

Legal Alert

Sample Issue

FOR SUPERVISORS



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Supervisor on the hot seat for terminating overweight staffer

Doctor's note said man's weight made him a safety hazard

The scenario

A worker whose weight reached 450 lbs. during the course of his employment suffered an injury to his knee while on the job.

He went on leave and his supervisor told him he would be fired if he stayed out of work for more than 180 days.

When his leave expired, the staffer's doctor completed a return-to-work form.

However, the supervisor realized the doctor had not reviewed the injured man's job description.

The employer asked the company doctor – who understood the job requirements – to evaluate the injured, obese worker to see if he was fit for duty.

In his evaluation, the company doctor noted the man had trouble breathing after taking only a few steps. The doctor also made mention that the man's weight was well above 400 lbs.

The doctor concluded that the obese man could not safely perform his job and did not permit him to return to work.

Since his leave time had expired, he was fired for being unable to go back to work.

Legal challenge

The man sued, saying his termination violated the Americans with Disabilities Act (ADA).

The company countered, saying that since there was no

disability or cause for the employee being overweight, he wasn't protected by the ADA.

The ruling

The company won. The court said that only people with a physiological cause for their obesity are protected by the ADA.

The skinny

The supervisor exercised due diligence by making sure that the man's injury had healed completely before allowing him back, and that the doctor who examined him understood the job responsibilities he had.

Cite: *EEOC v. Watkins Motor Lines*, U.S. Appeals Ct. 6, No. 05-3218, 9/12/06.

Was it racist for supervisor to threaten to send black worker to the 'back of the room'?

Boss told workers to achieve same level as top performer, who was white

"Thanks for taking the time to review this race-discrimination case with me," Supervisor Nathan Hawkins said.

"I'm eager to hear your side," Human Resources Director Carolyn Kelliher replied. "Why do you think Levon and Cora are accusing you of racial discrimination?" she asked.

"It seems like they perceived some things I said to be racist," Nathan said,

"but I never said anything to them that I wouldn't say to a white worker."

Carolyn asked, "Can you give me some examples of what you said to them?"

"Sure," Nathan replied.

Honest opinion

"Neither Levon nor Cora was meeting expectations," Nathan began, "so I told them that their performance was inconsistent."

Nathan continued, "I said

that if everyone else on the team was able to meet productivity goals every day, they should be able to also."

Sent to the back

Nathan thought for a moment. "One day, after I'd inspected Cora's work, I thought it was very poor. So I told her that if she didn't improve, I'd send her to the back of the room, where she'd be less distracted."

Carolyn said, "That's one

of the comments Cora perceived as racist.

"Cora said it was like being sent to the back of the bus, and that you never said it to any of the white workers," Carolyn explained.

Nothing obvious

Nathan replied, "That never entered my head, but now I can see how she may have thought that."

Nathan continued, "Cora
(Please see *Racist ...* on p.2)

Racist ...

(continued from p.1)

misunderstood one statement I made, but I know I never said anything blatantly racist toward her or Levon."

Carolyn said, "Cora and Levon told me that even though you never called them names or used any racial slurs toward them, they still think you're a racist."

Racist mannerisms

"How can that be?" Nathan asked.

Carolyn explained, "Cora said that your mannerisms and attitude were racist.

"For instance," she continued, "Cora claims after break time, you always told the black workers to go back to work before you said anything to the white team members."

Carolyn continued,

"Levon said the worst thing was when you assigned Tony to help them."

Given white mentor

Carolyn said, "According to Levon, having Tony, a white staffer on the team, help improve their performance was racist."

Nathan replied, "Tony is my best staffer. He always exceeds expectations – I figured he could help Cora and Levon!"

Carolyn responded, "That's the problem. Tony works through his breaks – that's part of the reason he always exceeds his production quota."

Above and beyond

She continued, "Cora and Levon felt that it was unfair to compare them to another worker, especially

one who did more than required."

"I think they misunderstood completely," Nathan said. "All I wanted was to get them up to par. I think we should fight this lawsuit."

Result: The company won.

The court ruled that the supervisor's statements and actions had no racial undertones.

It found the mentoring policy the supervisor started for his struggling workers wasn't a "negative employment action."

Also, Cora and Levon couldn't show any proof that they experienced any negative effects from the supervisor's statements.

Cite: *Ford v. American Airlines*, U.S. Dist. Court, N.D. Okla., No. 03CV0575-TCK-SAJ, 8/10/06.

What it means to you

Pairing struggling staffers with mentors is a great idea; just be sure to set clear expectations at the outset.

Keep in mind that struggling workers can be sensitive to any efforts to help them, even well-intentioned ones.

For instance, let your workers know you intend to target one area for improvement per week.

The mentor you choose should be strong in that area, but you need not always use your No. 1 staffer.

If there are many areas where staffers need help, rotate mentors for each area so as not to burden or call attention to any one staffer.

This can also help your struggling workers realize that everyone on the team has areas of strength as well as areas where improvement is needed.

You make the call

Supervisor fires pregnant worker on maternity leave

"Your staffer, Lena, has filed a lawsuit, claiming she was fired because of her pregnancy," Human Resources Director Josie Mitchell said.

She continued, "And based on her last performance appraisal, it seems like she was in good standing."

Supervisor Jeff Durnell thought otherwise.

"Lena excelled in some areas," Jeff said, "but as I noted in her review, she needed improvement in others. For instance, how she interacted with the other staffers.

"I was going to put her on an improvement plan, but then she told me she

was pregnant and would be out for six months," he stated.

Worried about baby

Josie asked, "Did you say anything to Lena about your intention to place her on a performance plan?"

"No, but I sent an e-mail to my manager saying I thought the maternity leave Lena was planning could interfere with her performance," Jeff explained.

"Then I ranked Lena in the bottom 10% of the department," he said.

Josie questioned further, "Was there a reason you didn't tell

Lena about her shortcomings?"

"I was afraid it might cause her too much stress and affect her pregnancy," Jeff said.

"A few months into Lena's maternity leave," Jeff said, "corporate told me I had to cut heads.

"Because of her low ranking, Lena was terminated," Jeff ended.

"So the termination had nothing at all to do with her pregnancy?" Josie asked.

"In light of her performance problems, which you noted in her file, I think we should fight this," she stated.

Did the company win?

■ *Make your call, then please turn to page 4 for the court's ruling.*

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management tools

Put candidates in your shoes

Ask this question the next time you interview a potential hire: “How would you handle this problem if you were a supervisor?”

You can then describe a hypothetical situation, or relate a real issue you faced in the past.

The responses will shed light on how prospects might respond in real-life situations specific to your department.

OHIO: A state of organization

Stay organized by remembering OHIO when sorting your mail and e-mail – Only Handle It Once.

When mail arrives, sort everything immediately,

rather than handling different pieces at different times.

OHIO saves you time because you won’t have to dig through piles of days-old mail looking for documents. Instead, you’ll have done everything you need as soon as the mail or e-mail is delivered.

Meet with everyone after a conflict

Discussing conflicts that crop up can help all of your folks – even those not directly involved in the issue– understand the outcome.

For instance, an argument between two staffers may raise questions about workplace safety or mediation policies.

Once you’ve handled

issues that need immediate attention, schedule time to meet with your whole team. They may have questions or just want reassurance that an issue has been resolved.

Post a loose-ends wish list for staffers

Create a wish-list of jobs you’d like your team to accomplish, but that don’t have a high priority.

Hang the list where all can see it, and encourage workers to take on some of the jobs, independent of their regular assignments.

Have them initial the jobs they complete.

You’ll get your small, but important, jobs finished, while also learning which people on your team are willing to go above and beyond the call of duty.

Supervisor’s insight

Improve your writing skills

As a supervisor, you may not think writing is a core job function. But writing is a form of communication, just like talking. If staffers don’t understand your message, it can cause problems.

That’s why you should take a systematic approach to writing, be it e-mails, proposals, or reviews.

1. Create an outline

a. List the topics you plan to discuss in your document

b. Number them in order of importance

c. Flesh out your points with details, questions, or action steps related to each topic.

2. Remove jargon

Use terms your reader will understand. Keep an eye out for certain phrases, words, or acronyms that are specific to your team and remove them where they aren’t necessary.

If you must include unfamiliar terms, make sure you explain them in a way a layperson could understand.

3. Check your work

Use automated spelling-and-grammar-checking features to correct your document.

If you’re handwriting a note or report, have a dictionary handy to avoid common spelling mistakes.

4. Proofread

Read your document aloud before distributing it. If you find it doesn’t flow, cut extra words or confusing sentences.

Even better: Have someone else read it. If another person finds certain parts of your document hard to understand, you may need to rewrite sections to clarify.



legal news for supervisors

EEOC looking for new lawsuit targets

You now have even more reason to schedule diversity-awareness programs for your staff members: The new chairwoman of the Equal Employment Opportunity Commission (EEOC), Naomi Earp, has labeled race discrimination the main focus of her term.

Even if you haven’t detected any racial tensions on your staff, working proactively to educate your workers on racial sensitivity could go a long way toward protecting your company, should problems arise further down the line.

Reason: The EEOC is planning to investigate entire companies where racial discrimination is reported, rather than limiting its inquiries to

specific departments or teams where racial discrimination is alleged.

New rules for giving tasks to lead staffers

It may be time to review how you delegate work to your crew. Too much responsibility could make your top workers supervisors in the eyes of the law.

That’s because a recent National Labor Relations Board ruling states that workers who assign jobs, reward performance, or discipline other employees are technically supervisors.

You can still delegate jobs to responsible staffers, just be sure to give them specific instructions on how you want jobs handled.

Advise your people on what you want done – and make sure they defer to you

when key decisions need to be made. You’re responsible for handling tasks such as setting hours, providing discipline and addressing disputes.

Where to look to spot recurring problems

A form OSHA requires all companies to fill out and post through April 30 may help you detect safety concerns that could leave your team vulnerable.

You may want to review your company’s OSHA Form 300A to see if you can detect any patterns of unsafe behavior or accident trends lurking on your team.

If you see that people may be committing safety violations, you can address them by scheduling training sessions before they attract the attention of regulators.



Should company have given leave to worker who left supervisor high and dry?

Supervisor’s take-home: It’s OK to ask your people to explain their actions if they negatively impact the team. Courts allow companies to act to safeguard productivity.

What happened: A woman was scared by a stray dog that got into her work area. She became lightheaded and disoriented. She feared she’d had a stroke.

The worker said she was ill and left work, but she didn’t go to the hospital.

She called out every day during the following week, claiming to be ill. She gave no details about her sickness, and didn’t give any warning that would have allowed her supervisor to find a replacement for her.

She did, however, go to her workplace to complain about the stray dog and other animals at the site.

What people did: Days later, the woman was notified that she’d used all of her time off. She was advised that if she wanted to apply for FMLA leave, she needed to provide a doctor’s note.

The woman got a note from her doctor, but it only excused her for the days she’d missed up to that point.

When she continued to call out sick, she was terminated.

Legal challenge: The woman sued, saying her erratic behavior should have alerted the company that she had an illness that qualified for FMLA. The company said

she didn’t fulfill the necessary requirements of FMLA.

Result: The company won. The court ruled calling in sick didn’t trigger FMLA. And while some people are so ill they can’t express a need for FMLA, the fact that she came back to her workplace to complain about the stray dog showed she was capable of abiding by FMLA rules.

The skinny: The courts recognize that you can’t allow workers to hold up your business. So long as you’re fulfilling your requirements, companies aren’t expected to tolerate disruptive behavior.

Cite: *Stevenson v. Hyre Electric Co.*, U.S. Dist. Ct., N.D. Illinois, No. 04 C 7990, 8/24/06.

You make the call: The Decision

(see case on p. 2)

No, the company lost.

While the court agreed the woman was fired because of performance issues, the company didn’t fulfill its responsibilities toward her.

Specifically, the woman had not been made aware that she was in any danger of losing her job in the months leading up to the firing. The company kept her in the dark because of her pregnancy.

The woman wasn’t given the chance to rebut her supervisor’s opinion, nor was she offered the additional training or mentoring a formal performance plan would have included.

What it means: Act quickly to fix problems

Terminating a pregnant worker is tricky under any circumstances, but when she’s out on leave, it makes it even harder to defend.

Especially since, in this instance, the supervisor didn’t address a performance issue the worker had.

Letting workers know you think their performance is slipping is important for two reasons: First, it lets them know they have to step up their efforts. And second, it shows that you are doing your job of monitoring their performance.

If you have loose ends to tie up with staffers, address your concerns before they go away on vacation or sick leave. Let them know where they stand and what actions you expect them to take, so there will be no surprises.

Cite: *Wrynski v. Agilent Technologies, Inc.*, U.S. Appeals Ct. 3, No. C048286, 9/26/06.



Management’s million-dollar mistake: Blaming man’s demotion on budget cuts

Overview

A long-time staffer’s position was cut to bare-bones, while younger, new workers were given more money and special privileges.

In the end, it was a home run for the employee.

The scenario

James Brady, head coach of the University of Missouri baseball team, had previously alleged he was the victim of age discrimination.

The case was settled – or so Brady thought.

Months after the settlement, Brady was informed that his position was being reduced to part-time, despite the team having a winning record and an 80% graduation rate for

his players.

Although his team was in first place in the division, Brady’s pay was cut in half, his benefits were taken away and his office was moved to a basement room near the swimming pool, in an area that was hot and humid.

When Brady complained, the vice chancellor and the athletic director cited budget cuts as the reason for his reduction.

However, new, younger coaches were paid more than Brady, had benefits and – despite working fewer hours – were considered full-time staffers.

Brady, a cancer survivor, was forced to pay out-of-pocket for his ongoing

medical treatment. He suffered from depression and anxiety, and lost 60 lbs.

Legal challenge

Brady charged that he was the victim of age discrimination and ongoing retaliation for his complaints.

The ruling

The university lost.

The court found that Brady was discriminated against due to his age, and then was punished for complaining.

The court also said the university used trickery and deceit in claiming budget cuts necessitated the reduction in Brady’s compensation.

Brady was awarded just over \$1 million in damages.

LegalSpotlight

Focus on: Workplace violence

☑ Today's Date: _____

☑ Your Name: _____

☑ Department: _____

The numbers speak for themselves. Thirteen U.S. workers die every week due to workplace violence. Two million people become victims of violent incidents in the workplace every year.

Many of these tragic incidents involve employees who, for whatever reason, become unglued and turn to violence.

And in the aftermath, it's often the supervisor who takes the heat, for not identifying the potential problem or for failing to take steps to defuse the situation.

That's why it pays to keep your eyes open for any kind of warning sign.

Know the risks

While there's no exact science to figuring out whether an employee has the

potential to become violent, certain signs and behaviors can tip you off to trouble brewing.

For starters, those with a past history of conflicts with others or a track record of drug or alcohol abuse should be on your radar.

Other high-risk employees include those with family or personal conflicts (divorce, separation, child custody), as well as those who have recently been disciplined, fired, laid off, demoted, or passed over for promotion.

What to watch for

Psychological experts have been able to isolate some characteristics common to instigators of workplace violence.

Be on the lookout for employees who

- have difficulty accepting authority or criticism
- use verbal and/or physical intimidation
- engage in misconduct of increasing frequency or severity
- are argumentative or uncooperative
- repeatedly make excuses or have a tendency to blame others
- have difficulty controlling their temper
- have attendance problems or chronic Monday absenteeism
- express extremist views (political or religious)

It's also important to be aware of dramatic changes in employees' personalities.

Decreased concentration or confusion may be a sign of trouble. Withdrawal from social interaction also

indicates a potential problem, as is the case with paranoid or depressed behavior.

Even more serious signs include a preoccupation with weapons or violence, or the development of an obsession with a particular person.

Act, but with caution

If you become concerned about an employee's apparent instability, there's a fine line between assuring the safety of your staffers and protecting the rights of the employee in question.

You may want to refer the employee to an employee assistance program or to counseling, but be careful how you do it.

If you make counseling a condition for continued employment, you risk legal issues because mental illness – even just *perceived* mental illness – is a protected disability under the ADA.

If you're in doubt about how to address a situation, talk to your HR manager.

Next page: Test your knowledge!

You make the call

Was company responsible for employee's shooting spree?

"I still have nightmares about that day," said Human Resources Director Alex Herr with a quiet sigh. "That was the darkest day in the company's history."

"I know," said Supervisor Rob Palermo. "I knew Ed Henson. I knew he was kind of a hothead, but I never imagined he could just walk in to work one day and start shooting at people."

"That's what a lot of people have said," noted Alex. "But even so, several of the

injured employees are suing us for damages. They're saying we should've done more to prevent it – that he should've been fired."

Racism not grounds for dismissal

"I'm not so sure about that," said Rob. "I know he owned guns, but so do a lot of other guys who work here."

"Unfortunately, it's not like he was the only racist on the payroll either," added Alex. "I'm told that some of his friends

shared his dislike of working with blacks."

"It's true," said Rob. "And it's not like we could've fired him for being a racist."

"Here's the bottom line," said Alex. "The company didn't *intend* for anyone to get hurt. Everyone who was injured is entitled to workers' comp, but that's all. We have to fight this one."

Did the company win?

■ **Make your call, then please turn to page 2 for the court's ruling.**

Legal Spotlight

Time to test your knowledge



> Focus on | Workplace violence

1. Personal events that could aggravate an employee's tendency toward violence include
 - a. Buying or selling a home
 - b. Divorce or child custody battles
 - c. The birth of a child
 - d. None of the above
2. Requiring an employee to undergo counseling as a condition for continued employment can be construed as discrimination because mental illness – real or perceived – is protected under the ADA. True or False?
 - a. Difficulty accepting authority or criticism
 - b. Having a tendency toward making excuses or blaming others for failures or mistakes
 - c. Temper-control problems
 - d. All of the above
3. Characteristics commonly found in those who perpetrate workplace violence include
 - a. 2,000
 - b. 200,000
 - c. 2 million
 - d. None of the above
4. Approximately how many U.S. workers are victimized in incidents of workplace violence every year?
 - a. 2,000
 - b. 200,000
 - c. 2 million
 - d. None of the above
5. Employees who are consistently argumentative or uncooperative are difficult to work with, but are not likely to pose a danger to others. True or False?
 - a. Consult with your HR manager right away to determine the best course of action
 - b. Tell him privately that you expect him to seek counseling within 30 days' time, or face termination
 - c. Take a wait-and-see approach, but warn other employees who work closely with him to be careful
 - d. None of the above
6. If a staffer has noticeably withdrawn from interaction with other employees and is exhibiting a preoccupation with firearms or other weapons, you should
 - a. Alcohol abuse
 - b. Drug abuse
 - c. Conflicts with other staffers and/or supervisors
 - d. All of the above
7. As a matter of caution, you should pay extra attention to the behavior of
 - a. Disciplinary actions
 - b. A demotion or a reassignment to a less favorable job, location, or shift
 - c. Being passed over for a promotion
 - d. All of the above
8. Chronic attendance issues or Monday absenteeism can be a sign of an employee's growing instability. True or False?
 - a. Disciplinary actions
 - b. A demotion or a reassignment to a less favorable job, location, or shift
 - c. Being passed over for a promotion
 - d. All of the above
9. Work-related events that could intensify an employee violent tendencies include
 - a. Disciplinary actions
 - b. A demotion or a reassignment to a less favorable job, location, or shift
 - c. Being passed over for a promotion
 - d. All of the above

> The Decision continued from page 1

Yes. The company won. The court said that because the incident stemmed from Ed's issues with working with blacks, the incident was work-related. As such, the victims' only remedy was workers' comp.

The company paid a steep price for dozens of related workers' comp claims as well as a mountain of legal fees.

Warning signs ignored

The saddest part of it all is that the incident could have been prevented.

Ed's supervisors were aware of his preoccupation with guns and hostility toward black coworkers. They put many lives at risk by taking the warning signs too lightly.

If a staffer is exhibiting signs that indicate a potential for workplace violence, don't delay action until it's too late. Consult with HR if you feel that the danger is imminent. ■

Citation: *Bailey v. Lockheed Martin Corp.*, U.S. Dist. Ct., S.D. Mississippi, No. 4:04CV124LN, 8/26/05.

Test your knowledge The answers

1. b. True. That's why it's best to choose your words with care when referring a staffer to counseling.
2. True. That's why it's best to choose your words with care when referring a staffer to counseling.
3. d. Employees who exhibit volatile tendencies such as these usually are at higher risk for turning to violence if they perceive that a coworker or supervisor is provoking them.
4. c. True. Attendance issues are common for certain high-risk employees, such as those who are depressed or who are substance abusers.
5. False. These traits are often found in the profiles of troubled and potentially violent individuals.
6. a. True. Attendance issues are common for certain high-risk employees, such as those who are depressed or who are substance abusers.
7. d. True. Attendance issues are common for certain high-risk employees, such as those who are depressed or who are substance abusers.
8. True. Attendance issues are common for certain high-risk employees, such as those who are depressed or who are substance abusers.
9. d. All of the above.