HR Manager's
Legal Alert FOR SUPERVISORS
Sample Issue

In This Issue

Man caught leering at woman while she pumped breast milk

Staffer told to lactate in an office with a camera and a window

The scenario

After giving birth to a baby boy, a woman asked her employer to let her pump breast milk on the job.

First, she was required to pump in a restroom. Then she was allowed to use an office that had a camera and a window through which her coworkers could observe her.

After her coworkers complained that she was missing work time while pumping, the woman was demoted and transferred to another location.

At the new facility, the woman was again forced to pump in an office with a camera and a window. Worse, one male worker was twice caught leering at her while she pumped. And another man frequently entered the room while she was pumping.

When the woman complained about the arrangement, her manager discouraged her from pumping milk at work. The boss told her that she didn't want to hear about the problem, and that she didn't really know what to do about it.

Eventually, the woman quit before she could be fired for allegedly stealing a coat.

Legal challenge

The woman sued for a hostile work environment.

The employer said her treatment wasn't severe or pervasive enough to be considered hostile.

The ruling

The employer lost. First, a court refused to dismiss the lawsuit. Then a jury awarded the woman $25,000 in compensatory damages and $1.5 million in punitive damages.

The skinny

You're obligated under the law to provide nursing mothers with regular breaks as needed to pump breast milk on the job. The woman must be allowed to do so in a private room that can't be entered by others, and the room should have a sink.

Cite: *Lampkins v. Mitra QSR, LLC,* U.S. District Court, D. Delaware, No. 16-647-CFC, 11/28/18.

Disabled crew member fired even though she'd successfully handled job for 28 years

Worker disputes the need for mandatory functional-capacity exam that she failed

"I didn't see this coming," said Supervisor Nathan Hawkins. "I can't believe the EEOC is suing us."

"Me neither," said HR Director Carolyn McGill. "The EEOC filed the lawsuit on behalf of Erica, claiming we're in violation of the ADA. Erica says we fired her because of her disability; she has a bone disorder which can cause issues with her balance."

"Erica needs to be practical about this," said Nathan. "We clearly had a legitimate reason to let her go. She constantly missed deadlines, showed up late and struggled to handle her workload."

Flawed justification

"Erica thinks our justification was flawed," said Carolyn. "She says she was perfectly able to handle her job for 28 years. It was only when her condition got worse that her work performance was called into question. She doesn't think that was just happenstance."

"She fell three times in a short time span," said Nathan. "After that, we started to get worried about her health. Her manager noticed that she constantly looked out of breath and groggy. We were concerned she couldn't do her job anymore without posing a threat to her own safety."

"Erica isn't on the same page," said Carolyn. "Erica says those falls didn't cause her any serious harm. She thinks we used her falls to muster up a reason to fire her."

The right thing

"That's stretching it," said Nathan. "We did the right thing. Her falls impaired her well-being and affected her job performance. We had no choice but to dig a little deeper into the problem and require a functional-capacity exam."

"Erica doesn't think the

(Please see *28 years* ... on p. 2)

28 years …

(Continued from p. 1)

exam was necessary," said Carolyn.

"She's downplaying all this," said Nathan. "The results of her exam were disconcerting. The doctor said she couldn't travel any farther than 10 minutes from the office. Since she was no longer able to perform a vital function of her job – which was navigating to and from job sites – we had to let her go."

Against her will

"Erica says she was forced to take the functional-capacity exam against her will," said Carolyn. "She questions our motives for making her agree to that test."

"Oh, please," said Nathan. "It's not like we had a gun to her head. And it's a good thing we followed through with the testing anyway. Otherwise, we wouldn't have found out that she was unable to safely do her job. If we hadn't done what we were supposed to do, she could've been a danger to herself."

Exaggeration

"Erica still thinks we're exaggerating," said Carolyn."But regardless, she says we didn't even try to work with her to figure out how to accommodate her condition. Instead, we denied her that chance, put her on unpaid medical leave and then fired her."

"We were told by her doctor that she wasn't supposed to travel more than 10 minutes," said Nathan. "What were we supposed to do? Ignore the doctor? Let's fight this."

Result: The company lost. The court ruled that the worker may have been fired because of her disability.

The judge said that it wasn't reasonable for the company to assume that the woman had become a threat to herself just because she'd fallen a few times and her manager noticed she was groggy once in a while, especially because those falls caused no injuries. For those reasons, the functional-capacity exam may have been administered as a veil to justify illegal termination.

Safely do the job

The court pointed out that the staffer was able to safely do her job for 28 years without any issues – and a few falls probably weren't going to change that.

Cite: *EEOC v. McLeod Health, Inc.*, U.S. Court of Appeals 4, No. 17-2335, 11/15/18.

What it means to you

If you have any questions about whether a crew member can continue to physically perform his or her job, proceed cautiously before requesting a medical exam such as a functional-capacity test. As this case indicates, the test could turn into a ticking time bomb.

In the alternative, you might want to document potential areas of concern and talk to the worker about them. Also, solicit the views of someone else such as your HR manager or another supervisor.

In addition, take into consideration how long a staffer has been successfully performing his or her tasks. Remember: Courts will look suspiciously at any claims by an employer that a disabled worker couldn't do the job if the person has been doing it for a long time, as was the case here.

You make the call

How quickly did staffer have to provide FMLA paperwork?

"This isn't a complicated situation," said Supervisor Margie Brunton. "Judy was supposed to provide us with a doctor's note after she was out sick for three days. She failed to give us the paperwork, so she was terminated."

"Judy has a different take on things," said HR Manager Alan Frankel. "She claims that she was already approved for intermittent FMLA leave because of her migraine headaches. She's suing us, alleging that we interfered with her FMLA rights when we fired her."

"That doesn't add up," said Margie. "Judy's termination had nothing to do with her FMLA leave. She knew that she was required to provide us with a doctor's note after missing three straight days, but she failed to do so."

At least 15 days

"According to Judy," said Alan, "the requirement that she produce a doctor's note after three missed days is a violation of the FMLA."

"In what way?" asked Margie.

"Judy claims that the law allowed her at least 15 days to provide a doctor's note after we asked for recertification of her FMLA leave," said Alan.

"We weren't asking her to recertify her need for leave," said Margie. "We were simply asking her to justify why she missed three straight days of work, as we're allowed to do under our attendance policies."

"Judy says that she told us she missed the time because of her migraines," said Alan. "In that case, she alleges that we were essentially asking her to recertify her need for FMLA leave."

"She's misinterpreting the FMLA," said Margie. "We should fight this lawsuit."

Did the company win?

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

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legal news for supervisors

Guidelines target grooming policies

A word to the wise: Recently issued legal guidelines could bring new scrutiny to your employer's grooming policies.

The New York City Commission on Human Rights just issued guidance on company grooming policies that ban, limit, or restrict natural hair or hairstyles most commonly associated with African American employees.

And it's more than just guidance. Employers found guilty of restricting hairstyles could be hit with a $250,000 penalty for each willful violation of the law.

Among the examples of illegal grooming policies cited by the commission are those that prohibit twists, braids, cornrows, Afros and Bantu knots.

Employers could also jump onto the commission's radar screen if they enforce a grooming policy that bans the use of colors or patterned hairstyles against black staffers only.

Or companies could get into hot water by forcing workers to straighten, relax, or otherwise manipulate their hair in order to conform to employer expectations.

Note: Employers that have legitimate safety concerns about the risks of long hair are expected to consider options such as the use of hairnets, hair ties, or head coverings.

No bathroom breaks for Latino employees

If you need more proof of the importance of paying attention to workers who express concerns about allegedly discriminatory behavior, consider the plight now faced by East Coast Labor Solutions, a staffing agency that hired Latino staffers to work on the production line at the Pilgrim's Pride poultry processing plant in Guntersville, AL.

East Coast Labor just agreed to pay $475,000 in order to settle an EEOC national-origin bias lawsuit.

According to the EEOC, Latino employees were segregated onto separate production lines away from non-Latino workers. They were also expected to work faster than non-Latinos. And they were routinely denied bathroom breaks.

After the complaints of the Latino workers were ignored, they went to the EEOC, which sued.

Based on EEOC v. East Coast Labor Solutions.

focus: inclusion

Help your employees get to know each other better – and avoid costly lawsuits

When you consider that crew members who feel connected to their coworkers are less likely to file a costly lawsuit, you know you have a solid reason to ratchet up your efforts to make people feel included.

Recent research provides several valuable clues on how to increase the feeling of inclusion among your crew members. A study by Limeade, Bellevue, WA, has revealed that employees rank peers they see and work with every day as the greatest contributing factor to their feelings of inclusion, ahead of organizational leaders and departmental managers.

Of course, helping workers feel included is easier said than done. Remember that inclusiveness should be practiced in small, everyday actions such as recognizing new ideas and helping crew members get to know each other better.

Specific strategies

In addition to smaller steps such as starting meetings by asking everyone what they did over the weekend, you can increase inclusiveness with more-specific strategies.

For instance, you could institute random lunches among your crew. Workers can sign up to go on a lunch date with someone they don't normally interact with at work.

In addition, you can look for opportunities for people to collaborate with each other, either during everyday work activities or at meetings and training sessions.

As much as possible, give workers a voice in how things are accomplished. Ask people what they think about how things are being done. Then be sure to listen respectfully to their comments.

And don't hesitate to look for opportunities to make your crew members aware that they're valued. Perhaps you could talk to each worker at an off-site event and let him or her know the unique capabilities and perspectives that he or she brings to your crew.

New legal rulings

Medical marijuana patient fails drug test

Talk to your HR manager if a worker with a medical marijuana card fails a pre-employment drug test.

What happened: A woman was given a conditional offer of employment pending the results of a drug screening. After she tested positive for marijuana, the woman explained that she was a medical marijuana patient. Nevertheless, the employment offer was withdrawn.

Legal challenge: The woman sued for violation of the state's medical marijuana law.

Company's response: We had the right to rescind the job offer at any time.

Ruling: The employer won. The court decided that the state's medical marijuana law doesn't protect job applicants.

Cite: *Eplee v. City of Lansing,* Court of Appeals of Michigan, No. 342404, 2/19/19.

Transgender worker sees job offer pulled

If a background check reveals that a job applicant was deceptive during the hiring process, you're almost always on firm legal ground if you pull the employment offer.

What happened: A background check on a transgender worker who'd been given an offer of employment revealed that she'd lied about the dates of employment in her previous job. The offer was rescinded.

Legal challenge: The worker sued for transgender bias.

Company's response: She deceived us.

Ruling: The company won. The court ruled that there was no evidence managers knew the worker was transgender. Plus, the company had a legitimate reason for pulling the job offer.

Cite: *Wittmer v. Phillips 66 Co.,* U.S. Court of Appeals 5, No. 18-20251, 2/6/19.

legal developments

Can worker refuse employer's request that she provide proof of her disability?

Supervisor's take-home: If the accommodation of a disabled worker results in that employee's decreased productivity, you have the right to rescind the accommodation.

What happened: A woman who suffered from post-traumatic stress disorder asked to be allowed to work from home four days a week in order to minimize exposure to workplace conditions that could worsen her condition. Her request was approved.

What people did: As soon as the woman started working from home, her productivity dropped significantly. She was warned that she needed to improve her output or her teleworking privileges would be rescinded. The woman responded by asking for the reasonable accommodation of being allowed to telework five days a week. The employer asked her to provide medical proof of her disability. The staffer failed to produce the requested documents. A few days later, the woman was told to resume working in the office five days a week. She failed to return to the office, then quit.

Legal challenge: The woman sued for disability discrimination, arguing that the employer failed to engage in the so-called interactive process and then denied her reasonable accommodation request.

The employer said that it did everything it could to meet the needs of the disabled woman.

Result: The employer won. The court dismissed the lawsuit. The judge said that the woman didn't provide the requested paperwork in order to prove her disability. Therefore, she was the one who failed to engage in the interactive process in good faith.

The skinny: Keep in mind that the ADA interactive process cuts both ways. Not only do you have to communicate with a disabled crew member about the best ways to accommodate his or her condition, but the staffer must also be willing to meet any of your reasonable requests regarding his or her disability.

Cite: *McDaniel v. Wilkie,* U.S. District Court, N.D. Ohio, No. 17-cv-91, 2/13/19.

legal nightmare

Supervisor says to black crew member: 'N-gg-r, you know what I'm talking about'

Overview

A black man was told by his supervisor to "kiss the ass" of a senior-level manager or he'd "write up his black ass."

The scenario

Although he saw his supervisor only two or three times a month, Fred Gates, an African American worker employed by the Chicago Board of Education, dreaded their interactions.

At one meeting between the two men, Rafael Rivera, Gates' supervisor, passed gas and then asked Gates why he didn't laugh about it. Gates said it wasn't funny.

Rivera responded by asking Gates what it's called when someone farts and a black guy is sitting there. "You call that a sh-t-sniffing n-gg-r," said Rivera.

In another instance, Rivera told Gates that he needed to "kiss the ass" of a senior-level manager or he'd "write up his black ass."

Another time, Rivera ordered Gates to sit down, but Gates refused. Rivera said that he "was tired of you people." Gates asked what he meant by the comment, and Rivera said, "N-gg-r, you know what I'm talking about."

Although Gates never filed a formal complaint with the Board of Education, he did contact the EEOC, which found enough merit in his claims to provide him with a right-to-sue letter.

Legal challenge

Gates sued for a racially hostile work environment.

The employer argued that three incidents over four years didn't constitute severe racial hostility.

The ruling

The employer lost. The court refused to dismiss the lawsuit. Acknowledging that three statements over four years might not be overly hostile, the judge noted that the comments were made by the man's supervisor rather than by a coworker, so they could be classified as severe because they potentially changed the conditions of his employment.

Based on Gates v. Board of Education of the City of Chicago.

You make the call: The Decision

(See case on page 2)

No. The company lost. The court refused to dismiss the lawsuit.

The judge decided that the employer violated the FMLA when it required the woman to provide a doctor's note after just three days of missed work. According to the court, the FMLA clearly provides employees with at least 15 days to provide medical documentation whenever an employer requests recertification of their need for FMLA leave.

When an employer's attendance policies conflict with requirements in the FMLA, said the court, the company must abide by the stipulations spelled out in the FMLA. Because the woman had already been OK'd for intermittent leave, she should've been given at least 15 days to provide the medical paperwork.

What it means: At least 15 days to provide documents

Beware the potential pitfalls of dealing with crew members who've been OK'd for intermittent FMLA leave.

Once a leave request has been approved, you have certain obligations under the law in regard to what you can and can't ask people to do. For instance, the FMLA forbids employers from requiring staffers to provide medical documentation to recertify the leave more often than every six months.

And the law stipulates that workers who've been told to recertify their FMLA leave are entitled to at least 15 days to provide the requested medical documents.

Based on Holladay v. Rockwell Collins.