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Boss tells Syrian man 'You people need to treat your wives better'

Employee says he was terminated because of his national origin

The scenario

During his first performance review with a new employer, a Muslim man of Syrian descent was told that he'd have trouble fitting in with the organization unless he improved his communication skills.

The staffer continued to receive poor performance reviews for several years.

Meanwhile, the worker's supervisor began to engage in behavior that the Syrian man believed was discriminatory. The worker said that the boss repeatedly made references to "you people." For instance, the manager said to the man, "You people need to treat your wives better."

The Syrian employee was

particularly upset when he was ordered during an off-site meeting to stand in front of his coworkers and recite lines to his wife that would make her feel loved.

Eventually, the crew member was terminated for failing to improve his performance.

Legal challenge

The Syrian worker sued for national origin bias, claiming that he was put on the improvement plan and eventually terminated because of his ancestry. For proof, he pointed to the multiple comments made by his supervisor that allegedly reinforced the stereotype that Syrian men don't treat their wives very well.

The ruling

The company won. A jury decided that the Syrian worker failed to prove that he was dismissed because of his national origin. The ruling was upheld by an appeals court, which found that the employer provided sufficient evidence that the staffer was fired for poor communication skills, not because of his Syrian ancestry.

The skinny

Employers that can provide solid evidence of poor worker performance usually fare well in court should a staffer later claim illegal discrimination.

Cite: *Haydar v. Amazon Corporate, LLC*, U.S. Court of Appeals 6, No. 19-2410, 9/16/21.

Disabled woman fired under an attendance policy that her boss didn't seem to understand

Worker who couldn't consistently and reliably show up for work alleges unlawful bias

"We were justified in terminating Tanya's employment," said Supervisor Nathan Hawkins. "She couldn't reliably and consistently show up for work."

"Tanya thinks we had a more sinister motive for firing her," said HR Director Carolyn McGill. "She claims that she was let go because of her disability."

"Disability?" asked Nathan. "What disability?"

"Tanya contends that she suffered a core muscle injury at work," said Carolyn, "and that she was deemed eligible for workers' comp following the injury."

The size of it

"Well, yes, that's correct," said Nathan. "So she's disabled because she filed a claim for workers' comp?"

"That's about the size of it," said Carolyn. "It gets worse, though, because Tanya

has hit us with a lawsuit for disability discrimination, contending that she was dismissed because of her muscle injury."

"She has some nerve," said Nathan. "Tanya was calling out all the time. We really needed her to be here, but she was constantly finding reasons to miss work."

"Tanya argues that all her callouts were related to her core muscle injury," said Carolyn. "She alleges that our

attendance policy allowed her to take time off to treat any injury linked to a workers' comp claim. She contends that most of her no-shows had to do with treatment for the muscle injury, so her absences were excused."

Liberal interpretation

"It sounds like she's taking a very liberal interpretation of our attendance policy," said Nathan. "Personally, I didn't (Please see *Didn't understand* ... on p. 2)

Didn't understand ...

(Continued from p. 1)

even know that treatment for a workers' comp injury could be considered an excused absence under our attendance policy."

"It sounds like we'll have to provide some refresher training on our attendance policy to all our frontline supervisors," said Carolyn.

Not a bad idea

"That might not be a bad idea," said Nathan. "However, either way, I still can't believe that Tanya can prevail in her lawsuit. I mean, we met with her to talk about her ongoing attendance problems, and she promised she'd clean it up, but she didn't. She continued to miss work."

"Tanya contends that all her absences could be linked to her muscle injury," said Carolyn. "In

her mind, any time missed because of the original injury would be excused under our policy. That means she only had to provide us with timely notice that she'd be out and the absence would be OK."

Creative arguments

"Tanya is using a creative argument to fight her lawful termination," said Nathan. "We should challenge her lawsuit."

Result: The company lost. The court said a jury should decide whether the woman was fired because of her disability.

The judge determined that the worker was able to link all her absences to her muscle problem, which was caused by her work-related injury, so the missed time was excused under the

employer's own attendance policy.

The court pointed out that company managers didn't even seem to understand whether the woman's absences were excused under the attendance policy. In the eyes of the judge, that meant the disabled woman was fired as a result of her boss's misunderstanding of the company's attendance policy.

Lack of clarity

Given management's lack of clarity about the company's own attendance policy, the court decided that the woman must have been let go for a different reason – her disability.

Cite: *Benson v. Wal-Mart Stores East, L.P.*, U.S. Court of Appeals 1, No. 20-1495, 9/15/21.

What it means to you

It's important for frontline supervisors like you to have a solid understanding of your employer's personnel policies, especially if those policies might be used to justify the termination of a crew member.

In this case, a woman who was unable to consistently show up for work – even after she'd been warned about her excessive absences – was able to prevail in a disability bias lawsuit for one reason: No one in the organization seemed to understand the terms of the attendance policy that was cited to justify her firing.

That was a red flag for the court, which made quick work of the employer's efforts to dismiss the lawsuit, saying that it couldn't rule in favor of a company whose frontline managers didn't seem to understand their own policies.

You make the call

Can woman who made more than man claim unequal pay?

"I just don't understand how Jennifer can sue us under the EPA, the Equal Pay Act," said Supervisor Margie Brunton.

"Why do you say that?" asked HR Manager Alan Frankel.

"Jennifer claims that she was paid less than a male coworker who had the same job title that she did," said Margie.

"However, when you consider bonuses and commissions, Jennifer actually made more in total compensation than her male coworker did."

"That's a good point," said Alan. "However, Jennifer claims that she was paid at a lower

hourly rate than her male colleague was, so she's justified in pursuing her EPA lawsuit. Why did we terminate Jennifer?"

Refused the transfer

"We didn't really fire Jennifer," said Margie. "We reassigned her to a different job, but she thought the new position amounted to a demotion, so she refused the transfer. That's when we ended her employment."

"Jennifer claims that the job reassignment would've meant a pay cut and, worse, she would've had to report to a male colleague who used to report to her," said Alan.

"She said it was a nonstarter for her."

"It was her decision to not accept the transfer," said Margie.

"Jennifer claims that she was a solid performer for us," said Alan. "She notes that she won numerous prizes and equity awards during her time here."

"She was a good performer," said Margie. "But we needed to rearrange job duties, and Jennifer didn't want to go along with it. The bottom line is that Jennifer made more total money than her male coworker did. 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

Look for a huge jump in retaliation lawsuits

Get ready for a big increase in the number of employees successfully claiming they were disciplined for reporting allegedly illegal behavior.

That's because New York Gov. Kathy Hochul (D) just signed amendments to the state's whistleblower protection law that'll make it easier for workers reporting untoward activities to gain legal protection.

The amendments dramatically expand the scope of behavior that's safeguarded from retaliation. For instance, the law covers whistleblowers who "reasonably believe" there's been illegal activity.

Previously, a whistleblower was protected only if the behavior was actually illegal. Now a person could blow

the whistle on something that's perfectly legal and still be protected because he or she believed it was illegal.

In addition, the new amendments extend whistleblower safeguards to former employees and contractors. Previously, only current employees were covered under the law.

And the amendments spell out penalties for employers that retaliate against whistleblowers: front pay, a fine of \$10,000 and punitive damages.

Physical-abilities test called discriminatory

Now might be a good time to confirm that any physical-abilities tests you're using to screen out job applicants doesn't discriminate against women.

Such advice comes too late for Stan Koch & Sons

Trucking, Minneapolis, MN, which just agreed to pay \$500,000 in order to settle a gender-discrimination lawsuit from the Equal Employment Opportunity Commission (EEOC).

According to the lawsuit, Koch required all job seekers to pass a Cost Reduction Technologies (CRT) test that measures strength in the knees, shoulders and trunk.

When job applicant Alana Nelson had her conditional offer of employment pulled after she failed the CRT test, she contacted the EEOC, which determined that the test unfairly discriminated against women. The EEOC also decided that Koch couldn't link the need for the test to the job, so it sued for gender discrimination.

Based on EEOC v. Stan Koch & Sons Trucking, Inc.

New legal rulings

Worker files rebuttal to improvement plan

Don't fire a crew member because he or she filed a rebuttal to a performance improvement plan (PIP).

What happened: After he was placed on a PIP, a worker filed a rebuttal, claiming that he shouldn't have been put on the PIP. The man was fired because he submitted the rebuttal.

Legal challenge: The staffer sued, claiming that he was let go in violation of public policy.

Company's response: His termination had nothing to do with public policy.

Ruling: The employer lost. The court said the worker could pursue his lawsuit, noting that the law provides employees with a public policy right to submit rebuttals to personnel decisions that affect them.

Cite: *Meehan v. Medical Information Tech.*, Supreme Judicial Court of Massachusetts, No. SJC-13117, 11/1/21.

Woman suspended for laughing at boss

Always provide a clear, supportable reason for an adverse employment action.

What happened: After her manager told her to begin adding part numbers to certain items, a female staffer refused to do so, then laughed at her direct supervisor. The woman was suspended for five days due to her insubordination.

Legal challenge: The woman sued for gender discrimination, claiming that male workers who also refused to add part numbers weren't suspended.

Company's response: She was insubordinate.

Ruling: The company won. The court said the woman wasn't fired for failing to add part numbers; she was dismissed for insubordination.

Cite: *Grubbs v. Grote Industries*, U.S. District Court, S.D. Indiana, No. 4:19-cv-00211, 9/23/21.

focus: egregious behavior

Knowing when you can skip progressive discipline and immediately fire a worker

Like most supervisors, you're probably inclined to follow your employer's progressive-discipline policy before terminating a staffer.

And that's a good idea.

However, there are certain situations when it might be better to skip progressive discipline and fire a crew member right away.

These situations would typically involve employee behavior that's completely egregious, including

- fighting
- assault
- theft
- severe insubordination
- property destruction
- drug or alcohol abuse
- record falsification

Most often, workers who commit any of these

infractions should be dismissed right away. Here's why: If you keep the person employed and he or she commits another similar offense, your employer could be on the hook for any damages because the first infraction put you on notice that there could have been a problem but you failed to resolve the issue.

Don't jump to it

However, it's also important to not jump to immediate termination all the time. That's because workers claiming bias could allege that you failed to follow your employer's progressive discipline policy, allowing them to claim that you took an

adverse employment action because of a protected characteristic such as age, race, or gender.

Nevertheless, you should immediately fire someone when the offensive behavior can be closely linked to the job. Example: A bus driver is arrested for driving under the influence. In that case, you can justify his or her dismissal because the offense was directly related to his or her job duties.

But what if the bus driver is arrested for disorderly conduct? That's a different kettle of fish because it has nothing to do with driving a bus. In that case, it's probably best to implement your employer's progressive discipline policy.



legal developments

Boss gives older worker poor evaluation, directly asks him, ‘Why are you still here?’

Supervisor’s take-home: Proceed cautiously before firing someone who’s filed a formal complaint of age discrimination.

What happened: For more than six years, an older crew member received glowing reviews of his job performance. Things changed, however, when the 60-year-old man was assigned to a new supervisor. Right away, the new manager tried to isolate the employee by removing most of his job duties. Then, during a staff meeting, the supervisor jokingly referred to the older staffer as “Uncle Ron.” He also mocked the man for having “old skills.”

What people did: Over

the next couple of months, the supervisor asked the older staffer at least ten times when he planned to retire. After the boss gave the man a poor performance review, he said to him, “Why are you still here?” The worker filed a formal internal complaint of age discrimination. He was fired a short time later.

Legal challenge: The worker sued for age bias and retaliation, arguing that he was dismissed because he’d complained of discrimination.

Result: The company lost. The court said a jury should decide whether the older man was terminated in retaliation for complaining of age bias. As potential proof of unlawful conduct, the judge pointed to

the short time frame between the worker’s allegation of age discrimination and his dismissal. The court also observed that the manager made several ageist comments to the worker. The boss asked the staffer at least ten times when he planned to retire. The supervisor also called him “Uncle Ron” and questioned why he was still with the company.

The skinny: Employers that terminate crew members shortly after they complain of discrimination are effectively asking a court to find them guilty of retaliation.

Cite: *Sloat v. Hewlett-Packard Enterprise Co.*, U.S. Court of Appeals 6, No. 20-6169, 11/17/21.

You make the call: The Decision

(See case on page 2)

No. The company lost. The court refused to dismiss the woman’s Equal Pay Act (EPA) lawsuit.

According to the judge, the wording of the EPA is clear: A woman can’t be paid at a lower rate than a male coworker performing the same job. The issue isn’t the total compensation paid to the man and to the woman; rather, it’s the rate at which each person is paid.

In this case, the evidence indicated that the woman was paid at a lower rate than her male coworker, even though she made more in total annual compensation than he did, so the lawsuit could proceed.

To rule otherwise, said the court, would mean that an employer could pay a woman \$10/hour and a man \$20/hour and it would still be legal – as long as the woman worked twice as many hours as the man did.

What it means: It’s the rate of pay that matters

In your efforts to maintain compliance with the EPA, keep in mind that you have to consider the rate of compensation provided to male workers and to their female colleagues rather than the total compensation of each one.

So that means the hourly rate or salary of each person must be the same if they’re performing the same job.

That’s why it’s a good idea to confirm that female and male employees handling comparable jobs are being paid at the same rate.

Based on Sempowich v. Tactile Systems Technology.



legal nightmare

Bosses question Christian man’s mental health after he begins a 40-day Lent fast

Overview

A Christian worker was fired because managers were concerned about his mental health after they learned that he was fasting for 40 days and chanting in a stairwell.

The scenario

Managers at Arthur J. Gallagher and Co., Centennial, CO, couldn’t help but notice the crew member Yu “Rex” Noda wasn’t afraid to show that he was a devout Christian. For one thing, Noda wore a bracelet with a cross, and he often told coworkers that he regularly attended church services.

When Noda began a 40-day fast during Lent, one coworker called it a “diet fad,”

while another said that Noda’s religious beliefs were “bullsh-t” and “stupid.”

Noda’s supervisors became concerned, however, when they overheard Noda chanting in a stairwell. Their anxiety escalated when Noda showed up at work with a bandage on his hands, claiming that he burned himself at home.

Supervisors decided to meet with Noda in order to figure out whether he was mentally stable. During the meeting, the bosses expressed concerns about the man’s chanting and fasting. They also provided him with information about the employee assistance program.

There was no discussion of any performance problems

during the meeting. In fact, Noda had never been warned about poor performance nor told that he wasn’t meeting expectations.

Less than a week after the meeting, however, Noda was fired, allegedly because of his erratic behavior. Noda contacted the Equal Employment Opportunity Commission (EEOC).

Legal challenge

The EEOC sued Arthur J. Gallagher for religious bias.

The ruling

The company lost. It agreed to pay \$40,000 in order to settle the lawsuit.

Based on EEOC v. Arthur J. Gallagher & Co.