

# Supervisors LEGAL UPDATE™



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December 15, 2021

## OUR TOP STORY

**Pitfalls bosses can face with workers out on FMLA**

## ONLINE

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### Management Minutes

6-point checklist to document better



### Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



## INSIDE

**Medical-related inquiries: Caution**

**Disability bias costs firm \$25K**

**Planning a virtual holiday festivity**

**Stray remark was dumb, but does it prove bias?**

## Out on FMLA with no clear return date: Did boss make right move?

*Sometimes health problems don't follow the calendar*

“What do you mean, I don't have a job here anymore?” Samantha howled.

Del, her boss, shook his head as he replied, “It's mostly because of a big mix-up when you started taking family medical leave, but I have to say you're the one who caused it.”

“Me?” Samantha blinked. “How?”

“First, you walk in here all of a sudden and announce you're coming back after I already hired a replacement. But let's back up a sec,” Del said.

“When your daughter got ill, you said

you needed leave to take care of your grandchildren,” he explained, “but you never gave me a date when you'd be back.”

**'You didn't give me an answer'**

“That's because I didn't know when the date would be,” she protested. “The doctor said he couldn't give us a firm date.”

“OK, then your daughter went into treatment, and I asked you when that would be completed,” he said. “Still, you didn't give me an answer.”

“There was a good reason I didn't,” she

*Please see **Right move?** ... on Page 2*

## Sharpen Your Judgment

### Was firing retaliation for pregnancy leave?

“Welcome back, Betty. How was your vacation?”

Supervisor Betty Murphy looked up from all the papers on her desk and saw company attorney Jim Gannon standing in her doorway.

“It was great, but I have so much catching up to do,” Betty said.

“So I guess you haven't heard about Kayla Lee suing us,” Jim said.

#### Falsified resume

“We had every right to fire Kayla,” Betty said. “We found out she lied on her resume and wasn't qualified for her job!”

“Kayla's lawyer is calling this retaliation, since

she was fired as soon as she got back from maternity leave,” Jim said.

“While she was out on leave, a few people were covering for her,” Betty explained. “But they found out Kayla was not getting her work done.”

“So you checked her resume?” Jim asked.

“Yes,” Betty replied. “Turns out, Kayla had two resumes on file that didn't match up. She falsified her second resume to get this job.”

“Kayla's lawyer says she just embellished her resume a little and should've been given a chance to fix her performance,” Jim said.

When Kayla sued for pregnancy discrimination and retaliation, 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.*

# Right move? ...

(continued from Page 1)

insisted. “There was no guarantee she’d be able to take care of her kids when the treatments were completed. And it turned out she wasn’t able to, so if I gave you a return date, it would have been wrong.”

“Sam, you can see how this all starts to pile up – not communicating with me,” he pointed out.

“I mean, we have a business to run here, and I can’t just say, ‘Oh, she’ll get in touch with me when she wants to.’”

“C’mon, Del, you’re just exaggerating,” she sighed.

“Am I?” he shot back. “Well, how ’bout this:

“You sent me an email saying the doctor said your daughter would need four more months of recovery, which would put you well past the time you had available for leave.”

## The response

Samantha rolled her eyes as she replied: “That was in response to your question about how she was doing. She is going to need that much time.

“But we’re going to hire someone to come in and help when my leave’s up. In fact, I planned to return on the date my leave

was used up. Today!”

“This mess gets bigger and bigger, but the bottom line is you never communicated all this to me,” Del said, “and I felt forced to hire someone.

“I’m sorry, but I can’t just go ahead and fire your replacement,” he went on. “Maybe if something opens up, I can bring you back.”

## Followed the law

Samantha decided that wasn’t good enough and sued the company for a violation of the Family and Medical Leave Act.

She said she had followed the letter of the law by giving her supervisor all the information required under the FMLA.

The company said she’d been lax and misleading about her leave needs, causing her supervisor to reasonably assume he needed to hire a replacement.

**Decision:** The company lost. A judge said that

while the employee’s methods of communication hadn’t been perfect, they still were sufficient to meet the requirements of the law. And if there had been holes in communication or confusion, it was up to the company to ask the right questions.

**Key:** The supervisor in this case needed to call in HR to get to the bottom of the problem and recommend a course of action.

*Case: Gienapp v. Harbor Crest.*

### What you need to know:

The Family and Medical Leave Act can be complicated and confusing, and made even more so by employees who may not understand their obligations under the law. If an employee of yours requests FMLA leave:

- Inform HR and your boss of the request and get up-to-speed on your company’s policies concerning FMLA leave
- Stay in touch with employees on leave to get the best possible fix on the situation and a likely return date, and
- If there are complications – such as requests for extended time – let HR know about it and ask how to proceed.

## TEST YOUR KNOWLEDGE

### Are you asking too many medical-related questions?

It always pays to be super careful about asking medical questions and requiring medical exams.

For a medical exam or inquiry of a current employee to be legal under the ADA, it must be “job-related and consistent with business necessity.”

To test your knowledge of how to proceed safely in this tricky area, respond *True* or *False* to the following:

1. A policy calling for periodic physicals or answers to medical questions is generally accepted to be a good, safe practice.
2. A safe way to learn about potential disabilities your employees might have is to have ALL your employees fill out a medical questionnaire at the same time.
3. You can require an employee with a known disability to take a fitness-for-duty exam.

## ANSWERS

1. *False.* It’s never a good idea to ask medical questions or subject employees to medical exams unless you have evidence that the employee has a medical condition that impairs their ability to do the job – or poses a direct threat.
2. *False.* It can be a violation of the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act (GINA) to submit employees to medical exams and inquiries that are not job-related or consistent with a clear, documented business necessity.
3. *True.* If an employee has a disability, an employer may require a fitness-for-duty exam only if the employee’s condition may prevent the employee from performing the job’s essential functions, or the employee poses a direct threat to his or her own safety or the safety of others.

### 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.*

### Equipment firm pays \$25K to settle disability lawsuit

**What happened:** Strategic Equipment, LLC, d/b/a TriMark Foodcraft, a Delaware corporation that specializes in commercial kitchen equipment and operates a distribution facility in Winston-Salem, NC, fired an employee who'd asked to return to work with an oxygen tank as an accommodation.

An accounts payable temp for Trimark was admitted to the hospital for breathing complications related to her disability. When the temp tried to return to work, she notified Trimark that she required the use of a personal oxygen device and would need to bring it to work with her. Trimark fired her.

The EEOC's position is that Trimark had a legal obligation to permit the employee to use her oxygen tank at work as a reasonable accommodation.

**Decision:** Along with paying \$25,000, TriMark agreed to amend its discrimination policy to include examples of job modifications that may qualify as reasonable accommodations under the ADA and to post the policy where it is visible to employees.

**Cite:** EEOC v. Strategic Equipment, LLC.

### Furniture retailer hit with gender bias settlement

**What happened:** Frizzell Furniture, a furniture retailer with locations in northern Minnesota, declined to hire a job applicant for a sales position because the applicant

is transgender. A hiring official informed him he would not "mix well with the customers."

**Decision:** The firm agreed to pay \$60,000 to settle the claim, and agreed to implement an anti-discrimination policy, provide EEO training to employees, and report any future complaints of discrimination to the EEOC for a period of three years.

The company will also adopt more objective criteria for hiring decisions and utilize a scoring matrix for job interviews.

**Cite:** EEOC v. Frizzell Furniture.

### Firm pays for retaliating against injured worker

**What happened:** Employer Solutions Group, LLC (ESG), a payroll services company operating in Eden Prairie, MN, fired an employee because she notified the company that she needed to use crutches following a surgery related to a knee injury

When the employee attempted to return to work following an approved medical leave, ESG asserted that she needed to be 100% healed before returning to work and cited her need for an "ambulatory aide" as reason for her dismissal

**Decision:** ESG will pay \$95,000 to the injured employee, and agreed to eliminate any policy or practice of requiring individuals to be released without restrictions or 100% healed in order to work. It also agreed to train managers on ADA rules.

**Cite:** EEOC v. Employer Solutions Group, LLC.

## STOP, LOOK, LISTEN ...

### 'Tis the season to be planning for the 'season'

A word of warning if you're celebrating virtually: Skip the Zoom happy hour. People are Zoomed out nowadays.

Instead, why not try:

#### Secret Santa with a twist

Most people have done a Secret Santa gift exchange at some time. But make yours a little extra special. Have participants give the name of a co-worker who knows them well. The gift "givers" then use these "special co-workers" to come up with meaningful gifts.

Set a budget and give employees pre-paid shipping labels to send their gifts. Then, to spread holiday cheer, have employees share what they got online via Slack or another company source and tag the gift giver in the photo – if they want to.

#### Traveling gift box

The first step for the traveling gift box is to find out who wants to participate. Then, group them by similar locations.

The next step is to send out a gift box filled with holiday cheer to one person in each group. That person then refills the box with new holiday cheer items and sends it to another person in the group and so on. Again, give employees pre-paid labels and set spending limits.

It could be things to decorate your home office space, or things for a special holiday meal. And as always, post pictures along company channels to share the cheer!

#### Holiday playlist

If your budget is tight, consider creating a company-wide Spotify playlist. Have everyone add their favorite holiday tunes. Encourage employees to play the music while they're wrapping gifts, cleaning or whatever.

Then have them comment on their favorite tunes, songs they've never heard before, etc. It'll be a fun bonding activity.

## SUPERVISORS SCENARIO

# After layoff, he cites supervisor's comment as proof of discrimination: Does court agree?

*Boss admits to saying 'a dumb thing' about employee's accent*

Anne studied the list of names as Ramon walked into her office. "You wanted to see me?" he said.

"You know about the layoff we're having because of business being down," Anne said. "So there's no easy way to say this: Your name is on the list of about a dozen who are being let go. HR will let you know about ..."

"Hold on," he interrupted her. "Did you have a say in whose name is on the list?"

"I did," Anne nodded. "But we mostly went by seniority ..."

He broke in again: "And by who has the 'funny' accent, too."

## A cartoon character

"What are you talking about?" a stunned Anne asked.

"You forgot about your little comment when I first came to work here," he answered. "How my accent reminded you of some funny cartoon character on TV."

"Ramon, that was a year-and-a-half ago," Anne pointed out. "And you know that

later I told you it was a dumb thing for me to say. I even apologized in front of the whole staff."

"So you think that's how this works – that you can embarrass me in front of everyone and then take it all back?" he said. "And then you lay me off."

"I understand you're upset," Anne said.

Ramon sued for national origin bias, saying the combination of Anne's comment and his selection for layoff proved the charge.

**Decision:** The company won. A judge noted there was just one comment by the supervisor, who had expressed regret. Given that, there was no clear connection between the comment and the layoff.

**Key:** At one time or another we've all said something we wish we could take back.

Admitting to a one-time mistake is OK, as long as it is a one-time mistake, and not part of a pattern.

*Case: de la Cruz v. Children's Trust of Miami.*

## What you need to know:

If you think you've done or said something that appears discriminatory, it's important that you:

- Avoid delays. Apologize quickly.
- Let HR know about the incident, to make sure the right steps have been taken.
- When making decisions about the offended employee in the future, double-check to make sure you have back-up documentation.
- Don't let an earlier incident influence future decisions; all that's required is that you be fair and reasonable.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

Yes. The company won when a judge dismissed Kayla's lawsuit.

Kayla's attorney said because the company fired her immediately after she returned from maternity leave, it was retaliation.

The attorney also said the discrepancies on Kayla's resume were just small embellishments, not blatant falsifications. Kayla should've gotten the chance to correct her performance, the attorney said, or at least have been asked about it before being fired.

But the court disagreed. It noted the timing of Kayla's firing was unfortunate, but the company had good reason to distrust Kayla.

It went on to say that "resume misrepresentation" was a severe enough offense

to warrant termination – the company didn't need to give Kayla a chance to explain or correct her performance issues.

## Legally tricky

This case is a good reminder that even if an employee has taken protected leave, that doesn't mean they're untouchable. With the proper cause and documentation, employers shouldn't shy away from firing bad employees.

That being said, termination lawsuits get tricky when protected leave is involved. Employers should make sure they'd be able to justify a firing in court, especially if it happened right after an employee returned from leave.

*Case: Bailey v. Oakwood Healthcare Inc.*

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