HR Manager's
Legal Alert FOR SUPERVISORS
April 2, 2021

In This Issue

Woman says employer reneged on accommodation agreement

Employee claims she became ill after Wi-Fi system was installed

The scenario

Shortly after her employer installed a Wi-Fi system, a female employee began to experience chronic pain, headaches, nausea, itching, shortness of breath, heart palpitations and fatigue.

Her doctor said she was suffering from electromagnetic hypersensitivity (EMS), so she asked her employer for an independent investigation of the potential harm from the new Wi-Fi system.

Managers agreed to her request, saying she could either use her own consultant for the investigation or allow the employer to pick a firm. She agreed to the proposal but said she didn't want the employer's firm to handle the evaluation.

Nevertheless, the company hired its own consultant to conduct an evaluation. The firm reported that there was no evidence the Wi-Fi network was causing the woman's EMS.

Unable to continue in the job, the employee went on permanent disability leave.

Legal challenge

The woman sued for disability discrimination.

The company said it tried to work with the woman on an accommodation but that it couldn't find one that was suitable for everyone.

The ruling

The employer lost. The court said the disability bias lawsuit could proceed.

The judge pointed out that the employer gave the woman a proposed accommodation – an independent investigation of the situation – but then reneged on the deal by conducting its own evaluation.

The skinny

This ruling shows why it's important to carefully consider accommodation options before offering them to employees; once you propose an accommodation, you have to provide it. Otherwise, a disabled staffer could successfully argue in court that you reneged on an accommodation agreement.

Cite: *Brown v. Los Angeles Unified School District,* Court of Appeals of California, No. B294240, 2/18/21.

Black employee, white coworker accused of sexual harassment; only one disciplined

Citing uneven handling of two similar accusations, staffer sues for race discrimination

"We reassigned Jeff because he sexually harassed a customer, not because of his race," said Supervisor Nathan Hawkins.

"Jeff thinks he was reassigned because he's Black," said HR Director Carolyn McGill. "He's suing us for race discrimination."

"That's ludicrous," said Nathan. "We had no choice but to reassign Jeff after he made sexual remarks to a female customer. He told the woman that her perfume aroused him. He also said that she'd 'woken up the little mister between his legs.'"

"Those comments were unfortunate," said Carolyn.

Rape feared

"I'll say," replied Nathan. "When the female customer complained to us, she expressed concerns that Jeff was going to rape her."

"How did we discipline Jeff?" asked Carolyn.

"We reassigned him for nine months while we conducted an investigation," said Nathan. "Eventually, he was moved back to his old job, but it's fair to say that he lost some opportunities for overtime while he was on reassignment."

"Jeff thinks he was more severely punished because of his race," said Carolyn. "For proof, he points to a white coworker who was also accused of sexual harassment but wasn't punished."

"The circumstances of each case were different," said Nathan.

"In what way?" asked Carolyn.

Shouldn't matter

"Well, first of all, the white man was accused of harassing a female coworker, not a customer," said Nathan.

"Jeff says that shouldn't matter," said Carolyn. "He

(Please see ***One disciplined*** ... on p. 2)

One disciplined …

(Continued from p. 1)

argues that he and the white man were both accused of violating the same sexual-harassment policy."

"The policy isn't intended to be one-size-fits-all," said Nathan.

"According to Jeff," said Carolyn, "the white coworker stalked a female employee for years, but he was never reassigned. In fact, he was eventually promoted, even though the female victim said she was terrified of him."

Victim not believed

"We didn't think the woman in the white coworker's case was believable," said Nathan. "However, we found the statement provided by Jeff's female victim to be more credible."

"Jeff thinks our credibility determination was driven by the fact that he's a Black man and his coworker is white," said Carolyn.

"Race had nothing to do with it," said Nathan. "We should fight this lawsuit."

Result: The employer lost. The court said a jury should decide whether the Black man was treated less favorably than his white coworker for similar offenses.

Same supervisor

The judge first noted that the Black employee and his white colleague were supervised by the same manager. They also had similar job titles and job functions, so they could be considered valid comparators for purposes of evaluating the staffer's race discrimination claim.

The court further observed that the two men were accused of violating the same sexual-harassment policy and that there were many similarities between the two incidents. Nevertheless, the Black worker was reassigned, while the white crew member wasn't disciplined and, in fact, was later promoted.

No distinction

The judge drew no distinction between the two victims, one of whom was a customer and the other of whom was a coworker. In the eyes of the court, the status of the victims wasn't relevant. What was relevant was the fact that a Black employee and white coworker accused of similar offenses were disciplined in markedly different ways.

Cite: *Levy v. Wilkie,* U.S. Court of Appeals 7, No. 20-1877, 1/7/21.

What it means to you

A word to the wise: Uneven punishment of two employees accused of similar offenses is never a good idea. It's an even worse idea when the person bearing the brunt of the more severe censure is a member of a protected class and the worker facing the less severe penalty is a white person.

That's why it's important to carefully consider all disciplinary actions before implementing them. Ask yourself whether others have been accused of similar offenses. If so, what punishment did they face?

Keep in mind that previous penalties should help guide your future decision-making.

Your best bet: Follow your employer's disciplinary policies because doing so will help reduce the chances of uneven discipline – and a costly lawsuit.

You make the call

Was it OK to fire staffer for planning to get pregnant?

"How can Kathy sue us for unlawful pregnancy discrimination when she wasn't even pregnant?" asked Supervisor Margie Brunton.

"That's a good question," replied HR Manager Alan Frankel. "Nevertheless, Kathy is suing us, claiming that we retaliated against her – and eventually fired her – because she expressed an intent to get pregnant."

"Now I've heard everything," replied Margie.

"When did we learn that Kathy was trying to have a baby?" asked Nathan.

"Right after she got married," said Margie. "Kathy returned from her honeymoon and told her supervisor that she and her husband were trying to get pregnant."

Not unusual

"That doesn't seem all that unusual," said Alan. "Newly married couples often express an interest in having children."

"I agree," said Margie. "However, Kathy's boss was worried. When Kathy told him about her plans, he said he wasn't too happy about it and wondered how her work would get done."

"Any manager would be concerned about filling in for someone during maternity leave," said Alan. "But Kathy never asked for a pregnancy accommodation. In fact, Kathy never did get pregnant while she worked for us."

"Exactly," said Margie. "After that conversation, though, Kathy felt her supervisor began to treat her differently."

"When she complained about the allegedly poor treatment," said Alan, "she was terminated."

"Kathy can't sue us for pregnancy bias if she wasn't even pregnant," said Margie. "We should challenge her lawsuit."

Did the company win?

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

HR Manager's Legal Alert 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), April 2, 2021, Vol. 16, No. 382, 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.

legal news for supervisors

New law forbids bias based on hairstyles

Proceed cautiously before disciplining crew members for their grooming practices, especially if those practices could be linked to their ethnicity.

By doing so, you'll steer clear of potential legal scrutiny related to hairstyles and other ethnic traits as more states and cities pass laws protecting workers with ethnic hairstyles.

Connecticut Gov. Ned Lamont (D), for instance, just signed into law the Creating a Respectful and Open World for Natural Hair (CROWN) Act. Under the law, which took effect immediately, employers can be cited for discrimination if they discipline workers for their hairstyles, e.g., braids, cornrows, locs, twists, Bantu knots, Afros and Afro puffs.

Other states, including California, New Jersey, Virginia, Washington and Maryland, as well as more than a dozen cities, have recently passed similar hairstyle-protection rules.

The new Connecticut law is more expansive than those in other states, however, because it doesn't limit the definition of ethnic traits to hairstyles, which means workers could use it to file a complaint if they think they've been discriminated against because of an ethnic trait other than their hairstyle.

Boss regrets hiring disabled employee

One employer just learned the cost of expressing regrets about hiring someone because he or she is disabled: $32,500.

That's how much Valley Tool, Inc., Water Valley, MS, has agreed to pay in order to resolve a disability-bias lawsuit initiated by the Equal Employment Opportunity Commission (EEOC).

The EEOC pursued the litigation after learning that Veronica Folson had been terminated because she told her boss that she suffered from sickle cell anemia, a blood disorder.

Here's what happened: During a team meeting, a supervisor said too many people were missing work because of illnesses. When Folson let him know that she suffered from the blood condition, he said to her, "If I'd known that, I wouldn't have hired you."

A short time later, Folson was fired, so she contacted the EEOC, which sued.

Based on EEOC v. Valley Tool, Inc.

focus: gender-biased feedback

Study: Men are advised to set a vision, while women are told to follow others

New research has provided valuable insight into the differences in the feedback provided to male workers and female staffers – while offering helpful insight into how you can tailor your employee evaluations to be more effective for both men and women.

Keep in mind, of course, that female workers who think the assessments given to them are clouded by their gender might be able to pursue a sex-bias lawsuit.

To learn more about the differences between the feedback provided to men and women, researchers at Queen Mary University, London, UK, examined open-ended, written assessments given to 146 staffers participating in a leadership-development program. They used a machine learning program to analyze the variations in the evaluations offered to men and women.

Big differences

The analysis revealed significant disparities in several areas, including vision, political skills, leadership and confidence.

For instance, male staffers were more likely to be told to set the vision. That is, they were advised to focus on the big picture; women, on the other hand, were instructed to emphasize operational tasks and to let other people set the vision.

Fortunately, there are some steps you can take to change the dynamics of the vision feedback provided to women and men.

Rather than being told to emphasize operational details, women should be encouraged to develop and articulate a personal vision for their team. Examples of questions that can be asked of female staffers:

- "What is your personal vision for your team?"
- "How can you involve others in developing this vision?"

Conversely, men should be encouraged to focus on operational skills. You could ask them "What operational or technical aspects of your job do you need to pay more attention to?"

New legal rulings

Was worker fired for disobeying his boss?

Yes, you can fire staffers after they return from leave, but make sure you have a solid reason for doing so.

What happened: After a man returned from 12 weeks of leave under the Family and Medical Leave Act (FMLA), he was reassigned to a new job. He didn't like the new position, so his supervisor offered him a severance package but told him to keep the details of the package to himself. However, the staffer told others about the package, so he was let go for disobeying his supervisor.

Legal challenge: The employee sued for FMLA interference.

Company's response: He was terminated for disobedience.

Ruling: The company won. The staffer was fired for disobeying his boss, not for taking leave.

Cite: *Hickey v. Protective Life Corp.,* U.S. Court of Appeals 7, No. 20-1076, 2/12/21.

Man seeks demotion, then sues for age bias

Workers claiming bias have to prove that they suffered an adverse employment action.

What happened: A 54-year-old male employee was placed on a performance improvement plan (PIP). Rather than comply with the conditions of the plan, he applied for a transfer, which was granted. However, the new job was a demotion for him.

Legal challenge: The worker sued for age discrimination, claiming that he was put on a PIP and forced to take a demotion because of his age.

Company's response: The transfer was his decision.

Ruling: The employer won. The court said the man suffered no adverse employment action – he opted for the demotion – so his lawsuit had no merit.

Cite: *Taglione v. Charter Communications,* U.S. Court of Appeals 6, No. 20-3680, 1/28/21.

legal developments

Did employer do enough to prevent male staffer from pestering female coworker?

Supervisor's take-home: Remember the importance of acting quickly and effectively to address allegations of sexual harassment.

What happened: A male worker made a female staffer feel uncomfortable. First, he told the woman that he and his wife were having marital problems because he wanted an open marriage. Rather than respond to his statement, the woman left the room.

After the female employee complained, managers told the man to stop talking about his personal life at work. He didn't speak again to the woman about personal issues.

What people did: Later, the man began to frequently visit the woman in her work area, asking her trivial questions he should've known the answers to.

The woman was becoming increasingly uncomfortable with the man, so she asked managers to let her not eat lunch with a group that included him; her request was granted. She also asked to be excused from the office Christmas party because he was going to be there; she was allowed to skip the party.

Because the woman was uncomfortable when she was alone in the workplace with the male coworker, managers reworked her schedule so she was never alone with him.

Legal challenge: The woman sued for a hostile workplace based on gender.

Result: The employer won. The court dismissed the lawsuit. First, the judge said the woman didn't face a workplace that was severely hostile based on her gender; many of the incidents had nothing to do with gender.

Further, the court said the employer addressed the woman's concerns. Example: Managers warned the man not to speak about his personal life at work, and he didn't.

The skinny: Employees claiming a hostile workplace usually face an uphill battle in court if their employer has addressed their allegations.

Cite: *Scarbro v. Social Security Administration,* U.S. Court of Appeals 6, No. 20-5416, 1/22/21.

legal nightmare

Manager tells woman that her status as a single mother isn't 'what God wanted'

Overview

An employer that required crew members to attend Bible reading sessions every morning found itself in hot water after several workers who didn't want to participate in the meetings were fired.

The scenario

For more than 11 months, Stacy O'Laughlin attended the daily mandatory Bible reading sessions held by her employer, Shepherd Healthcare, Flower Mound, TX.

However, O'Laughlin was taken aback when Virginia Shepherd, who owned the business along with her husband, Dr. Timothy Shepherd, pulled her aside and told her that her status as a single mother wasn't "what God wanted." She also asked her whether she'd like to go to church with her. O'Laughlin declined the offer.

A short time later, Virginia Shepherd ordered O'Laughlin to pick a Bible verse that meant the most to her and read it to the group during a morning Bible meeting. O'Laughlin asked that she not be required to recite a verse.

She was fired the next day.

Other employees also bristled at the requirement to attend the meetings and read Bible verses.

For instance, Almeda Gibson, a Buddhist, told the Shepherds that she wanted to be excused from the daily sessions because she wasn't interested in embracing the religious beliefs of others. Her request was denied; then she was terminated.

Legal challenge

Gibson contacted the Equal Employment Opportunity Commission (EEOC), which sued Shepherd Healthcare for religious discrimination.

The ruling

The company lost. Faced with dim prospects in court, Shepherd Healthcare agreed to pay $375,000 to settle the lawsuit. The company also said it would stop making employees attend daily Bible-reading sessions

Based on EEOC v. Shepherd Healthcare.

You make the call: The Decision

(See case on page 2)

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

The judge pointed out that pregnancy discrimination laws not only protect women who are pregnant, but they also provide legal safeguards to female workers who are trying to become pregnant.

Because only women can have a child, discriminatory actions taken against those seeking to have a baby are illegal because they can never be gender-neutral; that is, only women can face bias related to childbearing, either a pregnancy that's real or one that's intended.

According to the court, the company ignored the woman's complaints of retaliation after she announced her intent to have a child, then fired her. Because a man couldn't have been retaliated against or terminated for that reason, the company's actions constituted illegal bias.

What it means: Express joy at her happy news

Some supervisors might be surprised to learn that pregnancy discrimination laws apply to women attempting to have a child.

That's why you have to proceed carefully when a female crew member either announces a pregnancy or declares that she's trying to have a baby. In both cases, your best bet is to express happiness for her, then make sure she knows you'll work with her to figure out accommodations whenever she does actually become pregnant.

Based on South Texas College v. Cynthia V. Arriola.