HR Manager's
Legal Alert
FOR SUPERVISORS
October 4, 2024

In This Issue

Filipino woman asked whether she was going to cook her dog

Boss also told her that 'you people have to be taught a lesson'

The scenario

A Filipino woman was feeling sick one day, so she advised her manager that she'd be a little late. When she arrived at work one hour after her scheduled start time, her direct supervisor slapped her with an Absent Without Leave notice, telling her that "you people have to be taught a lesson."

The woman's manager made several other comments that the staffer thought were discriminatory due to her national origin. For instance, her supervisor once asked her whether she was going to cook her dog. Another time, the supervisor rejected a medical form submitted by the worker, saying it was useless because it was from "some Filipino doctor."

The woman was also upset when her manager said her professional credentials weren't valid because they were from "out of the country," even though all her certifications were attained in the U.S.

Tired of the discriminatory behavior, the woman filed an internal complaint of national origin bias. Three months later, she was fired. However, her manager failed to follow the employer's policies, which required progressive discipline prior to dismissal.

Legal challenge

The woman sued, saying she endured national origin bias because she's Filipino.

The ruling

The employer lost. The court said the worker was subject to biased comments and behaviors, and that she was probably fired because she complained about it.

The skinny

Remember the value of sticking to your employer's policies when disciplining people. In this case, the organization didn't adhere to its own progressive discipline rule before terminating the woman, which made it harder to prove to the judge that the staffer was dismissed for nondiscriminatory reasons.

Cite: *Paras v. Austin,* U.S. District Court, D. Hawaii, No. cv-24-00268, 9/24/24.

White manager says he'll eat fried chicken and chocolate on Martin Luther King Day

After she's fired for threatening a coworker, Black employee sues for racial hostility

"I can't believe Tiayana is suing us for a racially hostile workplace," said Supervisor Nathan Hawkins, "especially because we had a solid reason for firing her."

"Why did we terminate Tiayana?" asked HR Director Carolyn McGill.

"Tiayana was dismissed after a coworker complained that Tiayana had threatened her with violence," said Nathan. "Apparently, the two women were engaged in an ongoing argument about how to handle the workload when Tiayana blurted out, 'I let you slide the last time without putting my hands on you, but this time I'll knock you out.'"

"That was an unfortunate comment," said Carolyn.

Violence policy

"I agree," said Nathan. "We investigated the incident and fired Tiayana for violating our workplace violence policy."

"Tiayana insists that she was mistreated and eventually terminated because she's Black," said Carolyn.

"What evidence does Tiayana have to prove her allegation?" asked Nathan.

"Tiayana points out that she once overheard her white manager state that he was going to observe Martin Luther King Day by eating fried chicken and chocolate, the type of food he thought Dr. King would eat," said Carolyn. "Tiayana was extremely upset about the offensive statement."

Stray comment

"I can understand why she was upset," said Nathan, "but it seems to me that one stray comment hardly amounts to severe hostility."

"Tiayana also argues that her boss engaged in other discriminatory behavior," said Carolyn. "For instance, he once told Tiayana and some of

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Fried chicken …

(Continued from p. 1)

her coworkers that his wife wouldn't take an ancestry test because she didn't want to discover that her ancestors were Black. He also said his wife couldn't cook, so she must be Black. Tiayana says the comments made it sound like there was something wrong with being Black."

Plainly insensitive

"Yeah, those statements were plainly insensitive," said Nathan, "but they don't prove racial hostility."

"According to Tiayana," said Carolyn, "she faced more than just comments. She claims that her manager and several of her white coworkers sometimes engaged in a game where they tried to guess the race of customers. Tiayana found the game to be abhorrent and in poor taste."

"It was a silly game," said Nathan. "However, neither the game nor the offensive comments changed the terms and conditions of Tiayana's employment. We should challenge this lawsuit."

Result: The company won. The court tossed out the case. The judge said the woman failed to prove that she endured severe and pervasive racial hostility.

Not intended

Yes, the woman's white male manager said some inappropriate things. However, the manager's statements about his wife's refusal to take an ancestry test and her poor cooking weren't personally directed at the Black worker.

In fact, none of the racist comments referred directly and personally to the Black staffer. Instead, they were stray statements that, while offensive, didn't effectively change the terms and conditions of the woman's employment, or make the workplace severely and pervasively hostile for her.

Supportable reason

The organization also provided a supportable reason for letting the Black woman go. She threatened a coworker, which was a clear violation of the employer's workplace violence policy. Because the company had a solid justification for firing her, the Black employee's claim that she was dismissed because of her race lacked merit, ruled the court.

Cite: *Schiraldi v. ProHealth Medical Management LLC,* U.S. District Court, E.D. New York, No. 21-cv-5956, 9/20/24.

What it means to you

Of course, you can't turn a blind eye to comments that could be considered racist. Keep in mind, however, that a worker trying to demonstrate a hostile workplace must show that the behavior happened frequently and for a long time. One or two stray remarks made over time are rarely enough to prove a racially hostile workplace.

Moreover, a worker pursuing a legal claim of a hostile work environment usually has to show that the offensive comments and behaviors were targeted directly at him or her. General statements about other people – even those who are members of the same race – usually don't constitute severe and pervasive hostility.

And the individual must demonstrate how the behavior altered the terms and conditions of his or her employment.

You make the call

Man threatens to send nude photos to coworker's family

"After Sam and Kristen ended their romantic relationship, things got really ugly," said Supervisor Margie Brunton. "Not only did they stop speaking with each other even though they worked together, but they also engaged in some foolish conduct."

"Yeah, I know they treated each other horribly after they broke up," said HR Manager Alan Frankel. "Sam even threatened to send nude photos of Kristen to her family."

"The whole thing was a big mess," said Margie. "However, I don't know how Sam can now claim that we fired him because he asked for leave under the FMLA, the Family and Medical Leave Act."

"Sam says he was let go just a few days after he requested leave so he could enter a rehabilitation program for alcoholism," said Alan. "He's suing us for FMLA interference."

Harassing her

"Keep in mind that Sam first sought the leave right after he learned that we were investigating Kristen's claim that he'd been harassing her," said Margie.

"Sam contends that Kristen spread some false rumors about him, including an allegation that he was having an affair with a coworker," said Alan.

"Neither one of them acted like a saint, that's for sure," said Margie.

"So Sam never actually took leave?" asked Alan.

"That's correct," said Margie. "Before Sam could start his leave, we fired him because the investigator concluded that Sam had violated our personal conduct policy."

"The timing wasn't great," said Alan, "but it sounds like Sam's dismissal wasn't related to his leave request. We'll 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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legal news for supervisors

Women are reluctant to report harassment

A new report reinforces the importance of making sure you respond promptly and effectively to allegations of sexual harassment.

The study conducted by Leanin.Org and McKinsey & Company found that most women don't think it's worth their while to report sexual harassment. The survey of 15,000 workers employed by 27 U.S. companies revealed that only 53% of women believe that reporting sexual harassment would be effective. In comparison, 65% of men said reporting sexual harassment would be worthwhile.

Yet women are more likely to suffer sexual harassment, with 37% of females who participated in the survey saying they've experienced sexual harassment during their careers, but only 22% of male respondents reporting sexual harassment.

Women are also more likely to endure sexual coercion, which includes being pressured to engage in an unwanted sexual relationship or being touched in a sexual way without consent. Fully 14% of women said they've experienced sexual coercion during their careers, compared with just 2% of men.

Your takeaway: A prompt, effective response to a sexual harassment claim tells everyone that you have zero tolerance for inappropriate conduct.

Job seeker failed to reveal her disability

Keep in mind that you still have to accommodate workers who fail to reveal their disabilities during job interviews.

Such advice comes too late for All Day Medical Care Clinic, Gaithersburg, MD, which has been forced to pay $75,000 to resolve a lawsuit initiated by the Equal Employment Opportunity Commission (EEOC).

The EEOC sued on behalf of Charlene Fisher, a woman who suffers from extremely poor vision. On her first day working for the clinic, Fisher requested specialized software to help her see better. But the employer refused to provide the software, and then berated Fisher for not revealing her disability during her job interview. When Fisher was fired later that same day, she reached out to the EEOC.

Based on EEOC v. All Day Medical Care Clinic.

focus: service animals

Here's what to do when a staff member asks to bring her dog into the workplace

If a member of your crew asked to bring her dog into the workplace, how would you respond?

Keep in mind that certain dogs could be considered a reasonable accommodation under the Americans with Disabilities Act (ADA), which means you can't just turn down her request.

Rather, you're required under the ADA to engage in the interactive process to determine whether the woman should be allowed to bring her dog to work.

The first thing to find out is whether the dog is considered a service animal or an emotional support animal – the difference will play a big role in shaping your response.

Service animals, which must be dogs only, have been trained to handle tasks such as guiding blind people, alerting deaf workers, or pulling a wheelchair.

Emotional support animals, which can be any type of pet, haven't been trained to perform specific tasks. Rather, they provide the person with emotional or psychological comfort.

Important difference

The difference between the two classifications of animals is important because you're legally required to consider letting the woman bring her service animal into the workplace, but you can usually deny a request for an emotional support animal.

When considering the worker's request for a service animal, you must engage in the interactive process. Remember that you have limited ability to turn down a request for a service dog, unless you can show that the animal would create an undue hardship because it could be a threat to health and safety, could lead to significant workplace disruption, or could cause a financial burden.

You can, however, ask the worker to provide medical documents to prove the need for the service animal, and certification records for the dog to show that it has been trained to perform specific tasks to help the woman perform her job.

New legal rulings

After failed drug test, CBD oil user is fired

You aren't expected to be a mind reader. Workers who aren't obviously disabled have to let you know when they want an accommodation.

What happened: A woman who used CBD oil to treat anxiety was fired after she tested positive for marijuana.

Legal challenge: The woman sued under the Americans with Disabilities Act, arguing that her former employer failed to accommodate her disability.

Company's response: She knew she could be drug-tested.

Ruling: The company won. The woman didn't request an accommodation for her disability until after she'd already failed the drug test, so the organization didn't have a reasonable chance to consider potential accommodations.

Cite: *Anderson v. Diamondback Investment Group,* U.S. Court of Appeals 4, No. 23-1400, 9/4/24.

Did supervisor punish staffer for bias claim?

Workers who allege retaliation must show a direct link between their protected activity and any adverse employment action.

What happened: Shortly after a woman of Guatemalan descent told the HR manager that her supervisor had called her "different," she was put on a performance improvement plan (PIP) by her boss. Prior to the conclusion of the PIP, she quit.

Legal challenge: The woman sued for retaliation, saying she was placed on the PIP because she alleged potential bias.

Company's response: Her boss was unaware of her complaint.

Ruling: The company won. The decision-maker didn't know about the woman's bias claim, so there was no link between her allegation and the PIP.

Cite: *Stratton v. Bentley University,* U.S. Court of Appeals 1, No. 22-1061, 8/15/24.

legal developments

Worker turned down for job because she couldn't work on Saturdays, her Sabbath

Supervisor's take-home: Take note: You're legally obligated to engage in the interactive process before rebuffing a job seeker who has requested a religious accommodation.

What happened: When a woman who belonged to the Seventh-day Adventist church applied for a job, she told the hiring manager that she wouldn't be available to work from sundown Friday to sundown Saturday because of her sincerely held religious beliefs. She indicated, however, that she could work during her Sabbath in an emergency situation.

What people did: Because the employer required crew members to be available for night and weekend work as well as for emergencies, the woman was turned down for the job without any discussion of potential accommodations.

Legal challenge: The woman sued for religious discrimination, arguing that the prospective employer didn't even consider potential accommodations of her religious beliefs before she was denied the job.

Result: The employer lost. The court ruled that the organization failed to engage in the interactive process before turning down the woman for the position. The judge pointed out, for instance, that supervisors could've given the staff member the opportunity to switch shifts with other workers if needed. And the job candidate indicated that she could work on her Sabbath in an emergency situation. Furthermore, said the court, the organization failed to show how providing a religious accommodation to the woman would've created an undue hardship.

The skinny: Employers that refuse a potential religious accommodation to a job seeker without first considering alternative options are unlikely to prevail in court should the person later sue for unlawful bias.

Cite: *Brown v. Department of Corrections & Rehabilitation,* California Court of Appeals, No. C095798, 9/23/24.

legal nightmare

Woman who complained about offensive catcalls told she works in a 'boys' club'

Overview

A woman who complained to her male supervisor about sexual harassment was told that the workplace was a "boys' club."

The scenario

When she was hired as a production planner for AMZ Manufacturing Co., York, PA, Emily Rietschy knew that she'd be working mostly with men. However, she didn't anticipate how poorly her male colleagues would treat her because of her gender.

Almost every day, male workers catcalled Rietschy as she walked the production floor, shouting out that she had a "nice ass" and "nice tits." When Rietschy reported the unwelcome conduct to Joseph Sallinger, production manager, he told her that the plant was a "boys' club" and that's just "how it is."

One male employee, Sam Gurreri, Sr., a maintenance mechanic, especially liked to harass Rietschy. While speaking with Sallinger one day, Gurreri complained that women talk too much, stating, "God gave women two sets of lips, but at least one set of lips doesn't talk." And when Rietschy asked Gurreri to help her move a dry erase board, he said, "Only if I can mount you first."

When Rietschy complained about Gurreri, Sallinger told her that she needed to develop a thicker skin.

Rietschy also had trouble getting men to listen to her. When she suggested a solution to a production problem, Terry Miller, VP of technical operations, made a stop gesture in front of her face, then said, "Men are speaking."

Things became so intolerable that Rietschy quit, then contacted the Equal Employment Opportunity Commission (EEOC).

Legal challenge

The EEOC sued AMZ for sexual harassment.

The ruling

The company lost. AMZ agreed to pay $110,000 to settle the lawsuit.

Based on EEOC v. AMZ.

You make the call: The Decision

(See case on page 2)

Yes. The company won. The court tossed out the lawsuit.

The judge said the crew member failed to prove that he was terminated because he asked for FMLA leave so he could participate in a rehabilitation program to treat his alcoholism.

Yes, the staffer was let go just a few days after he asked for FMLA leave. However, the court noted that the timing of the employee's leave request was suspicious to begin with – he asked for leave right after he discovered that his employer was investigating him for a potential violation of its conduct policy.

According to the judge, FMLA leave isn't intended as a "get out of jail free" card that employees can use to avoid discipline.

What it means: Be sure to have solid evidence

You probably already know that it's rarely a good idea to terminate someone or take any other adverse employment action against a staff member right after he or she has asked for FMLA leave, because doing so could lead to an interference lawsuit.

However, as this case illustrates, you're usually on solid legal ground when you fire a worker who could be using a leave request as an excuse to avoid potential discipline.

The bottom line: Make sure you have strong evidence to justify any disciplinary measures taken against a crew member who recently requested medical or family leave.

Based on Blockhus v. United Airlines.