Just. Stop. Talking.

by Dennis J. Merley - Monday, March 27, 2017

Good employment law advice can be found in many places, such as the Bible (Proverbs 17:28) which tells us “Even a fool, when he keeps silent, is considered wise[.]”

The culprits in the following three cases must have skipped church that day.

Case One: “Hey Everybody, Guess What’s Wrong With Him”

A federal judge in Florida ruled that even where the employee was granted time off under the Family and Medical Leave Act (FMLA), he could still sue for FMLA interference because his supervisor disclosed the underlying medical condition for which the leave was sought.

The employee had requested a FMLA leave for what the judge described as a “chronic and serious health condition with his genito-urinary system.” After the leave was granted, a supervisor divulged his medical condition to a number of co-workers, many of whom began to tease him and make jokes in front of him.

The employee sued, claiming a breach of FMLA’s regulations requiring that medical information connected with leave requests be kept confidential. The employer moved for early dismissal arguing that there was no interference with the FMLA request since the employee was granted his leave. In addition, they contended that the law does not authorize lawsuits pertaining to the confidentiality obligation.

The Judge denied the motion to dismiss and allowed the interference claim to proceed. She noted that while some jurisdictions agree that there is no right to sue under these circumstances, other courts do permit such claims to be pursued. Ultimately, the judge concluded that "confidentiality of medical information is a right provided and protected under the FMLA."

Interestingly, courts in Minnesota do recognize a right to sue for breach of confidentiality under FMLA, although they appear to require proof of tangible injury caused by the breach in order for the employee to prevail.

Supervisors and managers usually do not need to know why the employee is on FMLA – they just need to know the parameters of the leave. Disclosing the medical reasons for the leave, as we saw here, can turn a simple FMLA leave into a costly legal claim. When it comes to medical reasons for FMLA leave: Just. Stop. Talking.

Case Two: Snatching Defeat From the Jaws of Victory

A federal judge in Tennessee refused to dismiss racial discrimination and harassment claims filed by an African-American who quit his job after being subjected to racially offensive and intimidating language from various supervisors.

The employee contended that the supervisors' racially-oriented conduct, which included frequent use of the "N-word" and jokes about Black History Month, proved that racial bias motivated these same supervisors to deny him various promotions that he sought. In addition, he contended that this behavior created a racially hostile work environment that eventually forced him to resign.

The employer denied the allegations of discrimination in promotions, claiming that the employee just was not qualified for the jobs. They also denied the harassment claims, despite the fact that they admitted 26 separate allegations of racially oriented epithets and comments. The judge allowed both claims to proceed, finding it "curious" that the employer would suggest that the extensive pattern of racially hostile behavior was merely "isolated offensive utterance(s)" and not evidence of actual racial harassment.

The case is still in its early stages so we do not know if the employee actually was qualified for any of the promotions he sought. If not, there were good reasons for not promoting him but the racially-oriented behavior may now influence a jury to believe that racial bias, is why he did not get promoted. Someone should have told these supervisors: Just. Stop. Talking.

Case Three: Lawyers Do This Stuff Too

Lest you think we focus only on bad behavior by employers, consider the matter of an employment lawyer (on the plaintiff's side) who recently was fined by a federal judge in California in the amount of $7,706 for suggesting that opposing counsel was displaying "female energy" and that a conspiracy existed among the women in the room during a deposition. The judge called the remark unprofessional and recommended sensitivity training.

The lawyer in question argued that he should not be subject to sanctions because the case had been very combative on both sides. He stated that he was only responding to [opposing counsel's] false accusations against him and her obvious dislike for him due to his "masculine appearance." The judge disagreed, stating "No number of disputes or perceived professional misconduct justifies [the] actions, in which he made disparaging remarks to opposing counsel, repeatedly insulted her and called her names." the judge said. She concluded "It was evident from the hearing that he experiences trouble channeling his emotions, and the Court is concerned that he harbors issues, and perhaps even resentment, towards women,"

The lawyer in question may have been correct in observing that opposing counsel was acting improperly but his message got lost among the highly inappropriate gender-oriented remarks. As a result, his wallet is now a bit thinner after the judge gave him a very clear message: Just. Stop. Talking.

Bottom Line

As an employer, even justifiable employment actions can be undermined by improvident or improper remarks about an employee's protected classification. If anyone in your organization has trouble understanding this, just give them this helpful bit of advice. Just. Stop. Talking.

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