



Human Resource and Management Services

July 2006

HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

◆ FROM WORKERS' COMPENSATION LAW BULLETIN ◆

“Staying after hours can spell trouble”

Restaurant and bar owners often allow workers to stay after they finish their shifts. The employer may consider them to transform from employee status to customer status, but a court may not share that view. One factor that could tip the scales in favor of employee status is whether the employee “helps out” even a little while off duty. Tending bar, serving drinks, or even washing a few dishes as a “favor” can lead to big liability for the employer.

◆ FROM PERSONNEL LEGAL ALERT ◆

“Fragrances in the Workplace: A Real ADA Concern”

A radio DJ claimed she was allergic to a co-worker's perfume, which caused her to have breathing problems and damaged her vocal chords. Although both the DJ's doctor and a company physician verified the DJ's allergy problems, the employer allegedly denied her request to transfer to a different shift to reduce her contact with the co-worker. She continued to have medical problems, which resulted in several medical leaves of absence. The company fired her for taking an allergy related leave when a second company doctor determined that she did not need an accommodation. The DJ charged she was fired in retaliation for having filed a disability discrimination complaint.

The company claimed it accommodated the DJ by telling the co-worker not to wear the perfume and adjusting schedules so the two would not have contact. It fired her for not going to work.

In court, a jury awarded the employee \$10.6 million in damages. (*Weber v. Infinity Broadcasting Corp., E.D. MI, No. 02-74602, 2005*)

Here's why the fragrance sensitivity netted a huge return for the employee:

Qualified Disability. She could show she was substantially limited in the major life activity of

breathing, and she could not perform the essential functions of the job with reasonable accommodation.

Accommodation. A shift adjustment is a reasonable accommodation. In this case however, it was not reasonable because it was not effective – she still encountered the co-worker every day.

Timing. The timing of the employee's termination – after she filed a discrimination complaint and while she was on medical leave of absence led to an inference that the employer retaliated against her.

◆ FROM CCH HR MANAGEMENT ◆

“Amendment to raise minimum wage unlikely to survive”

A House committee adopted an amendment calling for an increase in the minimum wage. While the vote provided Democrats with an unanticipated victory, the amendment is unlikely to remain in the final legislation.

The amendment endorsed by House Appropriations Committee would raise the minimum wage from the current \$5.15 an hour to \$7.25 in three increments over two years. The committee approved the provision by a 32-27 vote on June 13, adding it to an unnumbered bill to fund the Labor department and other agencies in fiscal 2007. Seven Republicans joined the committee's Democrats in support of the amendment. But the amendment is unlikely to survive because the Appropriations Committee does not have jurisdiction over the wage issue.

The vote on the amendment came on the heels of a new study by the Center for Policy and Economic Research, which concluded that the purchasing power of the minimum wage is at its lowest level in 50 years. The minimum wage has not been raised since 1997. Full-time minimum wage workers with families fall below the poverty line. Republican opponents of a wage increase argue that a rise would stunt new job growth and harm small business, a position dismissed by Democrats.

◆ **A REAL LIFE SITUATION** ◆

Situation: A long time employee showed up to work and appeared to be intoxicated. He was slurring his words and smelled of alcohol. The employee's manager said this is the second time this month that this has happened. Other employees have taken notice and are spending time gossiping about what is going on instead of working. The manager would like to fire the employee.

Observation: There are potentially two issues. The first issue is the employee showed up to work in some sort of state of perceived intoxication. The second issue is factual in that employees are now gossiping instead of working.

In addressing the first issue, extreme care needs to be taken because a) what credentials does the manager have in possessing the ability to tell that a certain smell on an employee is due to drinking? b) how does he know it's just not other employees trying to 'gang-up' on this employee and get him into trouble? c) how does the manager know that it's alcohol and not medication that is being smelled? and d) has the manager himself observed the slurring and smelled the scent of alcohol?

Because of the delicate nature of this issue, small and careful steps need to be taken to eventually lead to the \$1 million question, "Are you on something?" Dangerous if not done right. Extremely dangerous if the employee is terminated with the information given thus far.

Given the delicate nature of possible defamation, the second issue, which is factual, is the best one to address. This issue is to address to the other employees that they are creating disruption and disturbances that need to stop. Disciplinary action could also follow if necessary.

This issue also should address the employee's behavior, which are facts. And these facts are

- that his speech is coming across slurred and sometimes incomprehensible, and that
- he has a distinct odor emanating from him, his hair, breath, clothes, or some other part of him or his body.

Once these 'facts' are mentioned to him, he then needs to be told "Can you please explain?"

Based on his response, the manager should then be able to get either an admission or other input in which he can then make a better informed decision.

Obviously, this case could also have some possible serious ADA implications as well.

FEATURED SERVICE
Employee Handbooks

- When was the last time your Employee Handbook was reviewed?
- The last time an employee found a loophole with one of your policies, did you update it to make sure it doesn't happen again?
- Do you have certain policies from other companies that you now wonder if you should apply them to yours?
- You now have reached 15, 20, 50, or 100 employees. Do you know all of the government requirements that you have to meet now that you have reached that certain threshold?
- You don't have an Employee Handbook because you thought your business is too small. But at what point does it make sense to have one developed?

HR&M can help you determine when an update is needed, what policies apply to which industry, what magic number of employees do you have to have in order to comply with certain requirements, and at what point should an Employee Handbook be available to both employees and management.

Call HR&M to help you with these situations.

◆ **REMEMBER! WE CAN HELP!!** ◆

Consulting on performance, attendance, FMLA, Wage & Hour, management accountability, and other unique issues is just one of the areas of our expertise.

We also provide:

- supervisory/management training, ranging from brown bag luncheon training to ½ or full day sessions
- employee handbook development, from creating to updating
- responses to discrimination charges and unemployment claims
- on-line performance review forms and processes
- guidance on coaching, counseling, and disciplining in employee relations matters