



### **Question #1**

We have an employee (Employee A) who is in a romantic relationship with another employee (Employee B). They do not work in the same department. Employee A reported to her supervisor that she was assaulted by Employee B. Employee A's supervisor told HR. What is the employer's duty in this situation?

### **Answer**

*Below is an email communication that was sent by one of our HR Professionals to address the question:*

This email confirms our conversation today where we discussed your email regarding the assault of a female employee.

During our call, you indicated your female employee that works part time in your café was in a relationship with the maintenance supervisor. She claims he assaulted her outside of work by putting his hands around her neck. It does not appear that she is pressing charges. You asked how you should proceed.

Since you have not yet spoken with the female employee, it is important that you talk to her and find out if there is anything she is requesting of you. Your duty is to keep her safe at work, as with all other employees. Usually such situations lead the victim to be concerned about working with the accused. We discussed that it would be reasonable if she asks that he not work around her. For example, if there is a need in the café, it is likely he can have one of his employees take care of it if it is during the hours she is expected to work.

You asked about offering her counseling services available through your insurance/EAP. We discussed that this would be a good idea. When you speak with her you should be able to gauge whether it would be appropriate to provide these. Otherwise, you may inform her about them by letting her know that she's not

required to use these benefits, however you want to make sure she is aware of the resources she may access.

## Question #2

We have an injured employee in Texas who was released from work for 30 days. This employee manages the store and one additional employee. We need to hire a new manager. What are our rights as an employer when the injured employee is released to return to work? We prefer to have the employee back to work at 100% capacity. We understand the employee should return at the same rate of pay. What happens if we no longer have a position for the injured employee? What about the new manager?

## Answer

It appears that the employee may have protection under the Americans with Disabilities Act (ADA) and the Texas Employment Discrimination Act. If this is the case, it is important that you, the employer, do not take any action against the employee that would change the employment relationship.

This means that when the employee is released by her treating physician to return to work, the employee must be returned to her same position. In addition, once the employee is released to return to work, you cannot require that the employee be at 100% capacity. If she has work restrictions, you must engage in the interactive process. Also, the interim manager should be told that the position is temporary.

This type of situation is addressed by the EEOC in several of its guidance materials.

With respect to the employee's return to work, the EEOC's Enforcement Guidance regarding [Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#) provides as follows:

### **Leave**

*Does an employer have to hold open an employee's job as a reasonable accommodation?*

*Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.*

*If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.*

**Example:** *An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.*

With respect to a requirement that the employee be “100% recovered” prior to her return to work (which, as stated above, is not permissible), the EEOC’s materials [Employer-Provided Leave and the Americans with Disabilities Act](#) provides as follows:

Employees on leave for a disability may request reasonable accommodation in order to return to work. The request may be made by the employee, or it may be made in a doctor's note releasing the employee to return to work with certain restrictions.

### **100% Healed Policies**

An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be "100%" healed or recovered -- if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship.[7] Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a "direct threat." Direct threat is the ADA standard for determining whether an employee's disability poses a "significant risk of substantial harm" to self or to others. If an employee's disability poses a direct threat, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

Example: A clerk has been out on medical leave for 16 weeks for surgery to address a disability. The employee's doctor releases him to return to work but with a 20-pound lifting restriction. The employer refuses to allow the employee to return to work with the lifting restriction, even though the employee's essential and marginal functions do not require lifting 20 pounds. The employer's action violates the ADA because the employee can perform his job and he does not pose a direct threat.

Example: An employee with a disability requests and is granted two months of medical leave for her disability. Three days after returning to work she requests as reasonable accommodations for her disability an ergonomic chair, adjusted lighting in her office, and a part-time schedule for eight days. In response, the company requires the employee to continue on leave and informs her that she cannot return to work until she is able to work full-time with no restrictions or accommodations. The employer may not prohibit the employee from returning to work solely because she needs reasonable accommodations (though the employer may deny the requested accommodations if they cause an undue hardship). If the employee requires reasonable accommodations to enable her to perform the essential functions of her job and the accommodations requested (or effective alternatives) do not cause an undue hardship, the employer's requirement violates the ADA.