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FOR SUPERVISORS

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Company's response to woman's sexual assault claim: 'Go home!'

Staffer contacted the police, then obtained a protection order

The scenario

Shortly after she started a job, a woman began to receive text messages from her male supervisor asking her to have a sexual relationship with him. She rejected his advances.

After that, the male manager decided that he didn't need her approval. On three separate occasions, he sexually assaulted the female worker. The assaults included forced kissing, groping and digital vaginal penetration.

The female crew member reported the male supervisor's sexual assaults to her employer and to the police. She obtained a personal protection order against him. The male boss eventually pleaded no contest to

criminal sexual conduct.

However, the woman's complaint to the employer led to an unsatisfactory result for her: She was told to go home, which she did. But instead of returning to work, she contacted the Equal Employment Opportunity Commission (EEOC).

Legal challenge

The EEOC sued the woman's former employer for sexual harassment, alleging that the company's response to her assault allegation was unsatisfactory.

The company argued that it didn't have a chance to deal with the woman's assault claim. It asked the court to dismiss the lawsuit.

The ruling

The company lost. The judge said the EEOC's lawsuit could proceed, pointing out that the employer was aware of the sexual assault allegation, but instead of taking action against the male manager, it told the woman to go home.

The skinny

All claims of sexual harassment or sexual assault must be investigated right away. In the meantime, make sure the victim remains employed and is provided with as much support and counseling as needed.

Cite: *EEOC v. Konos, Inc.*, U.S. District Court, W.D. Michigan, No. 1:20-cv-973, 6/3/21.

Employee suffers severe injuries after her boss ignores her accommodation request

Manager promised to address her concerns about the schedule, but he failed to do so

"Justine is suing us for disability discrimination," said HR Director Carolyn McGill. "She claims that we failed to reasonably accommodate her diabetes."

"I feel bad that Justine's disability caused her to suffer severe head injuries," replied Supervisor Nathan Hawkins, "but I don't know how she can claim that we discriminated against her."

"How did Justine get hurt?" asked Carolyn.

"She experienced a hypoglycemic attack when her blood sugar levels suddenly dropped," said Nathan. "She had a seizure, lost consciousness and hit her head on a table and then on the floor."

Neck and shoulder pain

"She suffered some pretty severe injuries when her head struck the table," said Carolyn. "She now has tingling in her fingers, neck and shoulder pain, vertigo,

dizziness and emotional distress. Justine has also lost her senses of smell and taste."

"She was banged up," said Nathan, "but I'm still not sure how she can allege that we discriminated against her."

"Justine claims that she wouldn't have fallen if we'd been willing to accommodate her condition," said Carolyn.

"What accommodation is she talking about?" asked Nathan.

"Justine says the trouble

started when her boss posted a work schedule that delayed her lunch break," said Carolyn.

"The new schedule required her to go without eating longer than she would have preferred. As you know, she has to eat regularly in order to maintain her blood sugar levels."

Couldn't do it

"If Justine didn't like the schedule," said Nathan, "she could've said something to

(Please see *Severe injuries* ... on p. 2)

Severe injuries ...

(Continued from p. 1)

her supervisor.”

“According to Justine,” said Carolyn, “she did ask her manager to let her take her lunch break earlier, but he ignored her request. He said he’d get back to her, but he never did. When she finally cornered him for an answer, he said he couldn’t rearrange the schedule to suit her needs.”

Eat a snack

“Yes, but her supervisor also told her that if she wasn’t feeling well, she could eat a snack to maintain her blood sugar level,” said Nathan.

“Justine says that wasn’t good enough,” said Carolyn. “She claims that she needed the schedule changed so she could better control her diabetes.”

“I’m surprised by this lawsuit,” said Nathan,

“considering that Justine didn’t suffer a so-called adverse employment action, which I believe is required in order to pursue a disability discrimination claim.”

Good point

“That’s a good point,” said Carolyn. “We’ll fight this lawsuit.”

Result: The company lost. The court said a jury should decide whether the female crew member was discriminated against because of her disability.

Yes, noted the judge, employees are usually required to experience an adverse employment action such as a demotion, a pay cut, or a termination in order to pursue a claim of disability discrimination.

However, in this case, the woman needed to only show that the employer

failed to engage in the interactive process or to make a good-faith effort to accommodate her in order to prove discrimination.

Concerns dismissed

The court said that the employer’s actions were unlawful because her supervisor dismissed the woman’s legitimate concerns about the schedule, then refused to change it to help her manage her diabetes.

The manager’s callous disregard for the woman’s needs constituted a failure-to-accommodate claim that didn’t require the woman to prove she experienced an adverse employment action.

Cite: *Richter v. Oakland Board of Education*, Supreme Court of New Jersey, No. 083273, 6/15/21.

What it means to you

The ruling in this case raises the bar for employers to provide suitable accommodations for disabled workers. Previously, courts required employees to prove they suffered an adverse employment action in order to proceed with a disability discrimination lawsuit.

However, the judge here nixed that requirement. Now disabled folks need only to prove that their employer failed to work with them to accommodate a disability in order to pursue litigation.

With this more stringent standard in place, you now have a new reason to work with a disabled employee to find suitable accommodations. The key is to communicate with the disabled person about potential solutions, not to ignore and then dismiss his or her concerns, as the supervisor in this case did.

You make the call

Employee forced to return from leave claims retaliation

“We didn’t demote Tamra in retaliation for complaining about her new supervisor,” said Supervisor Margie Brunton. “We demoted her for a legitimate business reason.”

“Tamra thinks there’s a connection between her complaint that her new manager was harassing her and our decision to demote her,” said HR Manager Alan Frankel. “She’s suing us for retaliation.”

“Look, I feel bad about the way things went south with Tamra,” said Margie. “She’d been with us for quite some time when she was demoted

as part of a company-wide reorganization. But she didn’t get along with her new supervisor, so she filed an internal complaint that her new manager was harassing her. We investigated her claim, but we couldn’t substantiate it.”

Reduction in force

“What happened next?” asked Alan.

“Shortly after she complained about her new boss,” said Margie, “Tamra was again demoted as part of a reduction in force. After the second demotion, she was so upset that she went on medical leave.”

“But she didn’t stay on leave for long,” said Alan.

“That’s right,” said Margie. “While she was still on leave, we told Tamra that she needed to return to work right away or she’d be terminated. Faced with that choice, she came back to the job two months before her leave was originally scheduled to end.”

“Tamra now claims that we threatened to dismiss her and forced her to return from leave early in retaliation for her complaints,” said Alan.

“The two events were unrelated,” said Margie. “Let’s fight her 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

Many workers report mental health issues

A word to the wise: Your crew members are more likely to be suffering from mental health problems than it might appear.

That's your takeaway from a recent survey conducted by the Society for Human Resource Management (SHRM). The survey of 578 U.S. workers revealed that 48% of employees feel used up at the end of the workday, while another 41% reported feeling burned out from their jobs.

And female crew members – who have shouldered many of the negative impacts from the coronavirus pandemic – are more likely to identify mental health issues. For instance, 49% of female respondents said they feel

emotionally drained from their work, while only 33% of male crew members reported that same feeling.

In addition, 55% of the women said they feel used up at the end of the workday, but only 41% of men stated that they feel used up.

It also turns out that minority workers are more likely to suffer from mental health issues. While 36% of employees who are Black, Indigenous, or people of color reported that they sometimes felt down, depressed, or hopeless over the past few weeks, only 26% of white employees cited those feelings.

Job seekers can ask about salary ranges

Get ready for more job applicants to ask about wage ranges for the position. And when they do, you'll have to

provide the data to them.

That's because of a new Connecticut law intended to reduce the wage gap between men and women. Under the law, which takes effect Oct. 1, 2021, employers must provide job seekers with the wage range for a position either when the applicant requests it or when a job offer is made to the person.

Furthermore, the law will make it easier for women to win claims of unequal pay because it says females can't be paid less for "comparable" work. Previously, protections were only provided for "equal" work. The different language means a woman could prevail on an unequal pay claim by pointing to a higher-paid man who has a different job title but who's in a position that requires comparable skills and that has similar job duties.

New legal rulings

Woman's charge of unequal pay ignored

If a woman complains of unequal pay, be sure to investigate her claim and get back to her as soon as you can.

What happened: After a female employee alleged that two male members of her work team were being paid more than she was, her boss promised to investigate her claim. But he never did. The female staffer was terminated six months later.

Legal challenge: The woman sued for gender bias, pointing to the pay disparity between herself and her male teammates.

Company's response: The men had more responsibilities.

Ruling: The company won. The court said the woman failed to produce a male comparator to prove her claim; the two men she identified had different job duties and titles.

Cite: *Luth v. OEM Controls, Inc.*, Connecticut Court of Appeals, No. AC 43702, 4/6/21.

Employer mandated specific callout steps

You can require staffers seeking time off to follow a specific notification procedure.

What happened: A woman with reactive arthritis was approved for leave under the Family and Medical Leave Act (FMLA), but she was told that she had to call her boss and the HR department whenever she needed FMLA leave. The woman was later fired for attendance violations because she failed to follow the two-step notification requirement.

Legal challenge: The woman sued for FMLA interference.

Company's response: We could require two notifications.

Ruling: The company won. The court said the two-step callout procedure was neither unfair nor an undue burden.

Cite: *Evans v. Cooperative Response Center*, U.S. Court of Appeals 8, No. 19-2483, 5/4/21.



focus: effective communication

Adapt your messages so you can reach workers from all different generations

With more and more employees delaying their retirements, you probably have a work crew that represents several different generations, including Generation Z, millennials, Generation X and baby boomers.

While the wide range of ages among your staffers can be a good thing, it can also present challenges in the manner in which you communicate with your folks. The disparate communication methods used by the different generations can lead to misinterpretation and confusion. And, of course, a misunderstood message could prompt a costly lawsuit.

That's why it's important to

adapt your communication style to effectively reach both older and younger staffers.

Make it clear

One key is to make sure your messages are clear, succinct and to the point. The older generation will appreciate your clarity, while the younger generation will be grateful for your brevity.

It's also important to be flexible in the way in which you communicate. For instance, call or speak with an older crew member in person instead of using an electronic method.

On the other hand, you can use email or instant messaging to reach younger workers, which shows that you appreciate their need

for independence.

If you need to send a message to employees of all generations, you can use email, but make yourself available for follow-up by telling them they can reply to the message via email or call or visit you in person if they have questions.

In addition, double-check that your messages have a professional appearance. Avoid jargon and text abbreviations. As much as possible, use salutations and end messages in a business-like manner. The older folks will see the professionalism as respectful; the younger crew members will hold it up as an example of how to effectively communicate in the workplace.



legal developments

Woman terminated five days after telling her supervisor that she's carrying a baby

Supervisor's take-home: It's rarely a good idea to fire a woman less than a week after she tells you that she's pregnant – unless you have a solid reason for doing so.

What happened: A crew member who often showed up late for work was given a final written warning due to her habitual tardiness.

What people did: The woman informed her boss that she was pregnant. Five days later, the staffer was notified that she could either resign or be fired because she had falsified paperwork. The woman denied the accusation. However, she was warned that she could be reported to a licensing board over the documentation

falsification if she didn't resign right away. She quit.

Legal challenge: The woman sued for pregnancy discrimination, noting that she was fired just five days after she let her manager know that she was pregnant. She also said that the accusation of documentation fabrication was false.

The employer pointed out that in the five years before the woman was dismissed, 28 of its employees had a child within nine months of their start dates. Three were known to be pregnant when they were hired, and none of them were terminated.

Result: The company won. While acknowledging that the accusation of documentation

falsification was wrong, the judge said the firing was legal because the employer had an honest belief that the woman had modified paperwork.

The court also pointed out that the company had a history of hiring and retaining pregnant workers, casting further doubt on the woman's claim that the company had discriminated against her.

The skinny: Employers that have an established record of nondiscriminatory behavior usually fare well in court if a fired worker later accuses them of illegal bias.

Cite: *Cox v. The Little Clinic of Tennessee, LLC*, U.S. Court of Appeals 6, No. 20-6389, 5/26/21.

You make the call: The Decision

(See case on page 2)

No. The company lost. The court ruled that a jury should decide whether the woman was retaliated against because she'd filed an internal complaint of harassment against her supervisor.

Then a jury ruled in favor of the employee, and an appeals court upheld the jury's decision.

The appeals court said the jury was right to conclude that the crew member was retaliated against. The judge noted that the woman was forced to end her medical leave two months early under the threat of dismissal.

Because the employer couldn't provide a valid reason for forcing the woman to return from her leave early, both the jury and the court concluded that the demotion decision was made in retaliation for the woman's internal complaint of harassment.

What it means: Let them complete approved leave

Once a crew member has been approved for leave, it's usually in your best interest to let him or her finish the leave. If you insist that someone return early from leave, at least make sure you have a solid, supportable justification for doing so.

In this case, the company offered no legitimate reason for threatening to terminate the woman unless she returned from leave two months early, prompting the jury and the court to conclude that the return-to-work ultimatum must have been motivated by retaliation.

Based on Gonzalez-Bermudez v. Abbott Laboratories P.R., Inc.



legal nightmare

Black woman fired after she complains about being referred to as Aunt Jemima

Overview

A Black woman who was offended when her coworkers called her Aunt Jemima and other racial epithets was fired after she complained about the offensive behavior.

The scenario

Shortly after she started her assignment at the Ryder Integrated Logistics facility in Moreno Valley, CA, Regina Fisher, an African American employee of Kimco Staffing Services, realized that she didn't look like most of the other people working in the plant.

And some of her Hispanic coworkers seemed to bear a grudge against Black staffers like her. On an almost daily

basis, other employees referred to Fisher as *Negra Fea*, *Aunt Jemima*, the woman on the maple syrup bottle, a token black slave and *cocina*.

Fisher was deeply offended by the daily barrage of negative statements, so she complained to her boss, but he dismissed the offensive comments as gossip and harmless name calling.

Worse, managers for both Ryder and Kimco overheard several of the racist allegations, which also included references to Fisher as the Black girl. And she was told that Black people are lazy and don't like to work.

When Fisher again complained about the troubling behavior, she was

fired even though the employer's progressive discipline policy called for a verbal warning prior to termination for an alleged first offense.

After she was dismissed, Fisher contacted the Equal Employment Opportunity Commission (EEOC).

Legal challenge

The EEOC sued Ryder and Kimco for race discrimination.

The ruling

The companies lost. To make the lawsuit disappear, the organizations agreed to pay \$1 million each.

EEOC v. Kimco Staffing Services and Ryder Integrated Logistics.