

What not to say when disciplining a pregnant employee

If an employee is pregnant, smart supervisors pause and think before they hand out discipline. The natural fear is that the disciplined employee will sue, alleging she was really punished because of her pregnancy.

When disciplining a pregnant employee, a little bit of caution goes a long way toward limiting charges of pregnancy-bias discrimination. For example, when preparing discipline-related text messages, emails and memos, it's best to avoid mentioning the fact that the employee is pregnant. Such language may be easily misinterpreted, making it harder to get any resulting lawsuit dismissed.

If you discover that anyone has mentioned an employee's pregnancy, make absolutely sure that you can show you would have disciplined the employee under *any* circumstances. For example, include in your disciplinary justification examples of other, non-pregnant employees you disciplined for similar reasons.

Recent case: Elizabeth worked for Criterion Supply through two pregnancies. Back in 2014, she took maternity leave and then returned to work. Shortly after, she earned a promotion. However, things were a bit rocky in her new role. Several subordinates complained that Elizabeth treated them poorly; one threatened to quit.

In May 2017, Elizabeth informed her boss she was again pregnant. In June, she was placed on a performance improvement plan.

Later that month, a male employee complained that Elizabeth had made several passes at him. Elizabeth was placed on paid leave pending investigation. The male employee told investigators that he found comments Elizabeth had made offensive and that she made him uncomfortable.

The company fired Elizabeth. Nine months later, it hired a pregnant woman to replace her.

Meanwhile, Elizabeth sued, alleging pregnancy discrimination. She pointed to emails referencing her pregnancy between supervisors and HR. In one, Elizabeth was called "a cancer on the sales department." The writer mentioned that she knew Elizabeth was pregnant, but "that cannot affect her performance in the coming months." She added that Elizabeth would try to use her pregnancy "as an excuse" for performance difficulties.

The court considered the comments as potential evidence of pregnancy discrimination. However, it weighed other evidence, too—including that Elizabeth had been promoted after returning from her first maternity leave, that there were several other pregnant employees at the same time who were not disciplined or terminated and that the company hired a pregnant replacement. The court said that showed Elizabeth's termination was not motivated by discrimination against pregnant women. It tossed out her lawsuit. (*Levins v. Criterion Supply*, SD TX, 2019)

Final note: Elizabeth's attorneys also argued that because the company knew it was hiring a pregnant candidate to replace Elizabeth, it must have done so to subvert her lawsuit. In an email about the hire, a company representative mentioned the pregnancy as an "FYI," adding that this "certainly won't help [Elizabeth's] case."

But the court wrote that the statement “recognizing the impact of having hired a pregnant replacement, is not evidence of Criterion’s intent” when it terminated Elizabeth or when it hired her replacement. Unless Elizabeth could prove that her former employer sought out a pregnant candidate specifically to hurt the lawsuit, the comment wasn’t going to sway the court.