

EMPLOYEE MAY HAVE GAMBLED AWAY HER JOB

QUESTION: We are having a big problem with one of our longtime employees, Elizabeth. A couple of weeks ago I discovered that she has been using her work computer for internet gambling. Although I'm not sure exactly how long this has been going on, I obtained a computer usage report from IS and it is clear that she has been engaging in gambling on our equipment for several weeks. Given the amount of time she spends on the gambling web sites, it is obvious she is gambling during work.

As part of my investigation into Elizabeth's internet use, I reviewed her company credit card charges and noticed some unusual expenditures that do not appear to be business-related. Even though the unusual charges were minimal, \$20.00 here and there, they were very uncharacteristic - Elizabeth's travel expenses are usually routine and predictable.

While my investigation of Elizabeth's on-line gambling was unfolding, another employee, Zach - whose workspace is across the office from Elizabeth - reported to me that \$80.00 cash was stolen out of his wallet. Zach had no leads, but told me that he had left his wallet in a desk drawer while he went to work out at lunch, and when he returned the money was missing.

We have a few surveillance cameras in our office that the building security contractor installed. I was able to obtain the video tapes for the relevant time period and was shocked when - after fast forwarding through hours of surveillance video tape - the footage showed Elizabeth stealing money out of Zach's wallet. She rushed over to Zach's desk, took the money and rushed back to her cubicle just after everyone left for lunch.

I was stunned and disappointed. I met with Elizabeth to confront her about stealing Zach's money, and to a lesser degree, the gambling web site usage. Initially, Elizabeth denied that she'd been gambling at work and was especially vehement in denying taking any money from Zach's wallet. Once I informed her that the security camera had recorded the incident she stopped denying it and broke down into tears. Elizabeth said that she's "hit bottom" and that she intended to pay Zach back once she won some of her money back.

I told her I had no choice but to terminate her employment and she responded (in a very loud and agitated way) that I could not fire her because she has a disability - an addiction to gambling. She started crying and told me that she had been seeing a counselor in an effort to quit, but that she simply could not resist gambling on the Internet. She begged me, between sobs, for another chance, but I held firm. When she was leaving the office, she screamed that she would sue the company for firing her after all the years of loyal service she has given us. She also ranted about the impropriety of invading her privacy and said she can't believe she worked under the eyes of "Big Brother" all these years.

I met with the other managers to debrief about the incident, and some of the other supervisors are concerned that her termination might violate employment and/or civil rights laws. Until then it had not occurred to me that she may be protected from employment actions due to her gambling problem (or if it is in fact more than just a problem and has become an addiction).

Did I have any legal obligation to cut Elizabeth some slack and not fire her in light of her gambling issues? What about the fact that I relied on the surveillance video tape to confront her about stealing from a fellow worker?

ANSWER: State and federal anti-discrimination laws prohibit employment decisions that are based on a variety of protected classes. There are also anti-discrimination laws that require employers to make reasonable accommodations for employees with disabilities.

While many might consider a gambling addiction a disability, gambling is specifically excluded from protection under both the federal Americans with Disabilities Act and Oregon's disability law. However, even had Elizabeth been able to satisfy that definition and qualify for federal and state disability law protection, it would not be a reasonable accommodation to allow Elizabeth to violate important company policies (like those on internet use, wasting work time and filing accurate expense reports) or to continue to subject coworkers to Elizabeth's thievery.

Based on the objective evidence you uncovered during the investigation, and assuming it sufficiently proves that Elizabeth engaged in on-line gambling at work, charged false expenses on her company credit card and stole money from a co-worker, it is highly unlikely that Elizabeth could mount a successful challenge to her termination.

As for the surveillance video, the evaluation turns on whether Elizabeth has a reasonable expectation of privacy that was infringed by the surveillance footage and subsequent use of the videotape in the investigative findings. The issue is whether the videotaping constitutes an invasion of privacy. Invasion of privacy is not a civil rights safeguard, but is a theory available for employees to sue employers in the context of a tort action.

If the workspace is open and the cameras are obvious, Elizabeth will have a difficult time convincing anyone that she was reasonable believing that her actions were totally private and would never be scrutinized by others, including you as her employer.

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