

# An Ounce of Prevention: How to Stay Out of Employment Lawsuits

Pittsburgh Employment Law Conference

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CLARK HILL

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## HYPOTHETICAL #1

One year ago, Mikhail Murphy was disciplined twice, once for safety violations and once for cursing at his supervisor. Subsequently, he filed an EEOC Charge claiming age and national origin discrimination by his supervisor. Recently, there has been a rash of thefts from the plant and the parts are being sold on eBay. Mikhail's supervisor tells you that he has investigated the matter, talked to several employees, and has solid information that Mikhail is stealing the parts. He wants HR to approve the termination.

**What should I do?**

- A) Take no action because of a possible retaliation claim**
- B) Install video cameras and see if you can see Mikhail stealing the parts**
- C) Offer Mikhail a last chance agreement and terminate him if he doesn't sign it**
- D) Re-interview the witnesses and review the entire matter again**
- E) Approve the termination**



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## HYPOTHETICAL #2

You have a high-performing, thirty-year employee in a physically-demanding job which requires both climbing and lifting. Unfortunately, the employee has begun to gain considerable weight and suffers from both hypertension and Type I Diabetes. The employee's supervisor comes to you and expresses the concern that the employee is going to "stroke out" on the job.

**What should I do?**

- A) Do nothing**
- B) Get the employee involved in a wellness program**
- C) Transfer the employee to a less physically demanding job**
- D) Send the employee for a medical physical examination to determine if the employee can perform the essential functions of the position**
- E) Send the supervisor for EEO/ADA training**



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## HYPOTHETICAL #3

Shifty Lewis misses work at We Do Good Work, Inc. (WDGW) on April 4 and 5 and claims that his absence was related to anxiety and depression. You request medical certification for intermittent leave under the FMLA. The certification submitted is dated April 18, completely filled out and signed by Shifty's health care provider, a licensed mental health social worker. The certification establishes that Shifty has suffered from anxiety and depression for three years, was incapable of working due to anxiety and depression on April 4 and 5, but also states that Shifty's last mental health visit prior to getting the certification form filled out on April 18 was March 1.

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## HYPOTHETICAL #3

What should I do?

- A) Approve the FMLA leave because the certification is complete
- B) Seek a second opinion
- C) Deny the FMLA leave because the health care provider did not treat Shifty at or near the time of the April 4<sup>th</sup> & 5<sup>th</sup> absences and accordingly can not offer a valid opinion of whether Shifty was incapacitated on those days
- D) Call the health care provider to question how she can certify Shifty's condition and incapacity on two days that are weeks away from any treatment
- E) Deny the FMLA leave because a licensed mental health social worker is not a health care provider under the FMLA

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## HYPOTHETICAL #4

Jim is the supervisor of one of my teams. The team is made up of six white employees and four black employees. It also has several women on it including Tina. Tina came to me today and told me that Jim was harassing her and other team members. He yells at them all the time. He refuses to answer questions about the job, telling the employees to figure it out on their own. Because of Jim, she is considering applying to a different department. She also says if this continues, she will go to the EEOC and file a complaint.

**What should I do?**

- A) Move Tina to an open position in another department**
- B) Fire Jim because he is harassing Tina**
- C) Ignore it, Jim is not harassing Tina**
- D) Provide Jim training on how to be a good supervisor**



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## HYPOTHETICAL #5

You conduct a thorough investigation. Mikhail refuses to answer any questions about the thefts. Two employees sign statements that they heard Mikhail bragging about “making lots of cash selling stuff” on eBay. Another third shift employee reports that he has seen Mikhail leaving the warehouse with a full duffel bag on more than one occasion.

**What should I do?**

- A) Wait to discipline Mikhail until you have direct proof of theft**
- B) Offer Mikhail the right to be interviewed with a lawyer**
- C) Transfer Mikhail to the day shift and see if the thefts stop**
- D) Terminate Mikhail based on your investigation**



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## HYPOTHETICAL #6

Unfortunately, your overweight, hypertensive, diabetic employee begins to experience neuropathy in his legs and misses significant time at work, including mandatory overtime, both for medical appointments and for rest and recuperation. The employee's absences have reached the point where discipline is appropriate under the standards applicable to those in his/her classification.

**What should I do?**

- A) Do nothing**
- B) Get the employee involved in a wellness program**
- C) Discipline for all absences in the same manner as you would any other employee**
- D) Discipline for the absences occurring during the regular work week but not for those resulting from mandatory overtime**
- E) Ask if some form of reasonable accommodation is necessary**



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## HYPOTHETICAL #7

Shifty Lewis' FMLA medical certification states that it is expected that Shifty will be absent 3-4 times per month due to anxiety and depression. Shifty's manager is complaining because, for the last two months, Shifty has missed 6 and 8 days, respectively, due to anxiety and depression, and he has been tardy 9 times, claiming the same conditions. Unexcused, non-FMLA absences and tardies are assessed a point under the attendance procedure.

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## HYPOTHETICAL #7

**What should I do?**

- A) Nothing. Shifty's medical certification covers these absences and tardies, and anxiety and depression are unpredictable conditions**
- B) Assess points for each absence beyond three in a month, and if this warrants termination under the attendance procedure, terminate Shifty**
- C) Assess points for the tardies but not the absences. The absences are covered by the medical certification but not the tardies**
- D) Call Shifty's health care provider to find out what's going on**
- E) Question Shifty about his absences and tardies and seek recertification of his intermittent FMLA leave, informing the health care provider of the change in Shifty's absence/tardiness pattern**

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## HYPOTHETICAL #8

Barb is my office manager. I pay her a salary of \$600 a week. I pay the secretaries a salary of \$400 a week. Barb is in charge of the office staff. She ensures that the secretaries do their job; ensures that the billing statements are sent out on time; ensures the collection of the accounts receivables; and purchases supplies for the office. I do not pay her or the secretaries overtime because they are salaried employees. They do not punch a clock. I just got a call from Barb's attorney claiming I have to pay her and the secretaries overtime for the past three years.

**Do I have to pay overtime?**

- A) You have to pay overtime to both Barb and the secretaries**
- B) You have to pay overtime to Barb, but not the secretaries**
- C) You have to pay overtime to the secretaries, but not Barb**
- D) You don't have to pay any of the salaried workforce overtime**

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## HYPOTHETICAL #9

You decide to transfer Mikhail to the day shift. Two months later he applies for paid bereavement leave to attend his sister's funeral. The following week his new supervisor comes to you with pictures that coworkers have printed from Mikhail's Facebook page. They show Mikhail drinking, dancing and partying at multiple bars during a St. Patrick's Day Pub Crawl. These pictures were taken on the same date that Mikhail was supposed to be at the funeral.

Your boss the CEO has had enough. He terminates Mikhail.

Mikhail sues claiming retaliation, age and national origin discrimination and harassment. His Complaint alleges that he was at the funeral the day before the St. Patrick's Day Pub crawl and he did nothing wrong.

You meet with lawyers to assess the case.

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## HYPOTHETICAL #9

**What should I do?**

- A) Offer unconditional reinstatement with back pay to cut off damages because the Company made a mistake and didn't investigate the incident before firing Mikhail**
- B) Try to settle because the supervisor should not have obtained the information from Mikhail's Facebook page**
- C) Assert the defense that Mikhail is not entitled to any damages because of the evidence that he was stealing from the Company**
- D) Vigorously defend the case even though you may have been mistaken about the bereavement leave**

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## HYPOTHETICAL #10

Unfortunately, your overweight, hypertensive, diabetic employee suffers a stroke and requests a medical leave of absence. After the employee exhausts the 12 weeks of medical leave under the FMLA, the employee presents a physician's statement indicating that the employee needs one additional month of leave before being able to return to work.

**What should I do?**

- A) Grant the employee's request**
- B) Deny the employee's request**
- C) Engage in the interactive process to determine whether there is any other reasonable accommodation, such as reassignment to a less physically demanding job**
- D) Call Gordon or Rawitt**

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## HYPOTHETICAL #11

Shifty Lewis develops severe back pain due to a spinal condition and commences an approved continuous FMLA leave separate from his intermittent FMLA leave due to anxiety and depression. The medical certification states that the severe back pain prevents him from standing or walking for more than 15 minutes at a time. While he is on leave, two coworkers report that they saw Shifty mingling and drinking for more than an hour at McFadden's Saloon outside PNC Park after the Pirates won the pennant and then celebrating in the streets while walking several blocks to his car. As verification, the coworker – who is “friends” with Shifty on Facebook – shows you Facebook photos of Shifty mingling at McFadden's and celebrating in the streets. When you call Shifty, he acknowledges being at the game and having a beer at McFadden's, but states that he was sitting most of the time, that he walked to his car and that short walks actually relieve his back pain.

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# HYPOTHETICAL #11

**What should I do?**

- A) Nothing. You can not rely on Shifty's Facebook page photos because you are not "friends" with Shifty on Facebook.**
- B) Nothing. The risk is too great if you accept the word of co-workers over Shifty.**
- C) Inform Shifty if he does not return to work immediately, his employment will be terminated**
- D) Terminate Shifty based on your investigation's conclusion that he has engaged in FMLA fraud**
- E) Call Gordon or Rawitt to see if you can fire Shifty yet**

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## HYPOTHETICAL #12

You are the HR director for Mortsdron, a large upscale women's clothing store. This week, one of the top sales professionals in the store started to come to work dressed as a man. She is telling everyone, including customers, about the quick and "amazing" effects of hormonal therapy and that she plans on having sex reassignment surgery in six weeks. Customers have questioned the staff about her behavior and indicated that they think it's "strange."

The CEO wants her fired.

**What should I do?**

- A) Tell him he can because "transgender" is not a protected class under Title VII**
- B) Tell him he can because being a female is a BFOQ**
- C) Tell him he can because she is harming the company's public image**
- D) All of the above**
- E) None of the above**

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## HYPOTHETICAL #13

After you grant the employee's request for an additional month of leave, your overweight, hypertensive diabetic employee returns to work but with a restriction that he/she should not be required to work any overtime hours. Your policy has been not to allow an employee to return from a medical leave of absence unless and until the employee is 100% healed and can perform all of the essential functions of the position. What should you do?

**What should I do?**

- A) Allow the employee to return to work with the overtime restriction**
- B) Deny the employee the right to return to work until s(he) is 100% healed and can return to work without restrictions**
- C) Engage in the interactive process for the purpose of determining whether there is any other reasonable accommodation such as reassignment to a job that does not require mandatory overtime**
- D) Call Gordon or Rawitt**

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## HYPOTHETICAL #14

Shifty Lewis has been approved for intermittent FMLA leave due to anxiety and depression by WDGW. WDGW requires its employees to call in absences to their supervisor at least one hour before the start of the shift or be assessed an attendance point. Unexcused, non-FMLA absences and tardies are also each assessed a point.

Shifty calls in 15 minutes before the start of the shift to report that he will be absent by leaving his supervisor a voice mail message stating “I am feeling sick and won’t be in.”



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# HYPOTHETICAL #14

**What should I do?**

- A) Assess Shifty 2 points, one for a late call-in and one for an unexcused absence**
- B) Assess Shifty 1 point for a late call-in but excuse the absence based on his approved intermittent FMLA leave**
- C) Because Shifty has been approved for intermittent FMLA leave, do not assess any points**
- D) Speak to Shifty when he returns to work to find out why he did not call in at least an hour before the start of his shift and if he doesn't have a reasonable excuse, assess 2 points for a late call-in and an unexcused absence**
- E) Speak to Shifty when he returns to work to find out why he did not call in at least an hour before the start of his shift and if he doesn't have a reasonable excuse, assess 1 point for the late call-in but excuse the absence based on his approved FMLA leave**

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# PAY (A LITTLE) NOW OR PAY (A LOT) LATER



IT IS MUCH LESS EXPENSIVE FOR THE COMPANY TO  
GET LEGAL ADVICE ON AN EMPLOYMENT ISSUE  
THAN TO DEFEND A LAWSUIT.

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# Thank You

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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.

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