

October 29, 2014



Julie T. Bittner,  
Esq.

Questions  
on this topic?  
**CLICK HERE**

## Knowing When, and Why, to Say "Maybe You Should See Someone."

By Julie T. Bittner

It can be a human resources manager's nightmare: dealing with the fallout of two employees who were romantically involved and now have broken off their relationship. Complications often involve workplace gossip, as rumors start and animosity develops. The scenario is easy to imagine. Either one or both of the parties are visibly affected by the ending of the relationship. Often times, as coworkers are already aware of the situation, the employee does not restrain or hide his/her frustrations and emotions regarding the situation while in the workplace.

Imagine also a supervisor with good intentions who takes it upon him/herself to try to assist the employee by requiring him/her to see a psychological counselor. The employee agrees that counseling may be of assistance but refuses to attend because it is cost prohibitive. What is the employer to do? Can the employer fire the employee for refusing to see a counselor?

The Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee) recently grappled with this very issue in [Kroll v. White Lake Ambulance Authority](#). Emergency Medical Technician Emily Kroll was hired by White Lake Ambulance Authority ("WLAA") in September 2003. Kroll and her married coworker, Joshua Easton, began an affair in 2007. The relationship lasted several months but was "rocky" and riddled with frequent arguments. Coworkers

witnessed Kroll crying in an off-site parking lot, arguing with Easton on her cell phone, and sending messages while she operated an ambulance. Also, on one occasion after finishing a shift, Kroll called WLAA's office manager in tears.

Kroll's situation at work deteriorated even further in April 2008 when she and a paramedic, Jodi Osborn, went out on an ambulance run. Prior to the run, Kroll inadvertently forwarded an e-mail to Osborn meant for Easton. In the e-mail, Kroll asked Easton whether he was involved in a sexual relationship with Osborn. During the ambulance run, Kroll and Osborn argued about the e-mail. When they arrived on scene and began to treat the patient, Osborn asked Kroll to assist her in administering oxygen but Kroll ignored the request. After the run, Osborn complained to the Director of WLAA, Brian Binns, that Kroll had refused to communicate with her regarding the patient's care.

Binns, aware of Kroll's personal issues, met with her later that day and told her that she could continue her employment only if she agreed to undergo counseling. Although Binns previously had never had a problem with Kroll as to patient care, he decided to compel counseling because "her life was a mess and he thought he could help her." Binns made this recommendation without first consulting with a psychologist or other mental-health professional. Kroll agreed she might have benefitted from counseling but refused treatment because she could not afford it. She turned in her equipment, and the company did not schedule her for any additional shifts.

The following summer, Kroll filed a complaint alleging WLAA violated the Americans with Disabilities Act ("ADA") by requiring her to submit to a medical examination that was not shown to be job-related and consistent with business necessity.

The ADA prohibits an employer from requiring a medical examination unless such examination or inquiry is shown to be job-related and consistent with business necessity. Courts have found that the individual who decides to require a medical examination must have a reasonable belief based on objective evidence that the employee's behavior threatens a vital function of the business.

In this case, Binns had limited first-hand information regarding Kroll's emotional outbursts and disregard of safety rules. During his deposition, Binns testified he knew of only one incident during her entire career with WLAA where she provided substandard patient care (the complaint received from Osborn). Kroll had never been formally disciplined for any reason. Binns also knew of only one incident of Kroll using her cell phone while driving the ambulance, although litigation revealed that Kroll's coworkers had complained to each other about Kroll's use of her cell phone. They had reported only one incident to Binns.

The court held that an employer may request a medical examination only when there is "significant evidence that could cause a reasonable person to inquire as to whether [the] employee is still capable of performing [his/her] job." If Binns had been aware of a pattern of behavior that showed her emotional or psychological problems were interfering with her ability to drive an ambulance safely and/or provide direct patient care, he might have been justified in ordering the medical exam. However, he was not aware of that type of behavior and instead made the decision based on his own concerned attitude toward Kroll, most notably a concern that her sexual conduct, by being involved in an extramarital affair, was "immoral."

Binns admitted in his deposition that he ordered Kroll to attend counseling because he had "concerns" about her "sexual relationships with men" and that he thought that "her life was a mess and [he] could help her." The Court found Binns' open admission that he ordered the medical examination based on his own "moralistic condemnation" of Kroll's private behavior "troubling - to say the very least."

The matter was ultimately remanded to the district court to allow a jury to review the evidence presented and determine whether Binns had sufficient objective evidence to conclude that Kroll was impaired in the performance of her essential job function or posed a direct threat to the safety of others. WLAA will have to prove that the psychological counseling it ordered was job-related and consistent with business necessity.

This case serves a strong reminder that when considering whether or not to require an employee submit to a medical examination, employers must make an assessment as to whether the conduct or behavior of the employee impairs the essential job functions. It also serves as a reminder to stress to employees the importance of reporting safety violations they witness. Additionally, employers have to be cautious when ordering an employee to submit to a medical examination as a condition of employment. Here, Binns ordered Kroll to attend counseling based on what he thought was best for her. Employers need to be mindful not to inject their own personal opinions and biases into their employment decisions. Despite all of the evidence in the record of Kroll's emotional state, the Court only considered the objective evidence Binns had at his disposal when he made the decision to order Kroll to attend counseling as a condition of her employment.

---

*The 60-Second Memo® is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own*

*situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.*



[Forward this issue](#)

***Copyright 2014 Gonzalez Saggio & Harlan LLP. All rights reserved.***

Arizona | California | Florida | Georgia | Illinois | Indiana | Iowa | Massachusetts  
New Jersey | New York | Ohio | Tennessee | Washington, D.C. | Wisconsin

[www.gshllp.com](http://www.gshllp.com)