

# Unwanted Birthday Party Case Is A Warning To Other Cos.

By **Bridget Blinn-Spears and Caitlin Walker** (May 27, 2022)

In March, in *Kevin Berling v. Gravity Diagnostics LLC*, a Kentucky jury awarded Berling \$450,000 after his employer ignored his reasonable request not to celebrate his birthday and incorrectly interpreted Berling's subsequent panic attack as an act of aggression.

Like many employers, Berling's employer, Gravity Diagnostics, regularly celebrated its employees' birthdays. In anticipation of his first birthday as a Gravity employee in 2019, Berling submitted a request to Gravity's chief of staff to forgo his birthday celebration because he associated bad memories with his birthday.

At this time, Berling did not inform Gravity that he was diagnosed with an anxiety disorder about 10 years earlier, shortly after his parents announced their divorce on Berling's 17th birthday.

Berling also did not inform Gravity that he had a history of suffering from one or two panic attacks per year, which typically lasted for a couple minutes each; that Berling exhibited various symptoms during one of his panic attacks, such as crying, shaking and hyperventilating.

Berling also did not inform Gravity that his therapist recommended that he close his eyes and clench his fists to help him overcome an active panic attack. Berling did, however, make it known to Gravity on prior occasions that he attended weekly therapy sessions.

Gravity's chief of staff admitted that she had forgotten to inform others of Berling's request to forgo his birthday celebration. Accordingly, on the morning of Berling's birthday in 2019, several coworkers wished him a happy birthday. Berling stated that these greetings put him "on edge," but Berling was able to continue his duties that morning — a fact that Gravity did not deny.

At lunchtime, however, Berling went to the break room where he encountered a birthday banner and was again wished a happy birthday by his coworkers. Overwhelmed, Berling grabbed his lunch and retreated to his car for 45 minutes, where he experienced a panic attack.

Berling eventually returned to work that afternoon and emailed Gravity's chief of staff to inform her that he was "upset that there were birthday things around." For the rest of the day, Berling acted somberly and was not his usual self.

The following day, Berling requested to meet with some of his supervisors. During this meeting, Berling informed other Gravity employees for the first time that he suffered from anxiety and panic attacks, and that Berling experienced a panic attack the prior afternoon after he walked into his unexpected and unwanted birthday celebration.

Berling claimed that one of his supervisors criticized his reaction and accused him of "stealing other coworkers' joy." Consequently, Berling started to have another panic attack, causing him to become very red, clench his fists and close his eyes.



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Unaware that Berling was having a panic attack and attempting to implement his prescribed coping mechanisms, both Gravity employees said they believed that Berling was going to attack them. They claimed that Berling was "command[ing] silence while shaking." One supervisor even claimed that she would have called the police if she had had access to her cellphone.

That day, Berling was escorted out of the building, forced to turn in his building access key and then ordered not to return to work until the next Monday. Gravity then notified security that Berling was banned from the building.

Soon thereafter, Gravity's chief operating officer decided to fire Berling for violating Gravity's workplace violence policy because Berling's supervisors reported that they felt physically threatened and unsafe when they met with him.

Before the above noted incident, however, Berling had never exhibited any violent behavior, had no disciplinary reports in his personnel file and was known for often requesting additional work.

At trial, the jury unanimously decided that Berling had a disability and that he was fired because of that disability. Berling was awarded \$450,000. Gravity has appealed.

Regardless of the outcome of this pending appeal, this case serves as an important reminder for employers that seemingly unusual requests and potential mental health conditions should be taken seriously and may legally require accommodations.

### **What Gravity Should Have Done Differently**

Employers often receive requests to change things in the workplace or workflow. When these requests are related to a disability, employers are obligated to treat them as requests for reasonable accommodations and begin an interactive process to work through the request with the employee.

Employers are not permitted to discriminate on the basis of the disability or the request. These requirements apply not only to physical disabilities, but to mental disabilities as well.

Unfortunately for employers, however, employees do not always fully disclose their disabilities and may only allude to the fact that they might potentially require accommodation. Because the law is clear that employees need not utter magic words to invoke their rights under the Americans with Disabilities Act and related laws, employers must nevertheless prepare to appropriately recognize and handle requests that might be legally protected.

Accordingly, employers should train management to recognize and appropriately address requests implicating mental health conditions, even when employees do not explicitly disclose a particular disorder.

In the previously described situation, Gravity failed to use two of the most important tools available to employers in these situations — the employer's (1) right to request documentation of the need for the accommodation, and (2) right to conduct reasonable, disability-related inquiries and medical examinations when it believes an employee poses a direct threat.

***Employers have the right to request for the employee to provide documentation regarding their need for their requested accommodation.***

Equal Employment Opportunity Commission guidance states that documentation will be sufficient if it:

(1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.[1]

Had Gravity asked Berling for documentation to support his request, it would likely have learned about Berling's anxiety disorder and possibly even about his panic attacks. It would have then taken his request for no birthday celebration more seriously.

***If an employee poses a direct threat, employers also have the right to conduct reasonable, disability-related inquiries and medical examinations.***

The applicable regulations governing the Americans with Disabilities Act define "direct threat" as "a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation." [2]

An employer's reasonable belief that an employee poses a direct threat must be based on observed objective evidence that the employee does not have the present ability to safely perform the essential functions of his job.[3] The employer's assessment must be made on an individualized basis with no regard given to assumptions or perceived stereotypes surrounding the disability.[4]

Factors to be considered in conducting this analysis include, according to the ADA:

(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and, (4) the imminence of the potential harm.[5]

If, after conducting the individualized assessment, an employer makes the determination that an employee poses a direct threat, the employer may then request that the employee be examined by a medical professional of the employer's choice.[6]

This medical examination must be limited to determining whether the employee can perform the functions of their job with or without reasonable accommodation, and the employer must pay all costs associated with these visits.[7] If an employer concludes that the employee would still pose a direct threat even with a reasonable accommodation, the employer may then terminate employment.

Here, the Gravity employees who spoke with Berling the day after his unwanted birthday celebration believed that Berling was going to attack them. As Berling shut his eyes, clenched his fists, and told the employees to be quiet, it is clear that Gravity perceived Berling as a threat and was arguably justified in taking the actions they did in initially sending him home.

Due to the fact Berling was an otherwise exemplary employee and because Gravity had been informed Berling both attended therapy once a week and experienced a panic attack the day before, the best choice Gravity could have made at this juncture was to request

that Berling submit to a medical examination to determine whether Berling's disability affected his ability to perform the essential functions of his job without posing a direct threat to himself or others.

Like a documentation request, a medical examination of Berling would likely have resulted in Gravity learning about Berling's anxiety disorder and his panic attacks, allowing it to appropriately assess ongoing risk and plan next steps based on actual information rather than assumptions.

### **Key Takeaways for Employers**

Employers should consider the following key points to try to avoid placing themselves in a situation similar to Gravity.

#### ***Follow through.***

Even though an employer may have an accommodation process in place, such processes do little good if there is no follow-through.

In this case, Gravity's chief of staff told Berling that she would pass along his request, but she failed to do so. Had the chief of staff forwarded Berling's request as promised, Gravity would have been able to analyze the request, determine whether to grant it and inform Berling of its decision — eliminating the element of surprise that may have contributed to Berling's panic attack and also allowing Berling the opportunity to offer further explanation if necessary.

#### ***Provide appropriate training.***

Gravity's managers were not prepared to recognize potential mental health issues. While Berling may not have notified Gravity that his request was related to a mental health condition, he had made it widely known that he was engaged in regular therapy, and he also told Gravity's chief of staff that he associated his birthday with bad memories.

Ideally, his request should have been passed on to human resources or a disability accommodations team. In the meeting that led to the termination of his employment, Berling told company representatives that he had experienced a panic attack the previous day.

If these supervisors had been trained to recognize distinctions between anxiety responses and threats of violence, it seems unlikely the meeting would have resulted in the fear that led to terminating his employment.

#### ***Make the process accessible.***

Individuals with mental health disabilities may require extra help accessing the accommodations process.

Because some accommodations, particularly unusual ones like Berling requested, are not clearly linked to a disability, employers should remember that they may require employees requesting such accommodations to submit sufficient medical documentation to substantiate that they have a disability and also need the requested accommodation.

#### ***Carefully consider employee requests, even if they are unusual or confusing.***

While not perfectly clear, Berling's request warranted further inquiry. Had Gravity explored the reason for the request, it could have learned more specifics that would have more directly indicated the need to consider the request as one for a disability accommodation.

But even requests that do not legally require accommodation should be carefully considered before a company rejects them, particularly when they involve social or team-building events designed to enhance morale.

By ignoring Berling's discomfort with birthday celebrations, Gravity negatively affected not only Berling's employment experience but also the coworkers he encountered on his birthday and those involved in his meeting the day after. Berling's supervisor exacerbated this issue by blaming Berling for his colleagues' discomfort.

***Consider the circumstances.***

When an employee engages in highly unusual or uncharacteristic behavior, employers should analyze the totality of the circumstances to determine if there might be an underlying issue connected to a disability before engaging in adverse employment actions.

Had Gravity investigated the reason for Berling's seemingly bizarre response in the meeting, it could have learned how panic attacks manifested for Berling specifically and then planned appropriately going forward rather than disciplining him unnecessarily.

If Gravity remained concerned, it could have sought additional documentation regarding Berling's condition, which would have equipped them with the information necessary to conduct a more appropriate risk analysis.

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[1] U.S. Equal Emp. Opportunity Com'n, EEOC-CVG-2000-4, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 26, 2000) [hereinafter Disability-Related Inquiries and Medical Examinations of Employees Under the ADA].

[2] 29 CFR § 1630.2(r).

[3] Id.

[4] Id.

[5] Id.

[6] Disability-Related Inquiries and Medical Examinations of Employees Under the ADA.

[7] Id.