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'It's not me, it's the meds': Demoted worker sues for ADA violation

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Keys to handling worker threats

Male coach axed, school fined $41K

Firm hires PI to investigate leave

Worker fired for going to the cops

Was disability to blame for poor performance, or was it the meds?

Court asked to decide whether supervisor acted legally

Mandy pointed to the numbers on a sheet of paper as she spoke to Steve: "These errors you're making are out of control. What's going on with you?"

Steve hesitated for a moment and then said, "I guess we need to get this out in the open. I've been diagnosed with bipolar disorder, and I'm on some strong meds for it. They're affecting my judgment."

"OK," she nodded in response. "We've had some similar issues here before with other employees and the side effects of medication. I'm pretty sure we're going to need a doctor's note certifying everything."

"Why do I need a doctor's note?" he asked. "I'm not asking for time off."

"The straight answer is that you're in danger of getting demoted to a lesser paying job because of your performance," she replied. "If we don't have verification of a medical reason, you'll leave me with little choice."

What's next

"All right," he agreed. "I'll get the doctor's note next week. That'll work?"

"It's a start," she said. "Bring in the note,

*Please see **The meds …** on Page 2*

Sharpen Your Judgment

Fired over a Facebook post: Was it race bias?

HR manager Lynn Rondo had just confirmed her COVID vaccine appointment when company attorney Eric Bressler knocked on her door.

"Got a minute?" Eric asked.

"Sure, come in," Lynn replied. Eric sat down and sighed heavily.

"I'll cut to the chase. Karen Miller is suing us for discrimination. She says she was fired for her Facebook posts because she's white."

Double standard?

"Goodness gracious," Lynn muttered. "You and I both know that Karen's Facebook post about the recent protest was incredibly offensive. She said she wished the protesters would be run over!"

"I know, it was completely out of line," Eric said with a nod. "The problem is, two other employees, Alan and Sierra, also posted about the protests, but they weren't fired."

"Alan and Sierra didn't say anything half as bad as Karen," Lynn argued. "They didn't post anything violent, they just generally supported the protesters."

"I know," Eric said. "But she might be able to make a case that we took Alan and Sierra's side because they're African American."

"We need to fight this," Lynn responded.

When Karen sued for race discrimination, 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.

The meds …

(continued from Page 1)

and I'll have a talk with HR about the situation and what steps we need to take on this."

The next week Steve showed up in Mandy's office with the note in hand. As he handed it to her, he said, "We should be all set then?"

She glanced at the note and said, "I talked to HR, and it's a little more complicated than that."

"How do you mean?" he asked.

"Let's go over this again," she suggested. "You have bipolar disorder, but it doesn't affect your work. But you're taking medication that does affect your work."

"That's right," he agreed.

"That's where things get a little complicated," she explained. "We can maybe figure out some type of disability accommodation for the bipolar, if you need one. But there's no way around the problem of your medication causing what are really unacceptable errors."

'Demoted for bipolar disorder?'

Steve scratched his head and said, "I'm not sure I follow this. You're saying I could be demoted for having bipolar disorder?"

"Not exactly," she corrected him. "I'm saying if your error rate doesn't improve, you could be put in another position with less responsibility and pay. If I just let it go on the way it is, we could lose a lot of business. Customers don't want to hear excuses."

"Excuses?" he exclaimed. "You think this is an excuse?"

"You know what I mean, Steve," she said.

ADA lawsuit

Steve's error rate did get worse, and Mandy eventually demoted him for poor performance.

He sued the company for a violation of the Americans with Disabilities Act, saying he had a documented disability that was being treated by medication, and that he couldn't be punished because of the side effects.

The company maintained in court that the move was strictly about a performance issue.

Decision: The company won.

A judge came to the decision by noting that a limitation caused by a disability and a performance problem caused by medication are two different situations. An employer is under no obligation to put up with poor performance, no matter the cause.

Key: The supervisor clearly laid out the problem as a performance issue and took reasonable steps to address the situation.

Case: Caporicci v. Chipotle Mexican Grill Inc.

What you need to know:

When you get a request for a disability accommodation:

- Ask for the specifics of the accommodation – what does the employee want? A reduced schedule? An exemption from some physical aspects of the job? You're under no obligation to make the first proposal.
- Review the request to see if it fits with your business needs, and put together a compromise or counterproposal, if you think it's necessary.
- If you come up with something both you and the employee can live with, review it with HR to ensure it's legally sound and follows your organization's policies and standards.

TEST YOUR KNOWLEDGE

Worker threatens another – what should boss do?

On occasion, employees lose their cool and make threats against others – and some threats are more serious than others.

How do you handle it?

To test your knowledge of the topic and how to deal with the problem, answer *True* or *False* to the following (based on recent court decisions):

1. You're generally required to follow progressive discipline – such as "three strikes" – when dealing with employees who threaten others.
2. Because the "I was just joking" defense is so common, it's actually generally accepted by courts ruling on employees who make threats.
3. Employees who make threats and then claim emotional problems as a defense are obligated to seek and use counseling; in other words, it's not the responsibility of the supervisor or the employer.

ANSWERS

Answers to the quiz:

1. *False.* Progressive discipline is usually considered an option for a supervisor but not an obligation. Most courts recognize that the degree of the threat and how a supervisor handles it amount to a judgment call, meaning sometimes drastic action is needed immediately.

2. *False.* Popular though it may be, the "just joking" defense usually doesn't hold up, especially if employees who were targeted by the threats say they took it seriously. And that's all the more reason to document the perceptions of employees who are targets.

3. *True.* Supervisors and employers in general are well advised to reach out and try to help employees who claim emotional problems. But in the end, it's still the employee's responsibility to seek help from qualified professionals, and to put that help to good use.

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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.

School out $41K for firing male softball coach

What happened: Park School of Baltimore, Inc., a private school in Pikesville, MD, hired a male as head softball coach in the spring of 2014 and renewed his employment contract in 2015 and 2016.

The EEOC charged that despite his satisfactory job performance, in 2017 the Park School told the coach that it would not renew his contract for the next season because of its "preference for female leadership."

Federal discrimination laws protect men and women on the basis of gender.

Decision: In addition to paying $41,000 to the coach, Park School is prohibited from engaging in gender discrimination in the future and must implement a policy prohibiting gender discrimination and retaliation and provide training on federal anti-discrimination laws and the company's policies. The school will also post a notice regarding the settlement and employee rights under Title VII and report any future complaints of gender discrimination to the EEOC.

Cite: EEOC v. Park School.

Jacksonville pays $4.9M for racial bias lawsuit

What happened: The Department of Justice filed suit against the City of Jacksonville (FL) alleging its promotional practices for various positions in the Jacksonville Fire and Rescue Department violated Title VII of the Civil Rights Act of 1964's prohibition against race discrimination.

According to the lawsuit, the firefighters' union advocated for an unlawful promotional process that had a disparate impact on African American promotional candidates.

Decision: Jacksonville will establish a $4.9 million settlement fund for eligible candidates, develop a promotional exam for the selection of certain fire and rescue positions, and offer up to 40 settlement promotion positions for qualified African Americans.

Cite: EEOC v. City of Jacksonville.

Staffing firm to pay $475K for disability bias

What happened: Four staffing agencies under common ownership in West Virgina and Alabama recruited Latino workers for a poultry processing plant in Guntersville, AL, where they were subjected to harassment, ethnic slurs, threats and verbal abuse, and other abusive working conditions. The Latino workers were paid less than promised, were placed in the most hazardous positions, and were denied bathroom and lunch breaks, the EEOC claimed.

Decision: Along with paying $475,000, the firms must provide anti-bias training and post notices on their bulletin boards informing employees of their right to contact the EEOC if they feel they have been discriminated or retaliated against.

Cite: Civil Action No. 4:16-CV-01848-ACA.

STOP, LOOK, LISTEN ...

Court OKs hiring PI to investigate FMLA abuse

When one employer thought an employee was abusing FMLA, it hired a private investigator, or PI.

And a court backed the move.

Marsha VanHook worked for the Cooper Health System in New Jersey when she requested intermittent FMLA leave to care for her sick son.

VanHook took many FMLA days, as well as additional vacation days. These days were unscheduled and resulted in an attendance warning. After hearing from VanHook's co-workers that she wasn't taking FMLA days for legitimate reasons, the company became suspicious.

When VanHook's FMLA days began always falling on weekends or around scheduled PTO, the employer hired a private investigator to follow VanHook on three of her FMLA days.

For the next three days, the PI discovered that VanHook was not caring for her sick son, as she claimed to her employer. Her activities included coffee runs, shopping, going to the gym and taking her other child to school.

Upon learning this, the company fired VanHook for FMLA abuse. She then sued for a violation of her FMLA rights.

Right to monitor

Shockingly, VanHook didn't deny the FMLA abuse. Instead, she claimed the employer had no right to surveil her since it had no cause. The 3rd Circuit quickly rejected her claims, stating, "nothing in the FMLA prevents employers from monitoring employees' activities while on FMLA leave to ensure they do not abuse their leave."

The court also added that the employer did have reasonable suspicion to begin monitoring VanHook's activities, due to the information from her co-workers.

The good news for employers is you can take action and hire a PI if you suspect an employee is abusing FMLA leave. However, it's important to give employees a chance to explain before firing them. Sometimes activities that don't look FMLA-related turn out to be.

SUPERVISORS SCENARIO

Boss asked employee not to report workplace theft to police – and fired him when he did

Supervisor offers to settle the matter in house, but worker takes a different tack

"Didn't I tell you we'd handle this in house and get your money back?" Hunter said.

"You did," Monica agreed. "But I decided that having a co-worker steal money from my purse was something the police should look into."

"You've created a major headache for us," Hunter sighed. "First of all, we have cops crawling around here, disrupting business. Second, this made the newspapers, and I have customers asking me if we employ crooks."

'I know who it is'

"I'm sorry about that," Monica said. "As I told you, though, I'm pretty sure I know who it is – Amanda – and that this isn't the first time she's taken something from my desk. She needs to face the law."

He took a deep breath and said, "We can't deal in revenge and suspicion here. We have a business to run. I could have talked to her, gotten your money, maybe even fired her. There are ways to settle these things without the cops."

"So it would be OK if she left here and then stole money at her next job?" she shot back.

"What she does in her next job isn't our business," he replied. "And speaking of next job, you should start looking for one. I'm letting you go for disobeying a direct order to keep this internal."

Monica sued the company for wrongful termination. She said it was illegal to fire her for reporting a crime.

The company countered that she had been given an order to comply with an internal investigation and had no authority to defy the order.

Decision: The company lost. The ruling rested on the principle that no one can be disciplined for reporting reasonable suspicion of a crime, no matter the assurances that the issue will be handled appropriately by the employer.

Key: Terminations based on legally protected actions, such as reporting a crime or safety hazard, are ill-advised.

Case: Cardenas v. Fanaian.

What you need to know:

Commission of a crime in the workplace can be subject solely to in-house action and resolution. For example, theft from the company might result in discipline without filing the case with the police.

However, you can't:

- Order an employee who's been victimized by a crime in the workplace to keep the matter totally in house for resolution by the employer, or
- Discipline or retaliate against any employee who reports reasonable suspicion of a crime to the police.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a judge dismissed Karen's discrimination claim.

Karen's attorney argued that she was fired for being white and speaking out against the protest, and pointed to Karen's co-workers' posts.

Both Alan and Sierra posted about the protests, yet they weren't disciplined. Karen's race played a role in the company's decision, the attorney argued.

But the court disagreed.

It said that there was a stark difference between Karen's posts and her colleagues'. Karen advocated for violence online, while Alan and Sierra clearly didn't.

The company was justified in firing an employee with violent tendencies, the court said – and it had nothing to do with Karen's race. Case dismissed.

Violent threats not protected

This case serves as a good reminder about what online activity is protected, and what isn't.

The NLRA allows employees to discuss working conditions and terms of employment online without fear of retaliation. But that's about where the protections stop.

As this case demonstrated, controversial and threatening social media posts aren't protected, and employees can be justifiably fired for them.

Case: Ellis v. Bank of New York Mellon Corp.

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