talk about another worker, Banks asked Anibal to date him, but she refused. So he grabbed her shirt and pushed her against a wall.

Eventually, Anibal became so upset about Banks’s behavior that she quit.

Legal challenge

Anibal and several other female employees sued the McDonald’s franchisee for sexual harassment.

The employer said the women never complained about Banks and that he was eventually terminated.

The ruling

The company lost. The court said the franchisee should’ve addressed Banks’s inappropriate conduct sooner, noting that his boorish actions were obvious to everyone in the workplace. After the court’s ruling, the franchisee agreed to pay \$1.5 million to settle the lawsuit.

Based on *Ries, et al. v. McDonald’s USA, LLC, et al.*