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FLORIDA
EMPLOYMENT LAW LETTER

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G. Thomas Harper, Editor
www.HarperGerlach.com

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What's Inside

On HRhero.com

Safety

The Occupational Safety and Health Administration is stepping up its efforts to crack down on employers with unsafe workplaces. Are you doing everything you can to make your workplace safe? At www.HRhero.com, you can find the following tools to help keep you in compliance:

- HR Executive Special Report — The H in OSHA Stands for Health, www.HRhero.com/special_reports/osha.shtml?M818
- Sample HR Policy — Injury/Illness on the Job, www.HRhero.com/lc/policies/601.html

PREGNANCY DISCRIMINATION

No macaroni for the bun in the oven

What do you do when you have performance problems with an employee who you just learned is pregnant? Can't you discipline someone who isn't doing her job? After all, you don't have to tolerate customer complaints or insubordinate comments from an employee, do you? How important is the language on a termination form? A Florida employer recently learned the answer to those questions. Read on to find out how it all went down.

Background

Jenetta McGuire, who worked as a server for Romano's Macaroni Grill Restaurant, sued her employer for pregnancy discrimination and retaliation. Her direct supervisor was Brian Neel, and the general manager was Stephen Payton.

During her employment, Macaroni Grill documented numerous issues with McGuire's performance. She was chronically late for work, there were documented incidents of her failure to report to work and notify management that she would be absent, and there were various customer complaints about her performance. Additionally, she refused to carry trays of food, which was a restaurant policy. Instead, she preferred to carry several individual plates at a time.

In May 2006, McGuire discovered she was pregnant and immediately told Neel and her coworkers. She claimed that after she informed the restaurant of her pregnancy, she started getting treated differently. For example, she stated that although she was frequently late before her pregnancy, she began to be reprimanded more harshly for her tardiness after she became pregnant. Similarly, she felt that the managers didn't seem to care that she didn't use trays to carry food until after they learned of her pregnancy.

On June 13, Neel received a complaint from a customer about McGuire's service. McGuire claimed that Neel instructed her to report to the kitchen, where he then began to scream and curse at her. Following the incident, she asked Neel's permission to go home. On her way out, she remarked to a coworker that Neel "was being a d___." Neel overheard the statement.

On June 16, McGuire met with Payton, who wanted Neel to be present to tell his side of the story. She told Payton that she felt she was being treated differently because she was pregnant, and a few days later, she, Payton, and Neel met again to discuss the incident. McGuire was fired during the meeting, at which time Payton remarked that she could have her job back after she had the baby. Her termination document stated the reasons for her discharge as "insubordination/refused to do job" and "voluntarily sent herself home on a shift."

Pregnancy protection

Title VII of the Civil Rights Act of 1964 prohibits discrimination "based

on sex." The Pregnancy Discrimination Act (PDA) extends the meaning of "based on sex" to prohibit discrimination based on pregnancy, childbirth, or related medical conditions. The Eleventh U.S. Circuit Court of Appeals (which covers Florida) doesn't require you to give preferential treatment to pregnant employees under Title VII or the PDA. Instead, you are in violation of the law if you deny a pregnant employee a benefit generally available to temporarily disabled workers who hold a similar position.

Documentation created at the time of termination is often very persuasive evidence of why the decision was made.

For McGuire's case to get to trial, she had to show that she fell under the protection of Title VII and the PDA. To do that she needed to show that she:

(1) was a member of a protected class;

(2) was qualified for her job;

(3) suffered an adverse employment action; and

(4) was treated differently than employees who weren't pregnant.

Macaroni Grill acknowledged that McGuire met the first three requirements. She was pregnant, so she was protected. She was qualified for her job, and being fired was an adverse employment action. However, it contended that she was treated the same as any other employee. The court determined that based on the evidence, a jury could find that McGuire was treated differently.

Fired for being pregnant, being late, both, or neither?

After deciding McGuire met the four required factors, the court then examined Macaroni Grill's reason for firing her. The restaurant gave a laundry list of reasons for her termination, but the court chose to focus on the reasons listed on the termination form. Those reasons were "insubordination/refused to do job" and "voluntarily sent herself home on a shift." It refused to consider Macaroni Grill's arguments that frequent tardiness and customer complaints were part of the reason for McGuire's termination, even though the incidents were documented and admitted to by McGuire.

The court acknowledged that there was evidence of McGuire's insubordination (*e.g.*, her comment about Neel) but noted that after the incident, she was allowed to go home and soon after was fired. Because of inconsistencies and contradictions with respect to the termination form and the comment from Payton that McGuire could return to work after she had the baby, the court refused to dismiss the lawsuit. As a result, a jury will now hear McGuire's case.

Bottom line

Be as thorough as possible when filling out the termination form for a discharged employee. Documentation created at the time of termination is often very persuasive evidence of why the decision was made. It is always advisable to document incidents involving employees and to keep records.

➥ *You can research Title VII, the PDA, or any other employment law topic in the subscribers' area of www.HRhero.com, the website for Florida Employment Law Letter. Access to this online library is included in your newsletter subscription at no additional charge.* ✤

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