



Documentation and Proper Office Protocol: Avoiding Allegations of Pregnancy Discrimination

BY TDIC RISK MANAGEMENT DEPARTMENT

Once a quarter, the *Journal* features a TDIC risk management case study, which provides analysis and practical advice on a variety of issues related to liability risks.

Authored by TDIC risk management analysts, each article presents a case overview and real-life outcome, and reviews learning points and tips that everyone can apply to their practice.

A chairside assistant sues her former employer for wrongful termination and gender discrimination. Susan Felt and two other female candidates interviewed for a chairside assistant position in Dr. Michael Stanley's office. The interviews consisted of a series of technical questions from Dr. Stanley and general questions from the office manager, Ms. Claire Wiggins. During the interview, Ms. Wiggins asked each candidate whether she had any plans of getting pregnant in the near future. She informed each candidate that the office only had three employees and therefore, it could not operate with anyone out for a long period of time, such as pregnancy leave. The first two candidates stated that each was contemplating starting a family in the near future. Ms. Felt answered "no" to the question. Dr. Stanley hired Ms. Felt based on her skills and the fact that she did not desire to add to her family. Ms. Felt began her employment as a chairside assistant in 2000 with a 90-day introductory period.

During Ms. Felt's first two years

of employment with Dr. Stanley, he often disciplined her for being late for work. Additionally, she received poor performance reviews for neglecting her assigned duties. Dr. Stanley had Ms. Felt sign every performance evaluation and all corrective actions, gave her copies of the documents, and kept the originals in her personnel file.

In April 2002, Ms. Felt informed Dr. Stanley that she was pregnant. Dr. Stanley told her that he required a letter from her physician listing any special accommodations she may require during her pregnancy and her due date. Ms. Felt had her obstetrician fax a letter to Dr. Stanley's office. Dr. Stanley placed the letter, which did not indicate any special accommodations, and gave a due date of Dec. 26, in Ms. Felt's personnel file.

In the first week of December, Ms. Felt went on pregnancy leave. Ms. Wiggins informed her she had used all of her vacation and sick time but explained the Family Medical Leave Act. Even though Dr. Stanley's office had fewer than 50 employees, he chose to offer FMLA as an employee benefit. Ms. Felt said she would

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return to work on March 15, within her 12 weeks allotted under FMLA. As March 15 approached, Ms. Wiggins tried calling Ms. Felt several times to confirm the date of her return and to ensure that her physician agreed that she was ready to return. Ms. Felt failed to answer the phone calls or return any messages. Ms. Wiggins sent a letter to Ms. Felt extending her date of return to May 1. In the letter, Ms. Wiggins explained that if Ms. Felt did not return to work on May 1, Dr. Stanley would assume she was resigning her position.

Ms. Felt did not present for work on May 1, nor did she call to offer any explanation. Dr. Stanley sent Ms. Felt a letter accepting her resignation since she did not return to work. Dr. Stanley included information on how to obtain COBRA medical coverage and copies of excerpts from the employee manual pertaining to pregnancy leave and medical insurance. Ms. Felt's 2000 signature on the forms indicated she understood and agreed to the office policies.

Several weeks later, Dr. Stanley received a letter from Ms. Felt's attorney stating she was suing him for wrongful termination and gender discrimination. Additionally, the letter included accusations of sexual harassment but did not include any evidence to support this allegation. Ms. Felt demanded an apology from Dr. Stanley, reinstatement to her job, and back pay. The letter instructed Dr. Stanley to send a summary of the reasons Ms. Felt was terminated along with any supporting documentation.

During Discovery

Dr. Stanley contacted TDIC to inform them of the situation. The claims representative instructed Dr. Stanley to forward all information pertaining to Mrs. Felt's employment to TDIC and to the employee's attorney as requested in the let-

ter. Dr. Stanley sent copies of the office's pregnancy leave policy from the employee manual as well as copies of Ms. Felt's performance reviews, her timesheets, which revealed that she was repeatedly 15-20 minutes late for work, and copies of all written corrective actions documented during her two years of employment. After reviewing the information provided by Dr. Stanley, Ms. Felt's attorney declined pursuing any legal recourse, as there was no merit to Ms. Felt's allegations.

What Lessons Can We Learn From Reviewing This Case?

INTERVIEWS

For the sake of consistency and to avoid the appearance of discrimination during the hiring process, ask each candidate the same questions. If multiple people will be conducting interviews, it is important to review the questions with one another. This will ensure that the questions are appropriate. No employer should inquire, either on the application or during the interview, about an applicant's age, ethnic background, national origin, marital status, family planning, and disabilities. Questions about sexual, religious or political preferences are strictly taboo as well.

Dr. Stanley and Ms. Wiggins interviewed Ms. Felt to assess her clinical knowledge and her compatibility with the office staff. Unfortunately, Dr. Stanley and Ms. Wiggins did not discuss with each other the questions they were going to ask prior to the interview. Even though Dr. Stanley was not aware that

Ms. Wiggins was going to ask the candidates questions regarding pregnancy, Ms. Felt's attorney may have used that question to support the allegation of discrimination against Dr. Stanley.

PERFORMANCE EVALUATIONS

Employees are usually nervous about receiving their review and often see it as a negative experience. Consider these guidelines to help you develop successful performance evaluations.

- Perform evaluations regularly (at least yearly).
- Discuss promotions or raises well before the performance evaluation, not during it.
- Establish a date on which you will conduct the performance evaluation.
- Set goals that are realistic and have the employee prepare the same information, and then compare the two with the employee.
- Be sure the employee agrees with the established goals.
- Keep communication open.
- Nothing should come as a surprise to you or the employee. Address difficult topics as they arise and do not save them for the performance evaluation.
- View everything as positive feedback and not as a form of criticism.
- Document all discussions and the employee's reaction.
- Sign the performance evaluation and have the employee sign it. File the original in the employee's personnel file, and give the employee a copy.
- Have a follow-up meeting if there are areas of concern.

Because most people link promotions and raises to their performance evaluation, separate the process. Settle the money and promotion issues first, and then use the evaluation as a development tool. Once everyone begins to view

Do not have a separate pregnancy leave policy that is different from the short-term disability policy applicable to all employees.

the process as a means for feedback, the negativity associated with evaluations will lessen. A properly done evaluation will not only tell employees where they need improvement but also offer tools to assist them in meeting the expectations.

It is absolutely incumbent upon employers to make certain that they are being honest and forthright and point out any and all work-related deficiencies. Use specific examples. Do not water down the performance evaluation. Time and again in discrimination cases when employees are terminated for performance reasons, the performance evaluations do not reflect any problems because supervisors did not want to hurt the employees' feelings.

Dr. Stanley had thoroughly documented Ms. Felt's performance evaluations and was able to supply copies when requested by the attorney. These evaluations included Ms. Felt's signature and provided the necessary evidence to defend Dr. Stanley against Ms. Felt's allegations.

CORRECTIVE ACTION

It is important to follow similar advice for corrective actions. Documented corrective actions demonstrate and record the performance and/or behavioral issues with an employee and can be very helpful when defending allegations such as Ms. Felt's. Many times, performance and/or behavioral issues — sometimes very serious issues — occur in between performance evaluations and it is imperative these issues be addressed and documented at the time they occur rather than waiting until a performance evaluation, which may be months away. Consider these guidelines to help you develop successful corrective action processes. And, include them in your employee manual.

1. Conduct a confidential corrective action meeting with the em-

ployee shortly after the inappropriate issue starts and/or occurs.

2. Explain the issue and discuss the situation with the employee.

3. Set forth, in writing, the expected corrective action, which may be actions by the employee, you, or both.

4. Document all discussions and the employee's reactions.

5. Sign the corrective action notice and have the employee sign it. File the original in the employee's personnel file and give a copy to the employee.

6. Have a follow-up meeting if there are continuing areas of concern or if the corrective actions are not being taken.

Spelling out what you expect the employee to accomplish provides the employee a clear understanding of the job itself. Remember to be factual and objective. Dr. Stanley's thorough documentation helped defend him against Ms. Felt's allegations.

PREGNANCY PROTOCOL

It is important to establish a protocol for pregnant employees to follow. When an employee discovers she is pregnant, she should inform you as soon as possible as the most vulnerable period for the employee or her developing fetus is during the early stages of pregnancy. Your employee manual and policies should include a statement of the employee's responsibility to notify you of a pregnancy as soon as possible. At a minimum, document you advised your staff of their obligations to inform you and document in the employee's personnel file when an employee informs she is pregnant. Obtain a letter from the employee's

physician stating her estimated delivery date and any special accommodations she will require during her pregnancy. Keep a copy in her personnel file.

Dental offices must treat pregnant women or those with pregnancy-related conditions in the same manner as other applicants or employees with similar abilities or limitations. Do not have a separate pregnancy leave policy that is different from the short-term disability policy applicable to all employees.

Once Ms. Felt notified Dr. Stanley of her pregnancy, he followed the proper protocol by obtaining a letter from her obstetrician that included any accommodations necessary during her pregnancy. Additionally, Dr. Stanley placed the letter in her personnel file.

Since some states grant additional leave that you may be required to provide to pregnant women, visit thedentists.com for state-specific laws related to pregnancy leave and accommodations.

SAFETY MEASURES

Once an employer is notified of a pregnancy, the first obligation is to assess the risk for the pregnant employee within the workplace. We recommend:

- Assessing the risks to which pregnant women, women who have recently given birth, or women who are breastfeeding, are exposed and the extent of the exposure.

- Informing the employees concerned of any identified risk(s) and control/protective measures that will be put in place.

- Determining the practical measures to be implemented in the workplace to protect against the risk.

A great deal of concern surrounds the use of mercury, ionizing and nonionizing radiation, and certain chemicals, including nitrous oxide, for those women or men who are trying to conceive as well as

pregnant women. Research reported by the *New England Journal of Medicine* links birth defects to nitrous oxide use. However, this theory is controversial and not entirely supported by data. To be cautious, it is best to have pregnant staff members or those trying to conceive refrain from being in the same operatory when nitrous oxide is being administered, unless their treating physician states otherwise.

Be aware of legal and practical considerations affecting pregnant employees and those who are trying to conceive. Prepare in advance so that your office will run smoothly when one of your staff members announces she is expecting.

To ensure that you deal fairly with pregnant employees or those trying to conceive, remember to:

- Obtain a letter from the employee's physician stating his/her condition.
- Have the employee provide you with restrictions and the length of time those restrictions can be expected to continue as indicated in writing by his/her physician.
- Assess the risks to which the employee is exposed.
- Implement measures to protect him/her from those identified risks.
- Hold a staff meeting to inform other staff members of any changes that may be expected.
- Prohibit employees who are pregnant or trying to conceive from working in the operatory when nitrous oxide is being administered.
- Keep lines of communication open regarding the employee's condition and special needs.
- Consider placing the employee in a different position temporarily.
- Treat the employee as you would any employee with a disability.
- Accommodate employees who breastfeed. ■■■■