

MOMENTUM 2022 Annual Conference and Trade Show · August 30 – September 1, 2022 **LeadingAge**
Ohio

He's Not Doing His Job. Now What?

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LEGAL DISCLAIMER

Nothing in this Presentation should be construed as legal advice

Should a question of importance arise, you should seek advice from an attorney as soon as possible

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Objectives

- 1 • Understand Statutory Drivers for Claims that the Employee is unable to do his job
- 2 • Assess risk and options relating to an Employee's inability or unwillingness to perform a job requirement
- 3 • Create strategies to reduce risk and resolve disputes involving an employee's inability or unwillingness to perform a job requirement

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Laws Most Commonly Involved with Claims that the Employee Cannot Do His Job

- The Family Medical Leave Act
- The Americans with Disabilities Act
- The Ohio Bureau of Workers Compensation
- Title VII of the Civil Rights Act of 1964

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FMLA Core Concepts

- Serious Health Condition
- Leave: Continuous; Intermittent; Reduced Schedule
- Job Restoration
- Health Insurance Continuation

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ADA Core Concepts

- Impairment Substantially Limiting
- A Major Life Activity
- Ability to Perform Essential Function(s) of the Job
- With or Without Reasonable Accommodation

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Core Concepts for BWC Injuries

- Allowed Condition
- Temporary Total Disability
- Modified Duty
- Maximum Medical Improvement

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Case Study 1: Managing Attendance

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graph TD
    A[Employer has a No Fault Attendance Policy] --> B[9 absences in 12 months results in termination]
    B --> C[Heading into month 12, the Employee had 8 absences]
    C --> D[She tried hard to avoid that final absence]
    D --> E[But fate intervened...]
  
```

Employer has a No Fault Attendance Policy

9 absences in 12 months results in termination

Heading into month 12, the Employee had 8 absences

She tried hard to avoid that final absence

But fate intervened...

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Attendance

The Employee now had 9 absences in 12 months.

What should the Employer do?

- **Add a new fact:** her husband had a heart attack caused by the accident
- **Add a new fact:** the Employee is represented by a Union that states it will grieve any discipline

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Case Study 2: Workplace Investigation

(330) 928-****

Add to Contacts Block Number

Friday, August 27, 2021

Good Morning! **9:20 am** **9:29 am** Good Morning who is this?

Well, honestly, I was trying to see how much
It will take to get some of that big juicy
Wide*** **9:42 am**

9:49 am Who is this? It will cost you an arm and a
leg

That's fine I'll pay it.
When?

o Employee claims she is being harassed

o Latest example is a sexually-charged text message

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Investigation Practices

- ❏
The Intern who took the Complaint told the Employee that someone probably would contact her to discuss complaint
- ❏
The complaining Employee began looking for others possibly harassed
- ❏
The Intern lost the Employee's text screenshot and asked the Employee for another copy
- ❏
The Employee brought a second copy – but it contained information missing from the first one

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Investigation Practices

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9:49 am Who is this? It will cost you an arm and a leg

That's fine I'll pay it.
When?

?? **9:56 am**

U must be scared of ***** ****
\$150.00 **10:01 am**

Wassup boo **10:12 am**

I've tried calling you on my other phone
But you won't pick up
10:22 am (330) 375-****

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Investigation Practices

- Management did not discuss the text messages with Employee. Employee on her own determined the texter was a supervisor.
- Management decided the supervisor was the texter (They were ticked at him since he'd already been accused of harassment and should know better).
- Management resolved the situation by bringing the Supervisor and the Employee to the same conference room to remind them that the work rules do not permit employees to fraternize during work.
- Any Problem?

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Case Study 3: FMLA Leave & Discipline

- The Administrator was just days away from FMLA leave to have her first baby
- The Regional Director appeared at the Facility to discover disarray:
 - ✓ Civil war between the Administrator’s favorites and everybody else
 - ✓ Administrator was refusing new admissions because she was concerned about COVID affecting her pregnancy
- **Can the Operator take corrective action with the Administrator? Should it?**

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Case Study 4: Coordination for a Workers Compensation Injury



- The Employee injured at work 11/2020. The Claim was allowed for contusion of the right shoulder, strain right arm, 2 tears and tendinitis right shoulder



- The Facility offered LD compliant with restrictions 5/2021. The Employee rejected the offer



- 6/2021 - Surgery performed on the tears. MMI achieved 3/2022. The Employee hasn’t worked since 11/2020



- The Employer recently discovered that the Employee is still listed as active employee, covered by Employer health insurance – and using it!

- **Does the Employer need to do anything?**

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Case Study 5: FMLA & Termination

- The Employee has a mature record of poor performance
- The Employee was placed on a 30-day PIP four weeks earlier
- It is unknown what was done to monitor, evaluate or trend the Employee, or communicate expectations, performance observations, directions, etc.
- The Employer decided to terminate the Employee but postponed from Friday to the following Monday because the Administrator was taking a long weekend
- First thing Monday morning, the Employee requested FMLA intermittent leave supported by Med Certification
- **Now, what does the Employer do?**

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Case Study 6: Protected Activity

- The Employee has a mature record of poor performance
- The Employee was placed on a 30-day PIP four weeks earlier
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- The Employer decided to terminate the Employee but postponed from Friday to the following Monday because the Administrator was taking a long weekend
- First thing Monday morning, the Employee requested FMLA intermittent leave supported by Med Certification
- **Now, what does the Employer do?**

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Case Study 6: Protected Activity

- The Activities Director scheduled a meeting with a local church group that conducts period meetings at the Facility with residents who wish to participate
- At the meeting, the Director shared several bits of news, including that she can read spirits; that one of the group members has a “bad” spirit; and that the Director is compelled to reveal the bad spirit
- Group reports the meeting highlights to the Administrator
- Activities Director tells the Administrator that the group member and the Administrator are discriminating against her (they are white; she is not), that she has a lawyer, and that she knows about illegal activities occurring at the facility

What should the Employer do?

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Case Study 7: Reasonable Accommodation

- The Facility advertised for a dietary aide working in the kitchen
- An employment offer extended to an applicant
- Who is blind
- But he has a “helper” provided by a local agency
- **What does the Facility do; try it out? Rescind the offer? Something else?**

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Case Study 8: Request for Accommodation

- A probationary STNA says that he hurt his shoulder at home over the weekend
- He can't lift or pull anything
- He thinks that he'll be alright in a couple weeks if the
 - Facility can (pick one)Excuse his absence for the next two weeks
 - Get someone to do his lifting and pulling
 - Put him on light duty
- **What's the Employer's best plan?**

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Case Study 9: Request for Accommodation

- Employee wants to return to work. She's been off since last year when she hurt herself at her other job
- She has an approved worker comp claim for that injury. She recently presented part of a MEDCO-14 indicating she can work up to 40 hours as an STNA
- But she also presented a note from an endocrinologist stating that she can only work a reduced schedule of 20 hours per week because of arthritis problems with her right shoulder
 - But she also presented a note from an endocrinologist stating that she can only work a reduced schedule of 20 hours per week because of arthritis problems with her right shoulder
- **What's the next step?**

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Thank you!

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