HR Manager's
Legal Alert FOR SUPERVISORS
May 1, 2020

In This Issue

Compromising photos of woman prompt sex discrimination claim

Female employee horrified after male coworker betrays her trust

The scenario

A female crew member was horrified to learn that a male coworker with whom she was having a consensual sexual relationship had circulated compromising photos and videos of her. The material was distributed via text messages, and nearly everyone at work knew about it.

Not surprisingly, the woman broke off the relationship with the man. Then she filed a formal complaint of sexual harassment with her employer.

The company conducted an investigation. Eight months later, management suspended the male staffer without pay for one year, transferred him to a different location and placed him on probation.

Legal challenge

The female staffer sued for a hostile work environment motivated by gender bias. She argued that the employer's investigation took too long.

The employer countered that its monthslong investigation was reasonable and thorough, and the man was punished for his behavior.

The ruling

The employer won. The court ruled that the woman didn't endure a hostile work environment based on gender. The judge said that the length of time for the employer's investigation was reasonable, and the steps taken by managers to discipline the offender were effective.

The skinny

This case provides further evidence of the importance of making sure that investigations of inappropriate behavior are thorough. While the woman was unhappy that the investigation took too long, she probably would've been even unhappier with a slipshod investigation that resulted in no disciplinary action.

Key: Keep the person making the allegations in the loop. The woman in this case might have been less upset about the timing of the investigation if she'd been given more updates about what was going on.

Cite: *Martin v. State of New York,* U.S. Court of Appeals 2, No. 19-1479, 3/30/20.

Employee sues for age bias after supervisor refuses to tell her why she's being dismissed

Company contends she was let go because she committed financial malfeasance

"I know you have a lot on your plate right now, and I hate to add anything to it," said HR Director Carolyn McGill, "but I have some bad news for you. Deborah is suing us for age discrimination. She says we fired her because she was our oldest worker."

"Deborah's termination was justified," said Supervisor Nathan Hawkins. "We brought in an outside investigator to check on all our staffers and monitor their performances. The investigator had evidence that some people had engaged in questionable financial practices, and Deborah was one of them. We reviewed the investigator's report and fired two workers who admitted to wrongdoing. Ten days later, we fired Deborah even though she never acknowledged her transgressions."

Didn't even know

"When Deborah was fired, she didn't even know about the investigation," said Carolyn. "And during the termination meeting, her boss didn't tell her why she was being dismissed. Her manager simply said that she was being fired at will, without notice or reason."

"I'm not sure what prompted her boss to say that," said Nathan, "but the results of our investigation were clear."

"Deborah also argues that failure to follow our internal discipline policy proves her dismissal was unjustified," said Carolyn. "She points out that in cases of misconduct, our policy states that we must first suspend the worker, then conduct an investigation to determine whether further discipline is warranted. But we skipped several steps and let Deborah go right away."

Speed up the process

"Our policy gives us the right to speed up the discipline process in certain situations,"

(Please see ***Supervisor refuses*** ... on p. 2)

Supervisor refuses …

(Continued from p. 1)

said Nathan. "In this case, we're talking about financial malfeasance."

"Deborah says the fact that she was replaced by someone 20 years younger than her is further proof of age bias," said Carolyn.

"We hired someone qualified for the job," said Nathan. "Age had nothing to do with that decision."

Strategic plan

"Deborah thinks we wanted to keep the workforce young," said Carolyn. "She points out that one of the goals included in our strategic plan is to invest in the technology and innovation needed to recruit young people. The plan also details our participation in collegiate job fairs, which she thinks is a way to bring in young employees."

"While Deborah might be able to argue that the strategic plan favors younger workers, she can't claim that the plan had anything to do with our decision to let her go," said Nathan. "We should fight this lawsuit."

Result: The company won. The court ruled that the woman wasn't fired because of her age.

The judge stated that even though the employer didn't provide a justification for the firing, the woman was nonetheless terminated for a legitimate reason: The results of an investigation proved her financial transgressions.

Not enough proof

The court added that despite the fact that the company didn't stick to its internal discipline policy, the woman didn't have enough proof to show that the real reason she was fired was age discrimination.

Not always the case

And while the failure to uniformly apply progressive discipline can be evidence of pretext, that's not always the case.

In this situation, the employer was still within its rights to shorten the discipline process. Plus, the woman was treated the same as two coworkers who were immediately fired without progressive discipline, noted the judge.

And the court didn't think the company's strategic plan was adequate proof of workplace age discrimination.

Cite: *Miles v. South Central Human Resource Agency,* U.S. Court of Appeals 6, No. 19-5202, 1/7/20.

What it means to you

When you finally decide to pull the trigger and fire a member of your crew, it's usually in your best interest to tell the person why he or she is being dismissed.

In this case, the supervisor refused to explain to the woman that she was being let go because of financial mismanagement. As a result, the woman filled in the blanks herself and decided she was being terminated because of her age.

It's important, however, that your explanation of the reasons for a termination doesn't become too wordy, because a lengthy justification could give the person fodder to sue. Instead, come up beforehand with a one- or two-sentence explanation to justify the firing. During the termination discussion, don't provide the worker with any explanation beyond those couple of sentences.

You make the call

Boss refuses disabled man's request for light-duty work

"Eli stopped showing up for work," said Supervisor Margie Brunton. "How can he possibly sue us for disability bias?"

"Eli says he had no choice but to stop coming in," replied HR Manager Alan Frankel. "He claims that we refused to accommodate his disability, then gave him a final warning, which was effectively the same as firing him."

"It's true that no one has ever remained employed after getting a final warning," said Margie. "However, Eli's claim that we failed to engage in the interactive process isn't true."

"How did we try to accommodate Eli?" asked Alan.

Medication side effects

"The whole thing started when Eli began to suffer side effects from the medication he was taking to control his kidney condition," said Margie. "He told us that his job was too taxing and that he needed to be transferred to a light-duty position."

"But only workers who suffer job-related injuries are eligible for light-duty," said Alan.

"That's what we told Eli," said Margie, "but he didn't want to hear it. He met with his boss to talk about accommodation options, but he got combative when the boss said he needed a list of job restrictions, not a list of accommodations. After Eli was issued a final warning for attendance problems, he stopped showing up for work, so we terminated him."

"Eli says we should've allowed him to perform light-duty work," said Alan. "If we had done so, there wouldn't have been a problem."

"That wasn't even an option," 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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Accommodations can be temporarily OK'd

With all the confusion permeating U.S. workplaces as a result of the coronavirus pandemic, the last thing you probably need to be doing right now is figuring out a way to accommodate a disabled worker. How can you even evaluate potential accommodations when everyone is working at home?

In that case, suggests a recent technical assistance publication from the EEOC, your best bet might be to approve the accommodation, but also put an end date on it. That is, the worker can have the accommodation until a certain date, at which point you'll reevaluate the request.

Furthermore, the EEOC publication suggests that if the pandemic has had a significant impact on your cash flow, you might be able to rescind accommodations that have already been approved. For instance, you've already OK'd the purchase of telephone amplifiers for a hearing-impaired employee, but that approval now looks questionable because the company's financial situation has become much worse as a result of the pandemic.

As a result, you might be able to rescind the approved accommodation based on a revised undue hardship.

On the other hand, some staffers currently teleworking who previously didn't need an accommodation might now require one as a result of potential exposure to the coronavirus when they return to the workplace.

EEOC: How to handle high-risk job seekers

If you've been reluctant to hire someone because you think he or she has a high risk of contracting the coronavirus, a recent publication from the EEOC could provide some direction on what you need to do.

Your key takeaway from the document: You can't pull a job offer because you think someone could contract the coronavirus.

According to a newly updated EEOC technical assistance publication, an employer can't postpone a start date or withdraw a job offer when an applicant is at greater risk of contracting the coronavirus because he or she is, for instance, more than 65 years old.

However, you can suggest that the candidate work from home. You're also allowed to discuss with job seekers whether they'd be willing to postpone their start date until the pandemic has subsided.

focus: pandemic management

What to do when crew members ask you to limit their exposure to the coronavirus

If you're worried about accommodating employees because of potential workplace exposure to the coronavirus, you're not alone. In fact, a recent survey by Littler's Workplace Policy Institute has revealed that 59% of managers are extremely or moderately concerned about accommodating staffers due to potential coronavirus exposure. Moreover, of the 900 managers surveyed, an additional 35% said they're somewhat or slightly concerned about coronavirus accommodations.

What that means: Expect workers to ask you to take steps to reduce potential exposure, but remember that you'll have to handle the situation carefully. Otherwise, if an employee contracts the coronavirus or feels you didn't do enough to protect him or her, the person could later sue your employer.

A few options

To avoid liability and to accommodate workers who fear contracting the coronavirus, you have a few options.

In order to lower the chances of person-to-person transmission, consider the installation of plexiglass, tables, partitions, or other types of barriers between employees or between staffers and customers.

Plus, if crew members are complaining that their coworkers aren't practicing good hand hygiene, you could strategically position hand sanitizers around the workplace. Then tell your people that they have to follow safe hygiene practices or they could face progressive discipline.

Also, discourage people from using someone else's phone, desk, workstation, tools, or equipment. If that's not possible, make sure staffers clean and disinfect tools and equipment before and after each use.

Furthermore, workers requesting more flexibility to limit their exposure to the coronavirus can be offered temporary job restructuring, temporary transfers, changes to work assignments, or modified work schedules.

New legal rulings

Medical marijuana user gets fired, sues

If a worker tests positive for marijuana, first find out whether the employee is a medical marijuana patient before terminating him or her.

What happened: A worker was prescribed medical marijuana as a treatment for his cancer. He was subsequently involved in a job-related car accident and ordered to take a drug test, as per the employer's drug-free workplace policy. Even though he wasn't under the influence of marijuana at the time of the accident, he tested positive for marijuana, so he was dismissed.

Legal challenge: The man sued, saying his firing violated the state's medical marijuana law.

Company's response: We have a drug-free workplace policy.

Ruling: The company lost. The court said state law forbids firings over failed drug tests.

Cite: *Wild v. Carriage Funeral Holdings*, Supreme Court of New Jersey, No. 082836, 3/10/20.

Pregnant woman fails to provide paperwork

As much as you want to ensure policies are followed, the inflexible application of a policy can sometimes backfire.

What happened: After a woman informed her boss that she was pregnant, she was told to get a doctor's note confirming it was safe for her to keep working, as per company policy. She refused the request and was fired, so she contacted the EEOC.

Legal challenge: The EEOC sued for pregnancy discrimination, arguing that it was illegal to demand a doctor's note when the woman wasn't requesting a pregnancy accommodation.

Company's response: We were concerned about her safety.

Ruling: The company lost. It paid $27,000 to settle the case.

Cite: *EEOC v. Azul Wellness,* U.S. District Court, M.D. Florida, No. 6:19-cv-01689-PGB-LRH.

legal developments

Was disabled employee retaliated against because she asked for an accommodation?

Supervisor's take-home: When you provide reasonable accommodations to disabled workers, you not only help increase the likelihood that they'll be able to perform well in their jobs, but you also lower the chances that your employer will be on the losing end of a lawsuit.

What happened: A woman with chronic back pain was diagnosed with two herniated discs. She was provided with her requested accommodation, which allowed her to avoid tasks that aggravated her condition. A few years later, her back pain worsened and she asked for – and was granted – another accommodation.

What people did: The woman got into a fight with a coworker, and a complaint was filed against her. In addition, the employer faced a cash-flow shortage, so the woman was fired.

Legal challenge: The woman sued for retaliation. She argued that her request for a reasonable accommodation was a protected activity and that her employer retaliated against her by terminating her for making the request.

The employer countered that she was dismissed because she was involved in a fight and because there was a shortage of funds.

Result: The employer won. The court ruled that the woman wasn't retaliated against.

The judge said that the woman's accommodation request wasn't a so-called protected activity. Typically, said the court, a protected activity might include filing a complaint or assisting with the investigation of alleged illegal activity. In the eyes of the judge, requesting an accommodation wasn't a protected activity.

The skinny: In order for a worker to win a retaliation lawsuit, he or she has to be able to convince a judge that a so-called adverse action was taken in response to an activity that's specifically protected under the law.

Cite: *Lin v. Ellis,* Supreme Court of Missouri, No. SC97641, 1/14/20.

legal nightmare

Crew member who reported wage theft by coworkers is called a rat, then gets spit on

Overview

After filing a complaint of wage theft with his employer, an Egyptian man faced an onslaught of negative remarks from his coworkers. One coworker even called him a "f-ck-ng Egyptian rat."

The scenario

An Egyptian staffer named Gebrial Rasmy was ostracized by his coworkers at Marriott's Essex House Hotel, New York, NY, after he filed a claim of alleged wage theft against his fellow employees. He was also targeted because he was a devout Coptic Christian. For instance, his coworkers refused to use Rasmy's given name and instead called him rat, the mummy, camel, pretentious Christian and gypsy.

One coworker, Stamatis Efstratiou, especially targeted Rasmy. He called Rasmy a "f-ck-ng Egyptian rat," and a "f-ck-ng mummy." He also told Rasmy that "the idea of God is garbage," "religions are for stupid people" and "priests are child molesters and alcoholics."

At one point, Efstratiou intentionally referred to the Mormon guests who attended a work-related event as "f-ck-ng nonalcoholic Christians who don't drink, but they marry their sister" in front of Rasmy.

Rasmy told his boss he was being harassed. In response, his supervisor laughed in his face and ordered him to shut his mouth or his days with the company would be numbered.

Later, one of Rasmy's coworkers spat in Rasmy's face and threatened to pull a gun on him. Rasmy was fired following an internal investigation of the incident, even though the evidence showed that Rasmy had, in fact, been spat on.

Legal challenge

Rasmy sued for a hostile work environment based on religion. Essex House argued that it wasn't liable for harassment initiated by coworkers.

The ruling

The company lost. The court said Rasmy faced a hostile work environment motivated by religion and that Essex House failed to do anything about it.

Based on Rasmy v. Marriott.

You make the call: The Decision

(See case on page 2)

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

The judge ruled that the employer failed to engage in the interactive process in good faith. Even though the company was willing to provide injured workers with light-duty assignments, it refused to extend that same option to disabled staffers. On the face of it, said the court, the employer's policy was discriminatory.

Furthermore, managers put the disabled worker in a no-win position. He was missing work because the company failed to accommodate him. Then he was terminated for attendance problems.

The court noted that the staffer wouldn't have had the attendance problems if his disability had been accommodated to start with.

What it means: Courts expect some flexibility

Yes, it can sometimes be a challenge to accommodate disabled employees, especially when they can't perform their jobs without an accommodation.

Keep in mind, however, that managers who dismiss workers for a problem that would've been solved by a reasonable accommodation usually face an uphill battle convincing a court that they acted in good faith.

Judges expect employers to show flexibility when dealing with disabled folks. Hard-and-fast rules – no light-duty work for disabled crew members – rarely get a favorable reception in court.

Based on Fisher v. Nissan North America, Inc.