A PRACTICE MANAGER'S PLAYBOOK: PROTECTING THE PRACTICE FROM CLAIMS OF DISCRIMINATION, HARASSMENT, AND WRONGFUL TERMINATION

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Practice managers across all lines of veterinary medicine have found themselves in difficult situations with their employees and vendors, often involving sensitive topics such as race, gender, and religion. The emergence of movements such as #MeToo, and the changing social and cultural landscape of the modern workplace, have led to an increase in the number of lawsuits brought against employers that contain allegations of discrimination, harassment, and retaliation. These claims are among the most costly and time-consuming claims that a practice may face.

My staff is like family. Do I really need to be concerned about this issue?

The short answer is yes:

1. On average, it takes 318 days for a claim to be resolved. That's a huge time commitment for busy owners and practitioners.

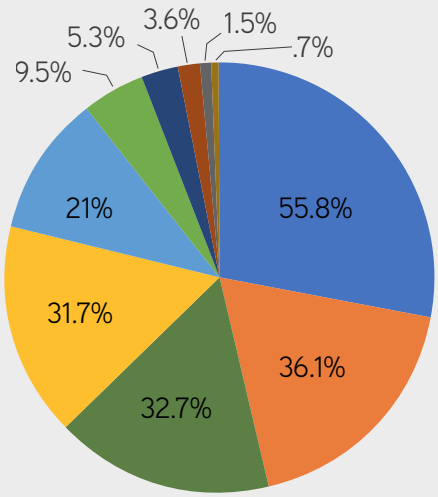
2. It's not just your employees you need to worry about. Vendors—such as delivery drivers and repair persons—and clients can accuse you of discrimination or harassment.

3. According to a recent report by the Society of Human Resources Management, the average cost of defending and settling an employment claim is $160,000, a crippling figure for small and medium-sized businesses to absorb.

4. A recent study by Hiscox found that while many employment lawsuits are settled out of court, when they do go to trial, employees and other plaintiffs win 67% of the time.

5. The Equal Employment Opportunity Commission (EEOC) and a growing number of states recommend or require that small businesses conduct anti-harassment training. Owners without a complimentary program available through their insurance provider will need to pay for these trainings out of pocket.

MOST FREQUENT CLAIMS



Data derived from the EEOC's Fiscal Year 2020 Enforcement and Litigation Data

These percentages add up to more than 100% because some charges allege multiple bases.

What can be done? The most effective way to protect your practice is by implementing proactive employment policies and practices in conjunction with an employment practices liability (EPL) insurance policy.

What is an EPL policy? EPL coverage responds to allegations such as wrongful termination, discrimination, and harassment. Would you practice veterinary medicine without malpractice or fire insurance? If you answered no, you should secure EPL coverage immediately because it is just as important to a practice owner.

In this playbook, we examine four EPL scenarios that took place in veterinary practices and discuss proactive steps employers can take to mitigate risks such as these. We also explain how EPL insurance policies may respond to prevent devastating financial consequences.

MEET THE COACHES

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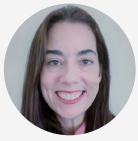

SCENARIO 1

Pregnancy Discrimination

An employee of the practice took Family and Medical Leave Act (FMLA) leave a few months prior to giving birth to her child because of a pre-existing disability that required her to be on bed rest. The claimant requested that the practice extend her leave by six days, even though she had exhausted her FMLA leave, because she was not yet able to return to work. The practice denied her request and terminated her employment, explaining that they have a policy of denying extensions of FMLA leave and instead encourage employees to re-apply for positions when they are fully recovered and able to return to work at full capacity. The employee alleged that she was discriminated against based upon her disability and pregnancy. The matter settled at mediation for $130,000.

Amy Bender

This employee may have been entitled to the six additional days of leave as an accommodation for her disability under the Americans with Disabilities Act (ADA). Although an uncomplicated pregnancy generally will not be considered a covered disability, in this case, the pregnant employee also had a pre-existing disability, so she was entitled to a reasonable accommodation. Six days of leave is a relatively short period of time and may not have caused the employer an undue hardship, but at a minimum, the practice should have engaged in an interactive discussion with the employee to determine if the additional time off or another accommodation was reasonable or would cause undue hardship. The practice's policy of requiring employees to be fully recovered and able to return to work at full capacity also is problematic. Click to read Amy's full opinion.

David Setzkorn

So, while pregnancy itself is not considered a disability under the Americans with Disabilities Act, eligible employers (those with 15 or more employees) are required to abide by Title VII, which prohibits pregnancy discrimination. In this case, the employee was asking for what they considered was a reasonable request based on her pregnancy. The law requires that employers treat employees with pregnancy-related conditions in a similar manner as they would treat other employees.

SCENARIO 2

Sexual Harassment

A veterinary assistant filed a lawsuit in which she alleged that the veterinarian/owner sexually harassed her and constructively discharged her because she felt that she had to quit out of fear for her safety. The veterinarian denied all wrongdoing. He said that while there was some physical contact between them, it was nonsexual in nature and consensual, such as a light touch on the assistant's back or arm to guide her in a particular direction while she assisted him with patients. The employee's evidence consisted primarily of incidents that were not confirmed or corroborated by anyone else in the practice. However, at mediation, the employee claimed to have witnesses to the incidents and produced anonymous statements from these witnesses. As it had been more than five years since the matter had commenced with a charge filed with the EEOC, it was becoming an increasing distraction to the practice, and the veterinarian was concerned that bad publicity from the lawsuit could harm his business. The veterinarian agreed to resolve the matter prior to trial to end the distraction and avoid bad publicity, even though he had a strong case. The matter was settled at mediation for $47,000.

Amy Bender

Policies, procedures, and thorough reviews are some of the best tools practice managers can use to prevent sexual harassment. Sexual harassment can take many forms, and what one individual views as innocent comments or physical touching may be interpreted by the receiving party as sex-based and unwanted. Any physical touching between employees is not prudent and should be discouraged or prohibited. It is important to implement a written workplace harassment policy that prohibits harassment, communicate the policy and train employees, maintain an effective complaint procedure, and review complaints thoroughly and promptly. Click to read Amy's full opinion.

Stacy Backes

While the veterinarian/owner may have thought that he was helping the assistant by physically touching her in order to guide her, his intent is irrelevant. The effect of the veterinarian/owner's behavior is that the assistant felt uncomfortable and she did not feel safe in her work environment. In addition, this coaching likely could have been provided to the assistant verbally; touching the assistant was unnecessary. The practice should ensure that a written anti-harassment policy is in place.
Click to read Stacy's full opinion.

SCENARIO 3

Failure to Provide FMLA Leave

A veterinary technician tripped in an operating room in the animal hospital, landed awkwardly, and broke his ankle. The hospital notified its workers' compensation carrier but failed to provide the employee notice of his rights under the Family Medical Leave Act (FMLA). The technician received workers' compensation benefits, but his employment ultimately was terminated when he failed to pass a number of physical tests, which were necessary for him to return to work. Because the hospital never advised the technician of his FMLA rights before his employment was terminated, he sued for interference of his rights under the FMLA. The hospital settled the claim for $35,000.

Amy Bender

FMLA guarantees 12 weeks of unpaid, job-protected leave to eligible employees under certain circumstances. Simply because an injury entitles an employee to worker's compensation benefits does not relieve the employer of its obligation to consider whether the employee also is eligible for FMLA leave. If an employee was entitled to FMLA leave and was not provided it, the employer may be liable, regardless of its intent. Click to read Amy's full opinion.

David Setzkorn

Several issues are at play here. The employer should have notified the employee of their FMLA rights since workers' compensation claims often arise from serious health conditions as defined under FMLA. The employer should have advised the employee about the return to work process and fitness-for-duty form as part of the FMLA process. The employer could have resolved the issue by retroactively designating leave as FMLA prior to taking employment action and advising the employee of his rights and obligations for returning to work. In order to be viewed as non-retaliatory, the employer would have to use the same standards as when they hired the employee, meaning that if they did not require those tests as part of the hiring process, they can't require them as part of the return-to-work process because then it may be viewed as a return to an equivalent level position. Click to read David's full opinion.

SCENARIO 4

Disability Discrimination, Failure to Accommodate Disability, and Retaliation

When a receptionist at a veterinary clinic was hired, he told the practice manager that he was bipolar and had anxiety and depression, but that he was on medication that controlled his symptoms. He requested that he work from 10 am to 6 pm as the medications he took made it difficult for him to wake up early. He worked at the clinic for approximately three years, receiving good performance reviews. However, when a new practice manager began working at the clinic, she changed the receptionist's hours to 7 am to 3 pm. Although the receptionist explained why he needed to work from 10 am to 6 pm, the practice manager refused to change his hours. After that conversation, the practice manager documented every time the receptionist was late, even if it was by a minute or two. The practice manager did not do the same with any other employees. After a few weeks of the new schedule, the receptionist contacted the practice manager to explain that the new schedule had worsened his depression and anxiety, and that he needed two weeks off to attend a treatment program. The practice manager denied his request. The receptionist sent an email to the veterinarians, complaining about the practice manager's treatment of him and of her refusal to approve his leave. A few days later, when the receptionist arrived five minutes late, the practice manager terminated his employment. The receptionist sued the practice, asserting claims of disability discrimination, failure to accommodate a disability, and retaliation. The case went to a jury trial, where the jury awarded the receptionist $130,000 in compensatory damages. The practice also incurred over $175,000 in defense costs.

Amy Bender

The practice manager's actions are problematic under the FMLA and the ADA. The practice manager altered the employee's modified schedule, which was designed as an accommodation, without any discussion, input, or exploration of other options. She also treated the disabled employee less favorably by scrutinizing and documenting his minor attendance issues while not doing so for other, non-disabled employees. Further, the manager denied the employee's requested medical leave for treatment for his mental health issues, which is potentially a violation of FMLA or other applicable leave laws if the employee was deemed eligible. Retaliation for engaging in protected activity such as complaining of discrimination or requesting an accommodation is unlawful. Click to read Amy's full opinion.

David Setzkorn

The practice manager may have violated both the FMLA and ADA regulations. The employer was aware of the employee's need for an accommodation and had approved such an accommodation for over three years without issue. The new practice manager made the decision to adjust the schedule without regard to the prior accommodation and did so without notice or engaging in an interactive process to determine whether a reasonable accommodation could be found. Click to read David's full opinion.

How can I protect my practice?

Great practice managers not only respect but embrace the diversity and uniqueness of their staff. By establishing inclusive policies, procedures, and culture, managers can mitigate—but not completely avoid—allegations of discrimination, harassment, and wrongful termination. The only way to truly safeguard the practice against the financial pain of costly claims is through employment practices liability coverage.

Employment practices liability (EPL) insurance protects practices and individuals against loss from claims alleging wrongful employment practices, including discrimination, harassment, retaliation, failure to hire or promote, wrongful discipline, breach of employment contract, and more. Without EPL protection, any legal defense fees and damages for wrongful employment practices claims are your responsibility.

The AVMA Trust EPL program offers many benefits tailored to the veterinary profession. These include an HR helpline that is serviced by attorneys; online training modules on topics such as workplace violence, immigration, and sexual harassment; and optional endorsements to strengthen your protection.