



## Discrimination Pitfalls and the Supervisor (or Safety Professional)

Insights

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Safety professionals routinely have to respond to or try to prevent various types of employment claims. Why you may ask? Partly because the supervisor and employees figure that “regulations are regulations,” so the safety dude probably knows about EEOC requirements and anything that smacks of weird regulatory stuff. Also, safety professionals often are accessible to employees and may learn of issues before other members of management. Finally, designing job descriptions and JSA’s often involves ADA considerations, as does determining if an employee can return to duty following a workplace injury. Safety professionals are also front line troopers in avoiding and managing employment law claims.

So here are a few recent developments worth remembering . . . .

Don’t Live Up to Forrest Gump’s Explanation that *“Stupid Is As Stupid Does.”*

Let’s start with the problems created by foolish or thoughtless comments. A single arguably discriminatory comment generally does not alone prove discrimination. However, that comment may be enough to get the plaintiff’s lawsuit past the employer’s summary judgment motion and before a jury. In a January 2014 Federal court decision, the Judge allowed a claimant to take before a jury, his FMLA claim by an HIV-positive manager in part because of a comment that “managers who take FMLA leave are useless.” The decision is scary because you’ve encountered similar unwise statements in your workplace.

I like Marie Symeou’s apropos comment: *“Life isn’t about just talking, it’s about thinking too.”* How about Haz rat Ali Ibu Abu-Talib’s remonstrance: *“Take care of your tongue like the way you take care of your gold and silver.”*

Or as Mark Twain commented, *“It’s better to keep one’s mouth shut and appear stupid than open it and remove all doubt.”*

Appearing Inconsistent Gets You Sued

In a Pittsburgh claim, the Plaintiff said that he was treated differently than a White employee. The employer grabbed a woman’s rear and “placed his fingers near her private parts.” He came up behind her and did this while the nurse was helping a patient “and he lifted her off the ground.” The

last time I checked, that's an assault and battery, and never tolerable. When she protested, he one-lined, "that was for Valentine's Day, they call me walking chocolate." He should have been fired for that obnoxious line alone.

This guy made it past summary judgment because the Judge strained to conclude that White employee's were not terminated after engaging in "similar conduct." He considered paramedics striking in self defense, drunken patients who were attacking them.

I think this decision was simply wrong. But the point remains that you must check to ensure that you are being consistent in applying discipline, and if you do choose to deviate from past practice, document your good reasons for doing so.

### ***Related People***

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