



# RIGHTS STUFF

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## It's Legal to Fire Employee Who Threatens to Kill His Co-Workers

Dr. Philip Bodenstab began working for Cook County Hospital as an anesthesiologist in 1998. In 2002, he called a friend, Jennifer Wengeler, and told her that he had a cancerous lesion on his lip. He also told her that he was going to the Mayo Clinic and if he found out his cancer had metastasized, he was going to kill his supervisor and other co-workers. He said that he might die in the ensuing gun battle with police.

Ms. Wengeler was understandably concerned and called local police and the FBI. After an investigation, they told the hospital's medical director that they found the threats to be credible. The hospital immediately suspended Dr. Bodenstab with pay and ordered him to see a psychiatrist for a fitness-for-duty exam. He refused, but he did complete a five-day multi-disciplinary assessment. The assessment concluded that Dr. Bodenstab suffered from paranoid and narcissistic personality features and occupational and interpersonal stressors. He entered intensive day treatment at that time.

After Dr. Bodenstab completed his treatment, his doctor said he could return to practice, but he should not work in "a work situation that is emotionally, politically, or interpersonally charged, as such an environment would likely strain his ability to work with others in a consensual and cooperative manner." Cook County Hospital's own psychiatrist interviewed Dr. Bodenstab and believed he suffered from paranoia and

interpersonally charged issues. The psychiatrist was concerned for his own safety.

The hospital notified Dr. Bodenstab that it was going to hold a hearing concerning his major infraction, threatening to kill the department chair and other co-workers. After the hearing, the hospital determined that Dr. Bodenstab should be terminated. He appealed and lost, and so he sued the hospital under the Americans with Disabilities Act. He lost there as well.

He tried to argue that the reason for his termination - that he had threatened the lives of his co-workers - was a pretext for discrimination on the basis of being regarded as having a disability. He denied having a disability, but he said the hospital believed he had problems with interpersonal relationships. He tried to downplay his threats, calling them "conditional syllogisms" and claiming he had been "misinterpreted." The Court said that there was no evidence that the hospital did not sincerely believe that Mr. Bodenstab had made the threats, and that was enough. In any event, Dr. Bodenstab admitted having said, "Well, maybe I'll take some people with me, if, if I have cancer, if I'm found to have metastases. Maybe, maybe it wouldn't be so bad being dead if you have metastases. If I have metastases, maybe I would take some people with me."

(continued on page 2)

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## Supreme Court Rules Against EEOC in a Narrow Ruling

If you file a complaint of employment discrimination with the Equal Employment Opportunity Commission, the EEOC investigates your allegations. If the EEOC finds probable cause to believe discrimination occurred, it has the statutory duty to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." Only after it makes this informal attempt to settle the matter may it take the matter to court.

A woman filed a complaint alleging that Mach Mining, LLC, had refused to hire her because of her sex. The EEOC found probable cause. It sent the parties a letter, explaining it had found probable cause, and invited them to participate in informal methods of dispute resolution. It's not clear what happened next, but a year later, the EEOC sent Mach Mining another letter, saying its efforts to conciliate had been unsuccessful and that it would be filing a lawsuit.

When it was sued, Mach Mining said that the EEOC had failed to try to conciliate the matter in good faith before filing suit. The Seventh Circuit Court of Appeals held that the "statutory directive to attempt conciliation" is "not subject to judicial review." In other words, courts do not have the legal authority to decide if the EEOC tried hard enough to settle the matter before going to court. This ruling was based in part on another part of the statute, which says that all conciliation discussions will remain confidential unless the parties agree to release them. If those discussions are confidential, the Seventh Circuit said, it would be hard for a court to review the EEOC's conciliation efforts. In a ruling issued in late April, 2015, the Supreme Court unanimously disagreed.

The Supreme Court said that the EEOC has wide latitude in the conciliation process. Normally, it will be sufficient if the EEOC files a sworn affidavit with its lawsuits saying that it had attempted to conciliate the matter but that its

efforts had failed.

But if the employer provides credible evidence of its own that the "EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the fact finding necessary to obtain voluntary compliance." The reviewing court will be looking "only to whether the EEOC attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions."

The case is [Mach Mining, LLC v. Equal Employment Opportunity Commission](#), 475 U.S. (2015).

If you have questions about fair employment, please contact the BHRC.

## Legal to Fire Someone Who Threatens Co-Workers (continued from page 1)

Dr. Bodenstab also argued that the hospital had failed to accommodate his disability. But the Court said that there is "no legal obligation to accommodate conduct as opposed to disability." Quoting a previous case, the Court said, "The law is well settled that the ADA is not

violated when an employer discharges an individual based upon the employee's misconduct, even if such misconduct is related to a disability."

The hospital won summary

judgment. The case is [Bodenstab v. County of Cook](#), [569 F.3d 651](#) (7th Cir. 2009).



## Judge Awards Almost \$75,000 to Victim of Pregnancy Discrimination

United Bible Fellowship Ministries, Inc., allegedly had a "no pregnancy in the workplace" policy. It prohibited the continued employment of any employee who became pregnant, and it prohibited the hiring of any pregnant applicant. United Bible is a Houston-based nonprofit organization that provides housing and residential care to clients with disabilities.

Shamira Johnson was an employee of United Bible. Her title was resource technician, and she provided care to residents. United Bible admitted that Johnson did her job well, that her pregnancy did not interfere with her ability to do her job, and that it terminated her only because she became pregnant. United Bible argued

that it fired her to ensure her safety, the safety of her unborn child and the safety of United Bible's residents.

It is a violation of the federal Pregnancy Discrimination Act to fire someone, or refuse to hire someone, merely because she is pregnant. The U.S. Equal Employment Opportunity Commission sued on Johnson's behalf. In May of 2015, the Court found in her favor, awarding her \$24,764 to compensate her for lost back pay, overtime and out of pocket expenses. The Court also awarded her \$50,000 in punitive damages, finding that Johnson had endured emotional pain, suffering and mental anguish as a result of the unlawful termination, and that United Bible had acted with malice or reckless

indifference to Johnson's federally protected rights.

The Court found that United Bible had failed to show that all or most pregnant women would be unable to safely and efficiently perform the duties of a resource technician.

In announcing the decision, Jim Sacher, an EEOC regional attorney, said, "All employers, even non-profits, are required by federal law to ensure equal access to job opportunities for all, regardless of sex, race, religion, national origin, age or disability." The case is [U.S. Equal Employment Opportunity Commission v. United Bible Fellowship Ministries, Inc.](#), 4:13-cv-02871 (S.D. TX 2015).

## EEOC Sues Company Over Its Wellness Program

A growing number of employers have voluntary wellness programs, which are perfectly legal. More than 90% of employers with more than 200 workers have such programs, which may include disease prevention programs, programs to diagnose and treat conditions early, smoking cessation classes and even cooking classes. They can help keep employees healthy and save employers money on medical costs.

But the U.S. Equal Employment Opportunity Commission (EEOC) says the wellness program that Orion Energy Systems, Inc. implemented

violated the Americans with Disabilities Act. Wendy Schobert worked for Orion and in 2008, she declined to undergo a health-risk assessment that was part of Orion's wellness program. She didn't feel the exam was really voluntary and she had concerns that Orion would not keep the results confidential. Because she refused, according to the EEOC, she had to pay all of her health insurance premium instead of only the employee share and she also had to pay a \$50 monthly penalty. Later, she was fired, allegedly for refusing to complete the assessment.

The EEOC, which enforces fair

employment laws including the ADA, is seeking compensation for Schobert as well as a court order forbidding the company from forcing employees to undergo medical exams or answer disability-related questions and prohibiting the company from retaliating against employees who object to participating in the program.

Employers need to make sure that wellness programs are truly voluntary, that the results of any exams are kept confidential and that incentives for participating are not perceived as penalties for not participating.



## Uber Sued for Disability Discrimination

Uber, a ride-sharing service, has recently begun providing services in Bloomington. Uber drivers have been sued for allegedly discriminating against passengers on the basis of disability. The BHRC has heard no such complaints against Bloomington Uber drivers.

The Americans with Disabilities Act says that providers of public accommodations, such as taxi cab companies, may not discriminate against customers on the basis of disability, and may not refuse to allow customers to be accompanied by service dogs.

According to a Federation of the Blind's lawsuit, an Uber driver

agreed to pick up a blind man and his friend at a pub and take them to the blind man's home. But when the driver saw the service dog, he shouted "no dogs," cursed at the blind man, ignored his explanation that the dog was a service dog, and sped away. As he sped away, he bumped the friend and nearly hit the dog. In another case, a Uber driver allegedly put a blind woman's service dog in the trunk, ignoring her pleas to release the animal. In some cases, according to the lawsuit, Uber drivers have charged blind passengers cancellation fees after its drivers refused to transport them. The company refunds those fees when it receives a written complaint.

In response to the lawsuit, Uber said that the company requires its drivers to provide transportation to blind passengers and their service dogs. The company said in its response that "The Uber app is built to expand access to transportation options for all, including users with visual impairments and other disabilities. It is Uber's policy that any driver partner who refuses to transport a service animal will be deactivated from the Uber platform." The lawsuit is pending.

(Article based on "Uber Accused of Disability Discrimination," by Bob Egelko, San Francisco Chronicle, posted at [www.disabilitycoop.com](http://www.disabilitycoop.com) on 9/16/14.)

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## Woman Wins Lawsuit Against Abercrombie & Fitch

Samantha Elauf is a practicing Muslim who wears a headscarf for religious reasons. She applied for a job at an Abercrombie & Fitch store, and an assistant manager found her qualified to be hired. But the assistant manager was not sure if the headscarf would be allowed, given the store's dress code, or Look policy. The district manager said the headscarf would violate the dress code, and Elauf was not hired.

She sued, and in June, 2015, the U.S. Supreme Court found in her favor in an 8-1 decision written by Justice Scalia. He wrote that "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in

employment decisions." The store argued that its dress code was a neutral policy, applied to all employees, and thus should not be considered to be discriminatory. Justice Scalia wrote that "Title VII [the federal fair employment law] does not demand mere neutrality with regard to religious practices - that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual's religious observation and practice.' An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an 'aspect of religious practices,' it is no

response that the subsequent 'failure to hire' was due to an otherwise neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

Justice Thomas, in a decision that concurred and dissented in part from Justice Scalia's majority opinion, wrote that "mere application of a neutral policy cannot constitute 'intentional discrimination.'"

The case is Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).