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Employer's dilemma: balancing ADA requirements with rules of the workplace

Under the Americans with Disabilities Act (ADA), employers must accommodate workers with disabilities. If an employer takes a negative employment action (firing, refusing to hire, demoting, refusing to promote, etc.) against an employee with a physical, mental or even emotional disability, the disability can't be the reason.

If an otherwise-qualified employee needs reasonable (not overly burdensome) accommodations for his or her disability in order to do the job, the employer must provide them. Employers also face serious legal trouble if they retaliate against employees for exercising their rights under the ADA.

This is more than fair, but it can create challenges for employers trying to accommodate disabilities while enforcing the rules of their workplace. It's a difficult balance, but a recent ruling from a federal appellate court may provide guidance.

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The case involved Shannan McDonald, a receptionist in Michigan who suffered from a genetic disorder that had required a number of surgeries for which she had to take time off from work. She was a union member working under a collective bargaining agreement that required workers to take lunch breaks no earlier than 11 a.m. Employees had to decide between a 30-minute lunch break with additional 15-minute breaks (not to be tacked on to the lunch break) and a one-hour lunch break.

McDonald chose a half-hour break but started leaving for the company gym at 10:30 a.m. to exercise while tacking on her 15-minute breaks to create an hour break. She also was accused of sexually harass-

continued on page 3

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Employer's delay waives right to arbitration

If your employees have signed an agreement to arbitrate any employment disputes, you need to act fast if you really want to keep the case out of court. If you sit on your rights, you might lose them.

That happened recently in Rhode Island, where an exotic dancer brought a class action against the club she worked for, claiming it misclassified her and other dancers as "independent contractors," resulting in their losing out on pay the club owed them under the law.

At the time she brought the case, the club claimed her signed contract and those signed by other dancers had gone missing in a disorderly and chaotic "records room" at the club. Meanwhile, the dancer denied ever signing any such agreement.

About two years later, the club manager found an agreement she had signed when she started working there. At that point the club filed a motion in court demanding that the case be referred to an arbitrator as called for under the agreement.

But a federal judge refused to do so. According to the judge, the club had "unduly delayed" asserting its arbitration rights until after discovery (the phase of a case in which each side demands that the other side produce documents and evidence and in which they interview witnesses) was completed, motions to dismiss had been filed and they were well on their way toward trial.

The fact that the club had continually asserted its right to arbitration in its pleadings and in pre-trial conferences didn't matter, the judge said.

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Beware of making tipped workers do non tip-earning tasks

Many employers in the service industry take what's called a "tip credit." In other words, they pay workers performing tip-generating tasks a lower wage (as little as $2.13 an hour, far below the federal minimum wage) with the expectation that tips will make up the difference. There's also been controversy for some time over whether tipped workers have to be paid at least minimum wage for time spent on non-tipped tasks. For example, do restaurant wait staff need to be paid minimum wage for time spent cleaning trash cans?

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Years ago, the U.S. Department of Labor issued "guidance" known as the "80/20" rule. This rule states that employers can't take a tip credit for time spent on non-tipped duties in excess of 20 percent of employees' workweek.

But it's not clear to what extent employers are required to follow such guidance (in other words, whether this is a recommendation or a hard, fast rule), though a recent decision from a federal appellate court on the West Coast indicates that at least in some jurisdictions it's mandatory.

In that case, a server at the J. Alexander's restaurant chain filed a class action on behalf of himself and other servers complaining that in addition to his tipped duties, the company abused the tip credit by forcing wait staff to spend more than 20 percent of their time on untipped tasks such as cutting lemons and limes, cleaning off drink dispensers and cleaning the bathrooms.

A federal judge threw out the case, finding that employers weren't required to follow the 80/20 rule. But the appellate court reversed, reasoning that the rule was necessary to stop employers from exploiting maintenance workers by paying them a sub-minimum wage simply because they might occasionally wait on a table or two.

Meanwhile, some states have adopted the 80/20 rule outright in enforcing their own wage laws.

What does this mean for employers? First, they need to consider whether it's really worth taking the tip credit if they're still going to force tipped workers to do other tasks. After all, it takes a great deal of recordkeeping to show you're complying with the 80/20 rule and the savings on wages may not be worth the cost of accounting.

Second, they should discuss their practices with an attorney who's well versed in wage-and-hour law to make sure they're not putting themselves at risk of a lawsuit.

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continued from page 1

ing another worker.

While the company was investigating the alleged harassment, McDonald asked to switch to an hour-long break or tack on her breaks in order to continue exercising during the workday, explaining that it helped with her pain.

Her supervisor denied the request because it didn't comply with the work rules under the CBA. She also warned McDonald that continued violations of the lunch break policy would result in discipline.

McDonald provided the personnel manager with a doctor's note confirming she needed to exercise every day for at least 30 minutes. While the personnel manager was processing her request, McDonald left early to go to the gym without permission. She was suspended for violating workplace rules and resigned.

McDonald sued her employer for violating the ADA by refusing to accommodate her disability and for retaliating against her by suspending her. But the court, upholding a trial judge's dismissal of the case, rejected her claim.

The court found that the employer met its obligation to reasonably accommodate McDonald. It noted that the employer listened to her request, provided alternatives and listened to her subsequent request, but she quit before it could process that request. It noted that less than two months had passed between the initial request and her resignation. The court also rejected her retaliation claim, pointing out that McDonald was suspended for violating rules and not for requesting an accommodation.

So what does this case show? Employers can hold fast to their workplace rules as long as they do so in a fair and even-handed manner and are flexible about requests for accommodations.

However, a 2014 case from California ended differently. In that case, a diabetic employee at a Walgreen's pharmacy was fired for violating an "anti-grazing" policy that barred workers from eating food sold in the store without first paying for it. The employee claimed she suffered a hypoglycemic attack when restocking items. She was allowed to carry candy in case she experienced a crash but didn't have any with her, so she grabbed a $1.37 bag of potato chips and ate a few. She claimed she tried to pay for the chips once she felt better, but nobody was at the counter where employees paid for items. She stowed the chips under the counter by her register, where a supervisor found them and fired her.

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The federal Equal Employment Opportunity Commission (EEOC) went after Walgreen's under the ADA, claiming disability discrimination. Walgreen's countered that it didn't fire the worker for her disability, but for the theft. It also pointed out that it was losing more than $350 million a year to employee theft at its thousands of locations, so it had to enforce its policy strictly.

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But a federal judge rejected this argument, stating that Walgreen's had to address the "business necessity" of the policy in the context of an employee suffering a medical event.

The judge also pointed out that Walgreen's couldn't establish the employee was "stealing" in light of her claimed attempts to pay for the chips. Ultimately, the company's conduct in this case resulted in a $180,000 settlement with the EEOC on the worker's behalf.

That costly bag of chips serves as a warning that although work rules matter, they should be applied reasonably. And both cases show that when work rules run into conflict with the ADA, employers should talk to an employment lawyer to discuss the best way to proceed.

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Firing workplace harasser may not be enough to avoid responsibility

A recent Virginia case highlights the importance of addressing reported harassment in the workplace quickly and supervising your managers in the process. It also shows that even eventually firing the harasser won't be enough to shield you from liability if you didn't respond sufficiently at first.


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In this case, employee Perry Funk claims that a male coworker subjected him to sexually inappropriate conduct, including opening his fly and thrusting his crotch in Funk's face and grabbing and jerking Funk's underwear. The co-worker also falsely and repeatedly told fellow employees that he and Funk had sex, according to Funk.

Funk reported these incidents to HR when his supervisor didn't address the situation. After an internal investigation confirmed that Funk had not only complained to the supervisor, but that the supervisor had actually witnessed the misconduct, both the co-worker and supervisor were fired.

Funk sued the employer in federal court, claiming a "hostile work environment" — a situation in which harassment was so pervasive it was unbearable to work there.

The employer tried to get the case thrown out, citing the strong action it took once Funk took his complaints to HR. But the court sided with Funk, finding that the supervisor's inaction was enough for the case to proceed. Now, Funk will get the chance to bring his case to trial, which could be costly.