

# Supervisors LEGAL UPDATE™



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October 2, 2020

## OUR TOP STORY

**Childcare and absenteeism: What supervisors need to know**

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6-point checklist to document better



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7 questions to ask yourself before deciding whether to fire someone



## INSIDE

**ADA: COVID-19 and 'direct threats'**

**Firm pays \$1.25M for racial bias**

**Families First and back to school**

**How much medical leave is enough?**

## Worker fired after childcare snag leads to attendance problems

### Boss pried into employee's caregiving duties

**C**indy, are you wearing sneakers?" supervisor Tom Loper asked. "That's against the rules. You know that."

Cindy let out a low groan as she spun around in her chair and looked up at Tom.

"Everything swells when your pregnant," she said with a smile. "Especially your feet."

"All of my shoes have gotten way too tight on me," she explained.

"I just wore these sneakers until I can get to a store and find an affordable pair."

"Well, you should plan to do that on your way home tonight," Tom said bluntly.

"I don't want to see you wearing

sneakers tomorrow, OK? Pregnant or not, no sneakers at work."

### Out of earshot

Cindy pulled off her headset and nodded for Tom to follow her.

When they came to a quiet corner, outside the earshot of her co-workers, Cindy stopped and began whispering.

"I won't be able to buy shoes until my next paycheck," she confided.

Tom looked at her puzzled.

"Don't you have a two-year-old at

*Please see Childcare ... on Page 2*

## Sharpen Your Judgment

### Co-worker kept staring at her; Must boss stop it?

**H**R manager Lynn Rondo was finishing her first cup of coffee when company attorney Eric Bressler knocked on her door.

"Hi, Lynn," he said. "Got a minute?"

Lynn stood. "Sure. I was just going to get more coffee. Walk with me."

Lynn and Eric headed for the break room. "I wanted to talk to you about Cassie Chen," Eric said, face grim. "She's suing us for a hostile work environment."

### Severe and pervasive?

Lynn stopped in her tracks. "You can't be serious!"

Eric frowned. "I know she had some issues with

Lou, but I didn't think it would escalate to this."

"Cassie complained to me about Lou," Lynn explained. "Apparently he would stare at her constantly and follow her around during her shift. It made her very uncomfortable."

"Did you talk to Lou?" Eric asked.

"Of course," Lynn replied. "I told him the behavior was unacceptable and he needed to stop. But Cassie said he still did it." Lynn shook her head. "I feel for Cassie, but I hardly think staring is enough to establish a hostile work environment."

"We'll fight this, then," Eric said.

When Cassie sued for a hostile work environment, the company fought to get the case dismissed. Did it win?

This regular feature sharpens your thinking and helps keep both you and your firm out of trouble. It describes a real legal conflict and lets you judge the outcome.

*Make your decision, then please turn to Page 4 for the court's ruling.*

# Childcare ...

(continued from Page 1)

home?” he asked.

“Of course, Ethan,” she said.

“Cindy, if you’re living paycheck to paycheck, what kind of future is that for Ethan?” Tom asked.

“And now you’re having another one? You really need to get your priorities straight, hon,” he said.

“Tell me, doesn’t Ethan have a father somewhere who’s helping you with support?”

A tear welled up in Cindy’s eye.

“That’s really not what I walked over here to talk to you about,” she said, sharply.

“I’ll get the shoes tonight. OK! I’ll just have to juggle a few bills.”

“For your sake, I hope so,” Tom said.

“For my sake. What’s that supposed to mean?” Cindy asked.

## On the bubble

“It’s a fair warning,” Tom said. “You’re already on the bubble here, so you don’t need another strike against you.”

“On the bubble for what?”

“I think you know,” Tom said. “But let me spell it out for you.

“You’re a fast learner and a pretty good worker, but you’re never here anymore,” he said.

“All of my absences so far have

all been excused,” Cindy said.

“There are still too many,” he said. “You’re either out because of childcare issues, or you’re off to the OB-GYN.”

## Babysitter cancels

A few days later, Cindy’s babysitter canceled unexpectedly.

She called Tom to say she couldn’t make it in.

“Why don’t you get Ethan’s dad to watch him?” he told her. “Or don’t bother coming in at all.”

When Cindy failed to show, she was fired for excessive absences.

She sued for gender bias.

She claimed her boss was biased against her because she was a single mom and he didn’t approve of how she was raising her family.

The company claimed the worker was fired for excessive absence, and for no other reason.

**Decision:** The employer lost when a judge sent

the case to trial, which frequently results in a hefty out-of-court settlement.

The court said the supervisor left himself wide open to a lawsuit because “stereotyping about the qualities of mothers is a form of gender bias.”

**Key:** Steer clear of how workers conduct their personal lives.

Case: *Matthews v. CT Light & Power Co.*

## What you need to know:

It is illegal for an employer to treat an employee less favorably either because of their pregnancy, or because of the worker’s caregiving responsibilities.

- You may not require that a pregnant worker take leave until her child is born or for a predetermined time thereafter, provided she is able to perform her job.
- While “caregiver” status is not a prohibited basis under the federal equal employment opportunity statutes, discrimination against workers with caregiving responsibilities may be actionable when an employer discriminates based on sex or another characteristic protected by federal law.

## TEST YOUR KNOWLEDGE

### Understanding the ADA ‘direct threat’ and COVID

The ADA requires employers to make reasonable accommodations for employees with disabilities, to allow them to perform their jobs.

However, even an employee who has a disability as defined by the ADA, and can perform the essential functions of the job, may be fired based on his or her disability if the employee poses a “direct threat.”

To test your knowledge, respond *True* or *False* to the following:

1. An employee is not protected by the discrimination provisions of the ADA if that employee is properly deemed to be a “direct threat.”
2. Employees exhibiting symptoms of COVID-19 can be legally banned from being in the workplace.
3. Because of medical confidentiality rules, it is proper for an employer to deem an employee a “direct threat” based on subjective observations.

## ANSWERS

1. *True.* A “direct threat” is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.
2. *True.* Under the direct threat defense, an employer may ban from the workplace an employee who exhibits symptoms of COVID-19.
3. *False.* Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information such as the duration of the risk, the nature and severity of the potential harm, the likelihood that potential harm will occur and the imminence of the potential harm.

## Answers to the quiz:

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# Where other supervisors went wrong

## News you can use to head off expensive lawsuits

*This feature highlights violations of workplace laws. You can learn how other supervisors got off track, what the mistakes cost and how to avoid them.*

### **Mexican eatery pays \$50K for sex harassment**

**What happened:** Female employees at Sol Mexican Grill, in Washington, D.C., were subjected to sexual harassment by a supervisor. The harassment included unwelcome sexual comments and propositions and unwelcome physical contact. When the employees complained about harassment, Sol Mexican Grill failed to adequately respond to the harassment and instead retaliated against the female employees by reducing their work hours or firing them for objecting to and complaining about the harassment, and for participating in the EEOC's investigation.

**Decision:** The firm agreed to pay \$50,000 to settle the claim, and to retain a consultant with expertise in Title VII compliance to investigate any complaints of sexual harassment and retaliation; provide a revised sexual harassment policy in English and Spanish; provide training to all employees on preventing and reporting sexual harassment; and provide periodic reports to the EEOC.

**Cite:** EEOC v. Sol Mexican Grill, LLC.

### **Management firm out \$42K for pregnancy bias**

**What happened:** Multi-South Management Services, LLC, a Memphis-based property management company, fired the community director of a large apartment complex in Montgomery, Alabama, after she began having medical complications that made her

high-risk for pre-term labor. The same day Multi-South officially took over management of the complex, it fired her without warning or explanation. The employee, who had been in her position for over four years with no record of performance problems, was the only employee at the complex not retained by Multi-South. She was abruptly fired shortly after offering a management official a doctor's note detailing her pregnancy related limitations.

**Decision:** Along with agreeing to pay \$42,500, the firm is prohibited from discriminating against any applicant or employee due to gender, pregnancy or disability in the future.

**Cite:** EEOC v. Multi-South Management Services, LLC.

### **Air Systems Inc. pays \$1.25M for racial bias**

**What happened:** Air Systems Inc., a San Jose, CA, electrical contractor, failed to remove racist graffiti of swastikas and racial epithets drawn on the walls of the portable toilets at the Apple Park construction project, as well as a noose at the worksite hung next to a scrawled note containing other expletives, and a threat of lynching. In addition, the company failed to act when notified by two African American employees that a white co-worker had taunted them with racial pejoratives.

**Decision:** Air Systems will pay \$1.25M to eight African American workers.

**Cite:** EEOC v. Air Systems, Inc.

## STOP, LOOK, LISTEN ...

### Understanding FFCRA

Here's when employees can take paid leave under the Families First Coronavirus Response Act:

1. When their child is out of school due to COVID-19-related reasons. Up to 12 weeks of paid leave is available to employees if their child's school or place of care is closed due to the coronavirus, and the employee is unable to work or telework.

2. When their child's school is physically closed, but is in session online. Employees can take FFCRA leave if the physical location of the child's school is closed, but they're still expected to complete assignments.

3. When a school is operating on a hybrid model and is only physically open part-time, an employee may be able to take intermittent paid leave – but it's up to the employer.

Employees can't take paid leave under the FFCRA when their child's school is open, but they decide to homeschool their child anyway.

Here's some sound legal advice from the law firm of Cozen & O'Connor when employees work from home:

1. Hours still need to be recorded accurately at home. While it's difficult to track hours worked when employees are remote, it's still just as essential – particularly for nonexempt workers.

It's important to communicate to your hourly workers that they're expected to continue to track their breaks and to take note of any childcare-related interruptions.

2. You aren't required to pay remote employees the same salaries they earned in the office. Employers have the ability to reduce employees' pay, but it's important to review local and federal laws before doing so.

3. You may be required to reimburse remote employees for at-home business expenses. Many states require employers to cover workers' business expenses, so it's important to check your local laws.

Even if it's not required, it's a good idea to do it anyway, as it can take some of the burden off your staff during this difficult time.

**SUPERVISORS SCENARIO**

# How much is too much when it comes to extended medical leave? Court decides ...

## *Supervisor on the hook for denying leave ‘accommodation’*

“I gotta tell you we have the best group of employees anywhere,” Rachel Barnes said gleefully.

“Two more people just signed up to donate some of their time off to me so I can take medical leave when I need it.”

“That’s great,” Supervisor Bill Ross said. “Our people do have big hearts. Enjoy it while it lasts.”

“While it lasts?” Rachel said. “What do you mean by that?”

“Well, having people donate some of their time off for you to use so you can be out of the office when you’re sick is a great accommodation,” Bill said.

“But it’s not an arrangement that can just go on forever.”

“Who knows how long it can last,” Rachel said. “Two new people just signed on. There will be more.”

“What I mean is, after this, I’m pulling the plug on this arrangement,” Bill said.

“But I have an auto-immune disorder and I don’t ever know when I’ll be sick or for how long,” Rachel said. “I need the

extra leave so I can keep my job.”

“I’m not so sure,” Bill said. “The problem is, you’re out too much. You are the receptionist and I need you here greeting people. Physically being here is essential to your job.”

### **Essential job functions**

Rachel sued the firm for violating her ADA rights by denying her access to an accommodation.

The firm argued the employee, by missing so much work, simply wasn’t able to perform the essential functions of her job, which included greeting people and answering phones.

**Decision:** The company won when the case was dismissed. The court ruled that providing the employee virtually unlimited medical leave was not reasonable.

**Key:** Extended time off beyond FMLA may be denied in certain instances if it prevents a worker from performing essential job functions.

*Case: Winston v. Ross*

### **What you need to know:**

This case underscores the importance of position descriptions, and their accuracy. To ensure you PDs hold up under legal scrutiny:

- Check to be sure they are realistic – that they accurately describe the major duties and aren’t just “paperwork.”
- Periodically review the PDs with your employees, maybe during performance reviews, to catch and document any change.
- Sit down with HR to go over the PDs and get answers to any questions you might have.

## ***Sharpen Your Judgment* – THE DECISION**

*(continued from Page 1)*

No. The company lost when a court said the case should go to trial.

The company argued that Lou’s conduct wasn’t severe and pervasive enough to constitute a hostile work environment. It also claimed the company acted appropriately by telling Lou his conduct was unacceptable.

But the court said a jury could possibly find the conduct to be severe and pervasive.

The court also pointed out there was some doubt as to whether the company’s response was “prompt and effective.”

It acknowledged that the firm counseled the employee about his actions, but it was unclear whether the company expressed

“strong disapproval” for the behavior, or made clear it needed to end.

### **Handling harassment**

This case shows that not only is it important to take sexual harassment complaints seriously, but to respond appropriately and effectively.

The company addressed the issue but because the harassment continued it threatened to become “severe and pervasive.”

All harassment complaints, no matter how big or small, should be taken seriously and handled swiftly.

*Case: Simmons v. Safeway, Inc.*

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