HR Manager's
Legal Alert
FOR SUPERVISORS
September 23, 2022

In This Issue

Boss derides pregnant woman who begged for light-duty work

Staffer quit physically demanding job to protect her baby's health

The scenario

Even though a company allowed employees injured on the job to be transferred to light-duty work with full pay, it refused to move pregnant employees to light-duty assignments. Instead, women were expected to work as long as they could and then take unpaid maternity leave.

A pregnant staffer who had a physically demanding job begged her boss to transfer her to light duty for the duration of her pregnancy, but the manager refused, claiming that she wanted "favoritism."

So the female crew member continued to work until she started bleeding and the baby's heartbeat began to drop. Concerned about the health of her baby, the woman quit the job and then contacted the Equal Employment Opportunity Commission (EEOC).

Legal challenge

The EEOC sued the employer for pregnancy discrimination, arguing that its policy of refusing light-duty transfers for pregnant workers was discriminatory.

The employer said its light-duty program had the singular intent of reducing workers' comp expenses.

The ruling

The company won. The court said the employer offered a legitimate, non-discriminatory reason for its policy: the need to cut workers' comp costs. Because the justification provided by the company didn't apply to pregnant employees who weren't eligible for comp, the policy wasn't discriminatory.

The skinny

If a woman in a physically demanding job requests light-duty work, talk to your HR manager before deciding whether to transfer her. Your employer might have a policy that forbids pregnant staffers from moving into light-duty assignments because it wants to reduce workers' comp costs, as was the case here.

Cite: *EEOC v. Wal-Mart Stores East,* U.S. Court of Appeals 7, No. 21-1690, 8/16/22.

Disabled staffer fired after his boss refuses to consider his accommodation proposals

Employee sues, claims company failed to engage in the required interactive process

"We didn't fire Richard because he has HIV," said Supervisor Nathan Hawkins. "We let him go because he couldn't consistently show up for work."

"Richard claims that we dismissed him in violation of the ADA, the Americans with Disabilities Act," replied HR Director Carolyn McGill. "He's suing us for disability discrimination."

"That's ridiculous," said Nathan. "What evidence does Richard have to prove we ran afoul of the ADA?"

Medical treatments

"According to Richard," said Carolyn, "we failed to engage in the interactive process in good faith. He claims that he often needed time off for doctors' appointments and medical treatments, but we refused to consider his needs."

"We bent over backward trying to accommodate Richard," said Nathan. "We provided him with the form he needed to fill out in order to request a reasonable accommodation, but he submitted a document that wasn't completed. Worse, he essentially asked for unlimited time off."

"Richard says he would've finished the form if we had provided his doctor with the information he needed," said Carolyn. "Richard says the doctor asked us to define full-time employment for him, but we never provided an answer to the doctor."

Useless information

"I don't know how our definition of full-time employment would've affected Richard anyway," said Nathan. "It didn't make sense to send useless information to Richard's doctor."

"Richard doesn't think the information would've been

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Refuses to consider …

(Continued from p. 1)

useless," said Carolyn. "Plus, he claims that he wasn't looking for unlimited time off. He was seeking no more than five days off every month."

"Yeah, he requested five days off," said Nathan, "but he qualified that by suggesting that it depended on how the medical treatments were going. We couldn't have that kind of uncertainty."

Job transfer

"Richard also contends that we could've accommodated his disability by transferring him to a job with regular hours," said Carolyn, "but we refused to even consider that option."

"We hired Richard to perform a specific role here," said Nathan. "We needed him in that job, not in some other position we didn't hire him for."

"That's a good point," said Carolyn. "It sounds like we tried to work with Richard on a reasonable accommodation, but his needs were too uncertain. We'll fight this lawsuit."

Result: The company lost. The court said a jury should decide whether the employer failed to engage in the interactive process in order to accommodate the employee's disability.

More difficult

The judge pointed out that the company neglected to provide the crew member's doctor with its definition of full-time employment, which made it more difficult for the staffer to properly complete the required accommodation-request form.

In addition, the court noted that the employee wasn't asking for unlimited time off; he was seeking five days off per month for his medical appointments. In the eyes of the judge, the worker's request was reasonable and the employer should've given more consideration to it.

Failed to engage

Moreover, the company refused to even contemplate a job transfer as a possible reasonable accommodation.

Taken together, the evidence showed that the employer failed to engage in the interactive process in good faith, so the lawsuit was allowed proceed.

Cite: *Dansie v. Union Pacific Railroad Co.,* U.S. Court of Appeals 10, No. 20-4054, 8/2/22.

What it means to you

When a crew member seeks a reasonable accommodation for a disability, it's important to remember one word: flexibility.

You're required to participate in the interactive process with an open mind. In this case, the employer refused to provide requested documents to the employee's doctor, then failed to even consider his proposals for five days off per month or for a job transfer.

At a minimum, the company should've provided the information sought by the man's doctor. Its failure to do so doomed its case. The employer also offered only flat-out refusals for the crew member's other suggestions, without even explaining to the staffer why his requests were unreasonable or how they might have caused a so-called undue hardship for the company.

You make the call

Man fired while recovering from emergency surgery

"Jack alleges that we fired him while he was in the hospital recovering from emergency surgery," said HR Manager Alan Frankel. "Is that true?"

"Well, I suppose it is," replied Supervisor Margie Brunton, "but it doesn't change the fact that we were justified in terminating Jack."

"Why did we dismiss him?" asked Alan.

"Jack failed to follow our required procedures for calling out of work," said Margie. "As you know, we have a phone number that staffers are supposed to use to tell their managers they'll be off the job. In the case of Jack, he didn't call his manager on the phone."

Used Messenger

"Jack did tell his boss that he'd be out of work because of the medical emergency, didn't he?" asked Alan.

"He did," replied Margie. "He used Facebook Messenger to let his supervisor know about the surgery, but he should've used the call-out phone number."

"Jack thinks he was justified in employing Facebook Messenger because he'd previously communicated with his boss that way. He's suing us for retaliating against him for exercising his rights under the FMLA, the Family and Medical Leave Act."

"That doesn't add up," said Margie. "First, Jack never formally requested FMLA leave. Second, he failed to provide his manager with a firm return date, as required under the FMLA."

"Jack contends that he couldn't stipulate a return date because he was in the middle of a medical emergency," said Alan.

"Jack failed to use our mandatory method for calling out," said Margie. "We should challenge this lawsuit."

Did the company win?

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

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HR Manager's Legal Alert for Supervisors (ISSN 1557-2102), September 23, 2022, Vol. 18, No. 418, 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

Black employee calls coworker 'white trash'

Do you have to take action if a white employee alleges race discrimination?

Yes – white workers can pursue claims of race bias.

Consider, for instance, the recent settlement agreement between the Equal Employment Opportunity Commission (EEOC) and Hampton Inn & Suites, Mooresville, NC, in which the employer agreed to pay $60,000 to resolve an EEOC lawsuit.

According to the EEOC, Rhonda Kendrick, a white employee, was forced to quit her job because she could no longer tolerate the discriminatory behavior of a Black coworker. The Black woman routinely referred to Kendrick as "white bitch," "white trash," and "white ho." She also said a group of white employees who took breaks under a tree were the "white tree people."

In addition to the offensive comments, the Black woman sabotaged Kendrick's work by delaying completion of her own job duties as long as possible. Kendrick repeatedly complained about the racism, but she became convinced that her managers wouldn't do anything about it, so she quit the job and contacted the EEOC.

After investigating Kendrick's claims, the EEOC filed a race-bias lawsuit against the company.

Based on EEOC v. T.M.F. Mooresville, LLC.

Workers won't discuss mental health issues

Don't hold your breath waiting for crew members experiencing mental health problems to tell you about it – a recent survey suggests that they won't.

The online poll of 1,207 U.S. employees and more than 500 HR executives and senior leaders conducted by Forrester Consulting showed that 49% of workers think that talking about mental health problems at work could have repercussions, including the loss of a job.

And the survey revealed a significant disconnect between how executives think employees are supported at work and how the staffers themselves feel.

According to the poll, 70% of managers believe their people are backed with paid time off and other benefits when they have mental health problems, but only 53% of crew members feel they're encouraged to take time off for mental health needs.

focus: employee feedback

What to do when a member of your crew rejects a negative performance appraisal

Oh, no! You just gave a negative performance review to one of your staff members, and she's not handling it very well. In fact, she refused to sign the appraisal, saying she doesn't agree with your analysis of her performance.

Keeping in mind that a negative performance review is often a springboard to a costly discrimination lawsuit, you want to respond to your crew member's concerns, but you're not sure how to proceed.

Before making a decision on your next step, consider talking to your HR manager about your options. He or she might have some good ideas on how to best handle the situation.

Among the alternatives that your HR manager might suggest is that you don't insist the unhappy worker sign her performance appraisal. Instead, ask her to simply acknowledge receipt of the document.

Her side of the story

And it might make sense to let the unhappy staffer offer her own rebuttal to the review. This gives her a chance to tell her side of the story, and it can lead to a helpful conversation about how to best address her performance issues.

Chances are that the staff member will state in her rebuttal that the review was unfair. Give her a chance to provide you with specific examples of how the review came up short. In select situations, you might want to revise the performance review, but do so only when the worker provides a solid justification as to why she's not meeting expectations.

While you might not agree with the points made in the woman's rebuttal, be sure to acknowledge receipt of the document, making it clear that you don't accept her conclusions.

Key: Providing the crew member with the chance to write a rebuttal in response to her poor review makes it less likely that she'll decide your appraisal was based on something other than her work, such as gender, race, or age, and then sue for bias.

New legal rulings

Staffer often prayed with his coworkers

While you can't fire a worker because of his or her religious beliefs, you can terminate a staffer for refusing to keep religion out of the workplace.

What happened: A Christian man liked to ask his coworkers whether they were Christian. He also initiated multiple prayer sessions. He was warned to keep religion out of the workplace, but he refused to do so and was fired after he continued to pray on the job.

Legal challenge: The man sued for religious discrimination.

Company's response: He was offending non-Christians.

Ruling: The employer won. The court said the employee wasn't dismissed because he was Christian; he was let go because he refused to keep religion out of the workplace.

Cite: *Eilefson v. Park Nicollet Health Services*, Court of Appeals of Minnesota, No. A22-0189, 8/8/22.

Was it OK to fire man for using legal weed?

Even in states where marijuana has been legalized, you might still have the right to fire an employee who tests positive for the substance.

What happened: A worker was terminated after the presence of marijuana was revealed in a post-accident drug test. The substance is legal in his state.

Legal challenge: The staffer sued, saying state law forbids the employer from firing him for engaging in a legal activity.

Company's response: We have the right to enforce our drug-testing requirements.

Ruling: The company won. The court said the use of marijuana isn't completely legal in the state because it's still outlawed under federal law.

Cite: *Ceballos v. NP Palace, LLC*, Supreme Court of Nevada, No. 82797, 8/11/22.

legal developments

Woman sues for age discrimination, says her employer was looking for 'new blood'

Supervisor's take-home: When talking about an open job position, try to avoid phrases such as "new blood" or "old ways" that could be misinterpreted as ageist.

What happened: A female staffer over the age of 40 was among a group of 34 crew members told that their job positions were being eliminated. They were also informed that they'd have an opportunity to apply for 20 retitled and redesigned jobs.

What people did: A hiring committee asked frontline supervisors to rate their workers on a scale of one to three, examined prior performance reviews and interviewed the candidates for the new position. The older woman interviewed poorly and wasn't among the 20 people chosen for the job. However, 55% of the candidates selected were over the age of 40.

Legal challenge: The older woman sued for age bias, arguing that she'd consistently received positive performance reviews and that she wasn't selected for a job opening because of her age. As proof of discriminatory intent, she pointed to a comment made by a hiring manager during a conference call about the new positions in which the supervisor had stated that the company was looking for "new blood."

Result: The employer won. The court dismissed the lawsuit. The judge said the one-off comment about new blood hardly amounted to ironclad evidence of age bias. In fact, noted the court, the phrase could mean many things, some of which have nothing to do with age. And the judge said 55% of the people chosen by the hiring committee were over the age of 40, dealing a fatal blow to the woman's allegation that she wasn't selected for a position because of her age.

The skinny: Employees rarely win age-discrimination lawsuits by relying on a single off-the-cuff, vague comment as proof of biased intent.

Cite: *Cronin v. Booz Allen Hamilton, Inc.,* U.S. Court of Appeals 3, No. 21-2085, 8/15/22.

legal nightmare

Man offended after his boss shows him an ISIS video, claims all Muslims are terrorists

Overview

A Muslim man was deeply offended when his boss said that all Muslims are terrorists.

The scenario

When Jon Randolph, a Black man who practices the Muslim religion, learned that he was being transferred to a special investigative unit (SIU) within the police department of the Southeastern Pennsylvania Transportation Authority (SEPTA), Philadelphia, he was overjoyed at the chance to work as a detective.

But Randolph's joy turned to worry after he met his new boss, Bryan McCauley, who had the unfortunate habit of using the N-word on a regular basis. McCauley even printed out an Instagram story that included multiple uses of the N-word, hung the article above his desk and called it the SIU's mission statement.

McCauley also told Randolph that he must like fried chicken and that the Black Lives Matter movement is a terrorist group. McCauley referred to a Black U.S. Marine as a Dark Green Marine. He said a Black SEPTA officer shouldn't be taken seriously because he had dreadlocks.

But McCauley didn't limit his offensive comments to Randolph's race. He also had issues with his Muslim beliefs. McCauley showed Randolph an ISIS beheading video and suggested that all Muslims are terrorists. He also argued that Muslim women shouldn't be allowed to wear hijabs.

After Randolph transferred from the SIU, he contacted the Equal Employment Opportunity Commission (EEOC). Unable to reach a settlement with SEPTA, the EEOC referred the matter to the U.S. Department of Justice (DOJ).

Legal challenge

The DOJ sued SEPTA for illegal discrimination based on race and religion.

The ruling

The employer lost. SEPTA agreed to pay $478,000 to make the lawsuit go away.

Based on USA v. SEPTA.

You make the call: The Decision

(See case on page 2)

No. The company lost. The court said the worker provided adequate notice to his boss about his need for leave under the Family and Medical Leave Act (FMLA).

Even though the employer required the use of the call-out phone number, it was still OK for the worker to use Facebook Messenger to contact his manager. For one thing, it was an emergency situation, so it might not have been realistic for the man to call on the phone.

Second, the crew member and his supervisor had been regularly communicating via Facebook Messenger, so it was suspicious that the employer suddenly had a problem with that approach.

And the staffer couldn't provide a solid return date because he was in the middle of a medical emergency.

What it means: Require the use of mandatory method

If your employer requires the use of a specific method for calling off the job, you should insist on the use of that approach when possible.

The worker here could still pursue his lawsuit even though he didn't use the call-out phone line because he and his supervisor had been communicating via Facebook Messenger. The manager should not have allowed the worker to use Messenger; the boss should've insisted on the use of the call-out phone line.

Caveat: Sometimes you have to let crew members use other communication methods, e.g., during medical emergencies.

Based on Roberts v. Gestamp West Virginia, LLC.