ACC NCR PRESENTS

Employees Behaving Badly: New Times, New Problems

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Welcome to Employees Behaving Badly where we will put all the employment training you have received to the test with real life scenarios.

SCENARIO 1

You allow your employees to work remotely. It has been great as you have been able to downsize your real estate and save money on overhead. However, you do require your employees to come into the office once a month for a mandatory meeting. You learn that one of your employees has moved out of state, into a jurisdiction your company does not conduct business. What is the company's exposure in that jurisdiction? What if the employee refuses to come in the office once a month? What if the employee agrees to come in but only if the employee pays for the travel expenses? Would you pay – put your answer in the chat box? What if the company agrees to pay for travel expenses, does it have to pay for travel time as work time?

KEY POINTS/TAKE AWAYS

- Personal Jurisdiction?
  - While several courts have addressed the question of personal jurisdiction based on remote employees being in a particular state, no uniform or bright line rule exists regarding how remote employment should be treated when considering whether a court has jurisdiction over a company.
  - Courts have been all over the map in deciding the issue. But a review of the various court decisions suggests that the particular details of the employer-employee relationship are a crucial factor in ascertaining whether a party may be subject to jurisdiction.
  - Court held that jurisdiction did not lie in a state where an employer permitted or knew that an employee was working remotely in that state, noting that the employer did not purposely direct any activities toward that state. 1 *Perry v Nat'l Assoc. of Home Builders*, No. 20-cv-454, 2020 WL 5759766 (D. Md. Sept. 28, 2020). (Nothing on point in DC or VA)

- FLSA: travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

SCENARIO 2

Keeping with the theme of remote employees, you have another remote employee who you suspect is not devoting her full time and attention to work. She seems to be unavailable during certain hours every day. You suspect she is working for another employer while working for you. You investigate and learn she has been working two full time jobs at once. She has been claiming a full 8 hours to each employer. You have been billing her time out on your federal contract, and the government has been pay for her on a full time basis. What do you do- put your comments in the chat box.

SCENARIO 3

An employee reports to you that she has seen a colleague who is on the Company's Sales Team (i.e., not a safety sensitive position) smoking marijuana in his car at lunch, returning to the workplace in the afternoon under the influence. You alert the manager, who agrees to investigate and asks you to sit in when she interviews the accused employee. In the interview, the accused employee denies smoking marijuana at all.

1. Do you ask the team member to submit to a drug test?
2. What if the company has no drug testing policy?

KEY POINTS/TAKE AWAYS

- The D.C. **Cannabis Employment Protections Amendment Act** of 2022 will take effect on July 13, 2023, or shortly thereafter, which prohibits adverse job action against employees for the use of, or positive testing for, marijuana.
- The law, however, contains a few exceptions. Employers will not be in violation if their actions are required by federal statute, federal regulations, or a federal contract or funding agreement, or if the employee used or possessed marijuana at work or while performing work-related duties. The law also does not cover employees in "safety-sensitive" positions, such as police, security, guards, construction workers, operators of heavy machinery, healthcare workers, caretakers, or gas and power company employees.

Practical Advice for Employers

- D.C. employers should promptly evaluate which positions are safety sensitive so they can provide written notification when required.
- D.C. employers should also review their drug and alcohol policies to make sure they (i) provide for testing upon reasonable suspicion and (ii) set forth testing protocols. Businesses should also make sure they exclude marijuana from preemployment drug testing for D.C. applicants.
- Employers should also prepare to comply with the notice requirements. Handbooks should contain the required notice of employees' rights under the act and the drug and alcohol testing protocols. An employer might also choose to list the positions that are designated as safety sensitive. Regardless of whether safety-sensitive positions are listed in a handbook, employees in those positions must be notified individually.
- National employers should consider a D.C. supplement that contains the required information. To satisfy the annual re-notification requirement, employers should redistribute the handbook or D.C. supplement each year. More specific guidance is likely to follow. If you have any questions, please contact a member of our team.

SCENARIO 4

Months later, in a casual conversation with another employee from the same office, you learn that it is well known in that office that the accused employee and his manager regularly get together to smoke marijuana recreationally after work.

1. What do you do about the accused employee?
2. What do you do about the manager who “investigated” the employee and failed to disclose the fact that she regularly smoked marijuana with this employee during the investigation?
3. If recreational marijuana is legal in the state where this took place, would it alter how you handled this?

SCENARIO 5

Employee is a Manager. She is responsible for training your volunteers. You have asked her to prepare a training manual. She prepares the manual during work hours, after work hours and has even invested $500 of her own money (for which she has not sought reimbursement) for training materials to incorporate. You find out she is using this manual on other side jobs including a business she owns. You demand that she stop using "work for hire." She claims that because she worked on this outside of work hours and used her own funds that it is her personal property and refuses to return it and stop using it. She says she will only return that portion she prepared during work hours. She is otherwise a very good employee. What do you do?

KEY POINTS/TAKE AWAYS

- **What is work for hire**?
- A copyrightable work is "made for hire" in two situations:
  - When it is created by an employee as part of the employee's regular duties
  - When a certain type of work is created as a result of an express written agreement between the creator and a party specially ordering or commissioning it
- When a work is a made for hire, the hiring or commissioning party is considered the author and the copyright owner.

- **What do your policies say**?

  - Do you have a work for hire policy?
  - Is the individual an employee or an independent contractor?

See **Community for Creative Non-Violence v. Reid** 490 U.S. 730109 S.Ct. 2166 (1998)

SCENARIO 6

You just fired your IT Director and learned that he changed all critical passwords before he left, and you cannot gain access to your files. You cannot simply change the passwords back because he has used an email address over which you have no control. He will not return any calls or efforts to reach him. What can you do?

SCENARIO 7

You have a store manager who is alone in the shop and is scheduled to work from 7-2. She is scheduled to be replaced by another manager who is scheduled to work 2 to close. The employee who is scheduled to relieve your employee is running late. However, this is not unusual for her. The store manager on shift from 7-2 is tired of having to stay late for this other employee. She refuses to work any later than her scheduled time and closes the store. Do you fire her?

SCENARIO 8

In the case above, the employee who closed the store and refused to work late detailed the ordeal and her refusal to work past her scheduled time on Tik Tok. In the video, which was watched over 250,000 times she says:

"Y'all, I am irked. I am irritated, I left work shaking today," she says in the video. "I am a store lead at a retail food establishment here in L.A. I am also 29 so I have been in this game for a little bit, and I say that because I am going to work the hours that I'm scheduled and nothing more unless a previous agreement has been made. I'm here to get a paycheck. I'm here to clock in and clock out. I'm not here to go above and beyond. I'm sorry."

SCENARIO 8

Do you terminate for posting on social media?

KEY POINTS/TAKE AWAYS

“Whether or not you are represented by a union, federal law gives you the right to join together with coworkers to improve your lives at work - including joining together in cyberspace, such as on Facebook.

Federal law protects your right to engage in not only union activity, but also "protected concerted" activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with co-workers and with a union. You have the right to take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, or seeking help to form a union. Using social media can be a form of protected concerted activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. But just individually griping about some aspect of work is not "concerted activity": what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management. Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy.”

Social media | National Labor Relations Board (nlrb.gov)

SCENARIO 9

One of your senior IT employees submits a letter of resignation, advising that she is leaving to pursue another opportunity. She is unwilling to identify her new employer. On her last day of work, she comes into the office to turn in her company property. When she hands over her laptop, she apologizes and explains that the day before she had been working in her backyard next to her pool and tripped and accidentally dropped her computer into the pool. She was unhurt but is concerned because the computer is damaged beyond repair. She offers to have you offset her outstanding expenses to pay the cost to replace it. What do you do?

KEY POINTS/TAKE AWAYS

Under the federal **Fair Labor Standards Act (FLSA)**, a deduction for loss or damage may be made if two conditions are met:

- The employee signed a written agreement prior to the shortage (at the start of employment or when the policy related to deductions is adopted) by which he or she agrees to such a deduction; *and*
- The deduction does not bring the employee's hourly rate below the minimum wage.
- So, put it in your handbook, as well as on the acknowledgement signature page. Make sure it gets signed at time of hire.

- **What about the intellectual property?** Conduct a forensic analysis to determine if trade secrets have been stolen

SCENARIO 10

Employee worked for company for over 10 years. She was employed as the Controller. Her supervisor, the General Manager, was a male. One day that male said, “look at this” and directed her attention to nude Playboy photos on the internet. He claimed they were pictures of another newly hired female employee, and that the employee was a Playboy bunny. The manager was showing the photos to any employee nearby. This was not the first time the work computers were used for pornography. Other times the female employee went into her supervisor’s office and asked what he was watching. He replied with “you don’t want to know it will only make you mad.” This same supervisor would pass pornographic images of woman on to other employees. The female employee has complained to HR. Is there enough to terminate the General Manager?

KEY POINTS/TAKE AWAYS

- Maryland law has removed "severe and pervasive" requirement for harassment. SB450:
  - Based on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile.
- Fourth Circuit Decision in ***Laurent-Workman v. Wormuth*, 54 F.4th 201 (4th Cir. 2022)**

  Here, the court found that "even though they do not depict daily misconduct, Laurent-Workman's allegations demonstrate a series of hateful workplace encounters that consistently targeted her racial identity." Specifically, the court noted that the repeat behavior of Adams and Khalifeh "was neither isolated nor a symptom of trite differences." The court noted that Laurent-Workman "endured a breadth of publicly humiliating comments from Adams on several occasions" and Khalifeh not only knew of Adams's racial hostility, "but further entrenched it with his own vile remark." The court concluded that Laurent-Workman pled a plausible claim for a race-based hostile work environment over and "above the speculative level."

SCENARIO 11

You have a long-time employee who has kept careful client records. She maintains frequent contact with these clients. She is a fantastic employee. From time to time, she asks clients to contribute to sponsored charitable programs, i.e. youth soccer organizations, food banks and protecting the Chesapeake Bay. She accepts the donations and distributes the funds, or most of them. You find out she was taking about 30% for her efforts. What do you do?

SCENARIO 12

Employee has requested and received an approved ADA accommodation, and FMLA leave, based on disability related to his eye-sight. He claims he cannot see the screens on the computers, and nothing can be done to help him. He provides all the necessary medical documentation. You find out through a social media search that, instead of working for you, he is actually running a video gaming business out of his home. There are photos of him playing the games without problem. In his posts he states he plays for hours. What do you do?

KEY POINTS/TAKE AWAYS

- Consider the FMLA/ADAAA:

An employer is permitted to designate a healthcare provider to furnish the second opinion, but the provider may not be employed on a regular basis by the employer (For reference, see 29 C.F.R. sect. 825.307(b)). An employer may not regularly contract with or otherwise regularly utilize the services of the healthcare provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g. a rural area where no more than one or two doctors practice the relevant specialty in the vicinity).

A U.S. Department of Labor Fact Sheet states that, under the FMLA: "If the second opinion differs from the original certification, the employer may require the employee to obtain a third certification from a healthcare provider selected by both the employee and employer. The opinion of the third health care provider is final and must be used by the employer. The employer is responsible for paying for the second and third opinions, including any reasonable travel expenses for the employee or family member."

The ADA defines "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

KEY POINTS/TAKE AWAYS

- Check list for inquiries:

  - ❑ Determine what laws are involved:
    - ❑ FMLA?
    - ❑ ADA?
  - ❑ FMLA
    - ❑ How much time is left?
    - ❑ Should you just let the time run?
    - ❑ What if they are getting paid (e.g. Uniform Paid Leave Act in DC)
  - ❑ ADA
    - ❑ Is the individual a qualified individual with a disability?
  - ❑ Should you send for a second opinion?

SCENARIO 13

Employee is pregnant. She claims she has a serious health condition related to her pregnancy, although she is not qualified for FMLA. On December 22, she called out of work for December 24-25, claiming she "suspects" her doctor will put her on bedrest when she sees her physician on December 23. You tell her that "suspicions" are not enough, and suspect she just wanted to have the holidays off knowing a simple request for leave would be denied because others requested leave first. You tell her that her calling off was inappropriate, but you let it go. You tell her you need a doctor's note excusing her from work on those two days and saying she is fit for duty to return. She provides a doctor's note excusing her for December 24-26 and saying she can return to work on December 27. However, she fails to return. You follow up with her three days later, after she has not showed up for work, and she provides a doctor's note excusing her from work from 12/27-1/3. On January 4, she fails to return to work again. You follow up again. Again, she provides a note covering her days of no call/no show. When can you act for failure to return to work? How long do you have to put up with this to avoid claims under PDA and ADA?

KEY POINTS/TAKE AWAYS

- Accommodate the Disability, but Enforce Policies and Procedures:

- *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817). If the employer satisfies "its burden, the plaintiff must show by a preponderance of the evidence that the proffered explanation is a pretext for discrimination." *Id.*

- A no call/no show policy is not motivated by pretext if the employee was fit to return and did not notify the employer (no call) even though they had the information and there was no emergency need for leave.
- Again, ask yourself what is the path least likely to expose the company?
  - If you can assume they are going to stay out, is it worth it to just keep calling to get the documentation?
  - Is her no show/no call causing an undue hardship?

SCENARIO 14

You have a female supervisor-level employee who has recently been snapping at her subordinates. One time, she even screamed at an employee to get out of her office and threw a pen at him as he was leaving. Her subordinates have been complaining about being "bullied." When you ask the supervisor, she explains she has been going through menopause and cannot help her mood swings. She claims menopause is causing her severe anxiety and hot flashes. In fact, she claims that her warm office is exacerbating her symptoms and demands to be moved to another office, which is cooler. She provides a doctor's note saying that she is suffering from severe anxiety and hot flashes related to menopause and needs a cooler office. Do you have to accommodate her?

KEY POINTS/TAKE AWAYS

- *Menopause in and of itself is not a disability:*
  - *See* Blanchard v. Arlington County, VA, Slip Copy 2023 WL 2215807 (E.D. V.A. 2/24/2023) citing *Saks v. Franklin Covey Co.*, 117 F.Supp.2d 318 (S.D.N.Y. 2000) ("This Court harbors no doubt that infertility that results from the natural aging process, rather than from some disease or defect, is not a 'disability' within the meaning of the ADA"); *see also Klein v. Florida Dept. Of Children and Families Serv.*, 34 F.Supp.2d 1367, 1372 (S.D.Fla.1998) (holding that "[m]enopause, generally, is not a handicap or disability"); *McGrow v. Sears, Roebuck & Co.*, 21 F.Supp.2d 1017, 1021 D.Minn.1998) (holding that menopause is not a disability).
- However, engage in the interactive process for those symptoms that might rise to the level of a disability.
  - Remember: Individual is "disabled" under Americans with Disabilities Act (ADA) if he: (1) has physical or mental impairment that substantially limits one or more of his major life activities; (2) has record of such impairment; or (3) is regarded as having such impairment. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.
  - Interactive process regarding a reasonable accommodation under the ADA for an employee's disability requires bilateral cooperation, open communication, and good faith; Americans with Disabilities Act of 1990, § 102(a), (b)(5)(A), 42 U.S.C.A. § 12112(a), (b)(5)(A); 29 C.F.R. § 1630.2(*o*)(3).

SCENARIO 15

You have several employees who insist on telling each other “I love you,” burning candles and reading spiritual texts at work. When you confront them on their behavior, they all claim it is religion-based and demand an accommodation. They all claim to adhere to Onionhead beliefs. Do you have to accommodate?

KEY POINTS/TAKE AWAYS

- "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); Sherr v. Northport–E. Northport Union Free Sch. Dist., 672 F.Supp. 81, 92 (E.D.N.Y. 1987) ("Defining 'religion' for legal purposes is an inherently tricky proposition."). Because of the intrinsic difficulties associated with evaluating whether a particular practice or belief is religious in nature, there is "no consensus on how to define religion" for purposes of employment discrimination cases. Donna D. Page, Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition, 7 U. Pa. J. Lab. & Emp. L. 363, 371 (2005). Neither the Supreme Court nor the Second Circuit has addressed how to define religion for purposes of a Title VII action.

- Title VII provides that the "term 'religion' includes all aspects of religious observance and practice." 42 U.S.C. § 2000e(j). EEOC guidelines further define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.... The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.
- 29 C.F.R. § 1605.1. The EEOC adopted its expansive definition of religion based on two Supreme Court decisions, *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) and *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), which defined religion broadly for purposes of addressing conscientious-objector provisions to the selective service law.

Equal Opportunity Employment Commission v. United Health Programs of America, Inc., 213 F.Supp.3d 377 (E.D.N.Y 2016)

SCENARIO 16

You operate a large wedding banquet facility. The waiters commonly carry large heavy trays loaded with food from the kitchen to their assigned tables within the catering hall. Each waiter typically supports 4 tables at a large event, with 6 to 8 waiters being assigned to an event. You currently have a pool of 16 waiters who are regularly assigned to catering events.

SCENARIO 16

After two weeks, three other waiters come to HR individually with similar notes and requests for accommodations. In each instance, the waiter acknowledges that he/she is aware that one of the other waiters already has a similar accommodation. You cannot accommodate all of them simultaneously. You strongly suspect that at least some of these individuals are using their "injury" to get the easiest assignment and may not have a disability at all. What do you do? Put your ideas in the chat box.

What if the waiters are union employees?

KEY POINTS/TAKE AWAYS

29 C.F.R. § 1630.2

(p) Undue hardship—

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

SCENARIO 17

You have a new employee at your manufacturing facility, David. The facility is mostly men and very blue collar and a boisterous group of employees. The new employee, David, does not fit this mold -- he is small and meek and quiet.

After several weeks of employment, one of the “swing managers” comes to you to raise concerns about David. He explains that some of the “boys on the floor” thought David was more than a little strange and, based on some things David said, they were concerned he might be a pedophile. The swing manager explained that several weeks ago, while at work, one of the guys set up a fake email account and pretended to be a 12-year old girl, seeking to bait David through emails sent to David’s personal email account. While David’s initial responses were ambiguous, three days earlier he had emailed “Samantha” and asked her to send him nude pictures and offered to send her nude pictures of him.

SCENARIO 17

The swing manager admitted that, when the email campaign had first started, some guys on the floor had begun to harass David, deflating his tires, hiding his tools and stealing his lunch from the kitchen refrigerator. He is concerned that the guys on the floor might escalate this to violence based on the recent email.

What do you do?

SCENARIO 18

Your restaurant is hiring a waitperson to work three days per week. The job description makes it clear that the restaurant is expressly hiring this individual to work Friday, Saturday and Sunday evenings for the dinner rush on its three busiest nights. During the interview process, management also makes it clear that the individual selected for this position will need to be able to work Fridays, Saturdays and Sundays. It hires Maggie, who has seven years of experience working as a server in various well-known restaurants.

In the middle of her first Friday night shift, Maggie tells her manager that she is unable to work the next day, even though she is on the schedule to work Saturday evening. Maggie explains that she is a Seventh Day Adventist and her religion forbids her from working on Saturdays.

What do you do?

KEY POINTS/TAKE AWAYS

Religious Accommodation:

- Examples of burdens on business that are more than minimal (or an "undue hardship") include: violating a seniority system; causing a lack of necessary staffing; jeopardizing security or health; or costing the employer more than a minimal amount.
- If a schedule change would impose an undue hardship, the employer must allow co-workers to voluntarily substitute or swap shifts to accommodate the employee's religious belief or practice. If an employee cannot be accommodated in his current position, transfer to a vacant position may be possible.
- Infrequent payment of overtime to employees who substitute shifts is not considered an undue hardship. Customer preference or co-worker disgruntlement does not justify denying a religious accommodation.

It is advisable for employers to make a case-by-case determination of any requested religious accommodations, and to train managers accordingly.

What You Should Know: Workplace Religious Accommodation | U.S. Equal Employment Opportunity Commission (eeoc.gov)

Questions?

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