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OUR TOP STORY

How far must you bend under the Americans with Disabilities Act?

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7 questions to ask yourself before deciding whether to fire someone



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'Phony' excuses cause problems

The ADA: He can't do the job anymore; can you let him go?

Supervisor stuck in a sticky legal spot

"I just got the results of your medical exam from HR," Jan said to George as he sat down in her office. "We need to discuss the results."

"I don't even know why I had to take that exam," he said.

"George, you've fallen down several times here and injured yourself," she explained. "Given that your job requires you to make lots of trips over to the warehouse – plus your history of taking leave because of balance and dizziness problems – we couldn't take any more risks with you."

"And on top of that, your performance has dropped to a dangerously low level."

"OK, OK," he conceded. "So exactly what did the doctor say?"

Now what?

Jan scanned the report as she spoke: "Your dizziness problem is getting worse, to the point, according to the doctor, it's probably not even safe anymore for you to do your job."

"Well, now what do we do?" he asked.

"I've talked to HR, and it looks like we have an option," she answered. "I've

*Please see **Let him go?** ... on Page 2*

Sharpen Your Judgment

Religious beliefs prevent Saturday work shift

"I'm really hoping you can take me off Saturdays," Bianca said to her supervisor, Lynn Graves.

"I mean, I'm thrilled I got this promotion," Bianca added, but working Saturdays is strictly forbidden by my religion."

"I've thought about this pretty carefully," Lynn replied. "But unfortunately, if you want this management position, you have to work Saturdays. There is just no getting around it."

Unreasonable, or not?

Bianca frowned.

"I can't, though. It's against my religion. I just explained that to you," she said.

"I know," Lynn replied. "But if you can't work on

Saturdays, we'll need to have others work overtime, or even hire an assistant manager to help pick up the slack.

"It just doesn't make business sense for us."

Bianca's eyes narrowed as she grew angrier. "You have to accommodate my religious beliefs," she said. "I know my rights. You can't not give me the job because of my religion."

"We're required to give you a reasonable accommodation," Lynn pointed out. "And your request isn't reasonable."

"I'll see you in court," Bianca huffed.

When Bianca sued for religious discrimination, the company fought to get the suit 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.

Let him go? ...

(continued from Page 1)

looked at several positions you might be able to fill here – jobs that don't require a lot of walking around. We might be able to place you in one of them."

"I assume they'll be at the same salary I'm making now," he said.

"Well, no, actually," she said. "They're all at a little bit lower salary, but they're really all we have available for right now."

"That's not going to work for me," he said. "I'm barely making ends meet now. A salary cut would bury me, for sure."

Jan scratched her head, thought for a moment and then said, "Then we're in a tough spot. You can't do your job safely or competently. What exactly are we supposed to do about this?"

"How about if you let me have a trial period with my job?" he suggested. "Give me one more chance."

Maybe another option

"I can't do that," she replied. "It puts you and the company at risk, but maybe there is something."

"Like what?" he asked.

"Go see another doctor," she said. "If you can get one to clear you and say the problem is stabilized or getting better, I'll give

you another chance."

He shook his head as he responded: "I'm not going to go through all those tests again."

"Then you leave me no other choice but to let you go," she said. "But the offer of one of the lower paying jobs still stands."

"I already told you that's not going to work for me," he said.

Illegal denial?

With that, Jan began the procedure to terminate George.

He continued to refuse the jobs with lesser pay and sued the company for violation of the Americans with Disabilities Act. He said he was forced to undergo an improper medical exam and was illegally denied a suitable position as an ADA accommodation.

The company maintained it had done everything legal and practical to try to resolve the problem.

Decision: The

company won.

A judge said the medical exam was legal and proper, given the employee's history of problems and failing performance.

The supervisor tried to accommodate the medical problem. Every action was a reasonable one that took into account the needs of the business and the employee.

Case: *EEOC v. McLeod Health Inc.*

What you need to know:

The Americans with Disabilities Act sets out some strict guidelines on the prohibitions for supervisors and employers when dealing with disabled, injured or ill employees.

In particular, you cannot:

- bar an employee from filling a position or doing a task because you have decided the disability prevents the employee from doing it; only documentation from a medical provider can do that, or
- use past and outdated medical histories on which to base a determination that an employee is unable to do a job because of a disability.

TEST YOUR KNOWLEDGE

Keys to avoid family bias

Family responsibilities discrimination arises when workers are treated less favorably because of their caregiving responsibilities, such as caring for children, aging parents, ill spouses, or other family members with disabilities.

To test your knowledge of such lawsuits – and how to avoid them – answer *True* or *False* to the following:

1. A full-time employee announces she's pregnant. It's OK to ask if she'll continue on a full-time schedule after she has the baby.
2. You're interviewing someone for an opening that involves long hours. It's OK to ask if he or she has obligations that might interfere with putting in the hours required.
3. To care for an ill spouse, an employee takes FMLA, and as a result, misses a deadline. It's OK to note the missed deadline in the employee's performance review and to withhold a raise because of it.

ANSWERS

1. *False.* Asking a question like that could lead her, or a judge, to assume that you believe women with children can't or shouldn't work full time. The better idea is to wait for her to bring up the subject. If she does, you can discuss it.
2. *True.* Asking if "outside obligations" will interfere with the requirements of the job is OK. However, if you ask such a question, be certain that you ask it of all candidates – male and female alike.
3. *False.* Approved leave taken under the Family and Medical Leave Act is considered a "tree pass." You cannot penalize employees whose productivity decreases as a result of taking such leave. Similarly, if you approve perfect attendance awards and bonuses, the time taken for such leave cannot be considered when deciding if the employee is eligible for such a bonus.

Answers to the quiz:

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.

Owner's sex and race bias has hefty price tag

What happened: Climatemp Cooling & Heating, Inc., an HVAC company based in Summerdale, AL, fired a former employee in retaliation for his complaints about the firm's owner's harassment of female employees and refusal to hire qualified Black applicants. The EEOC charged that the owner frequently called female employees derogatory names, referred to having hired them for sexual favors, and mocked their intelligence.

The owner also referred to African Americans with derogatory terms and instructed employees to indicate the race of Black applicants to ensure they were not hired. The company fired another employee because she had biracial grandchildren, the EEOC charged.

Decision: To resolve the case, Climatemp agreed to pay \$175,000 to 13 people affected by the owner's behavior, as well as develop and communicate to all employees company policies designed to ensure a discrimination-free workplace, annually train its employees, and provide multiple avenues for employees to report discrimination, harassment and retaliation.

Cite: EEOC v. Climatemp Cooling & Heating, Inc.

Teen sexually harassed by restaurant supervisor

What happened: A male manager for a chain of Nebraska

restaurants grabbed a teenage female employee's buttocks while making a sexual comment to her, and male co-workers repeatedly made inappropriate sexual comments about her body.

After the teen's mother contacted the restaurant to complain, the manager showed up at her house twice, causing great distress to her and her family. The EEOC said that the harassment forced the teen to quit her job.

Decision: The company was ordered to pay \$85,000 and issue an apology to the teen and her family.

Cite: EEOC v. El Vallarta, LLC.

Disability discrimination costs design firm \$25K

What happened: A sales administrator for Design and Integration, Inc., Baltimore, requested to telework one day per week for a three- or four-week period as a reasonable accommodation for her disability, anxiety and depression.

Instead, the firm fired her, stating it would never had hired her had it known about her conditions.

Decision: Along with paying the employee \$25,000, the firm agreed to provide telework as a reasonable accommodation in the future, provide training on the ADA, post a notice of the settlement and posters required by EEOC regulations, and report to the EEOC on its compliance with the consent decree and its handling of any future requests for reasonable accommodation.

Cite: EEOC v. Design and Integration Inc.

STOP, LOOK, LISTEN ...

Problem-solving to help employees ease stress

Many employees feel stressed because they face more and different problems every day.

The line between work and life has blurred – whether they work remotely or not – and issues from each bleed into the other.

Many people try to solve problems without a strategy. They hope for the best, and sometimes make things worse.

5 quick steps

This quick approach to problem-solving from Harvard researchers can help. Pass it along.

Define the problem. No matter how small (meeting a deadline) or large (finishing an unprecedented project), name it.

Brainstorm potential solutions. Throw in easy fixes, major overhauls and out-of-the-box ideas.

Rank the solutions. Consider what's most feasible considering time, resources, practicality and alignment with personal and corporate goals.

Develop an action plan. Set deadlines, define tasks and anticipate outcomes.

Test the solution. Regularly check that the plan is working so there's time to step back, adjust or try another solution.

One last thing ...

Encourage and remind front-line managers to talk one-on-one with employees as often as every two weeks about:

- their goals, duties and workloads
- availability of time and resources to meet those
- feelings about ability to handle their workload, and
- ideas to better handle the workload (for instance, through streamlining, different resource allocation, change in process, etc.).

SUPERVISORS SCENARIO

Employee wants med leave after giving ‘phony’ excuses: Did boss make the right call?

Hasty decision leads to protracted legal mess

Steve barged into the office of HR manager Lucinda Howell and said, “I want to start the process for firing Maddie right now.”

“Whoa,” Lucinda replied. “Can you give me some background on this?”

“You bet,” he said. “Three or four times in the last six months she’s left work early without telling me or anyone else about it. She always had some phony excuse – ‘my neighbor needed a ride,’ ‘my sister’s daughter had to be picked up from school.’

“I told her if it happened again, she’s outta here.”

“And it happened again?” she said.

“Yesterday,” he fumed. “I was looking for her around 2 o’clock to answer a customer’s question, and she was gone. Today, I confronted her about it.”

“What did she say?” Lucinda asked.

“She said she felt ill and had to leave right away to go to the doctor’s,” he replied. “She knew she was in trouble, so she said she wanted the time off to count

as leave under the Family and Medical Leave Act.”

Doctor’s note?

“Then she should have a note from her doctor,” Lucinda said.

“She says it will take a couple of days to get the note,” he noted as he rolled his eyes. “It’s just another phony excuse.”

Steve went ahead with the termination, and Maddie sued for violation of the FMLA, saying she had a legitimate illness.

The company said it was part of a pattern of suspect excuses.

Decision: The firm lost. The judge noted that it was true that the employee had a string of unexcused absences and had been warned about further offenses.

But the employee did offer a reasonable excuse for leaving without permission and also offered to obtain the required FMLA documentation.

The firm should’ve given the employee time to obtain the document.

Case: Stringfield v. Cosentino’s Food Stores.

What you need to know:

This case illustrates at least two key points about how courts treat FMLA leave requests:

- Employees must be given every reasonable opportunity to provide the documentation to support an FMLA claim, and
- Past offenses – unauthorized absences – can’t be factored into whether an FMLA claim is valid; the claim must be judged on its own merit.

Supervisors who ignore those points put their companies at risk.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a court dismissed Bianca’s lawsuit.

Bianca’s attorney argued Bianca was passed over for promotion because her religion prevented her from working on Saturday – a clear violation of the Civil Rights Act.

The company was legally required to accommodate her religious beliefs, the attorney said. But the court disagreed.

It said Bianca’s inability to work Saturdays created an undue burden for the company, which then would have to hire additional help to cover Bianca’s absences.

Furthermore, the Civil Rights Act “does not place the burden of accommodation on fellow workers,” the court said – and granting

Bianca’s request would force her colleagues to work overtime to pick up her slack. Bianca’s accommodation request wasn’t reasonable.

Undue hardships

While employers must consider an accommodation request from a protected employee, they don’t have to grant the request if it poses an undue hardship to the business. And asking co-workers to add to their workloads is considered an undue hardship.

It’s important though to never outright deny a request, even if it seems immediately unreasonable. Always go through the interactive process.

Case: EEOC v. Walmart.

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