

Employment lawyer at the movies: What if "Miracle on 34th Street" happened today?

By **Robin E. Shea** on December 16, 2010

One of my favorite Christmas movies is the 1947 version of *Miracle on 34th Street*, but ever since I became an employment lawyer, I have not been able to watch it without thinking about how different the story would be today. For our readers who are not black-and-white movie buffs, here is a summary of the plot: A nice little old man named Kris Kringle (Edmund Gwenn) is strolling down the streets of Manhattan on Thanksgiving Day,



and encounters Macy's parade Santa Claus, who is tangled up in his whip. Kris tries to teach parade Santa how to crack the whip properly and quickly realizes that parade Santa is three sheets to the wind. Kris finds the parade organizer, personnel manager Doris, a divorced "career gal" played by the lovely Maureen O'Hara, and indignantly tells her. Desperate to get a replacement Santa before the parade starts, she asks Kris to substitute. Kris does, and is a huge hit, and he's hired to be Macy's department store Santa for the Christmas shopping season.

After Kris starts work, the manager of the Toy Department tells him to promote gifts that are available at Macy's (especially the ones that aren't selling well), even if the kids want something else. Kris resists this commercialism, and actually encourages the children's mothers to go to competitor Gimbel's to get the toys they want. Doris and the toy manager are terrified that Mr. Macy will fire them for having hired Kris.

Meanwhile, Doris has reviewed Kris's employment application, and sees that he thinks he really IS Santa Claus. Although his address is a nursing home in Long Island, he says he is from the North Pole, and he lists eight reindeer as his next of kin. Doris makes up a story about last year's Santa having unexpectedly returned, and she fires Kris.

Soon, Doris and the toy manager are summoned to the office of Mr. R.H. Macy. Fully expecting to be fired themselves, they are astounded to hear that Mr. Macy is delighted with the kinder, gentler image of Macy's and plans to put it into place at the Macy's stores in other cities. He promises bonuses to them both, "and tell that Santa Claus I won't forget him, either."

Doris manages to catch Kris before he leaves Macy's for good, but because he seems delusional, she decides to send him to Mr. Sawyer, the store psychological tester, for an evaluation to ensure that Kris is not dangerous. Kris continually outwits Mr. Sawyer in the testing, and so the evil Mr. Sawyer vindictively reports that Kris is a potential menace. At the same time, the head of the nursing home where Kris lives is telling Doris that Kris is completely harmless and "has a delusion for good." Based on his opinion, as well as Mr. Macy's, Doris allows Kris to stay on.

Kris makes friends with Alfred, a chubby teen-ager who works as a janitor and who enjoys dressing up as Santa Claus for the poor kids at the Y because he can wear the costume without padding "on account of I got some extra padding myself." One day, Alfred seems depressed, and Kris asks him what is wrong. Alfred says that he's been meeting with Mr. Sawyer, who told him that he had a "complex" and hated his father. Kris, irate that Mr. Sawyer would provide psychotherapy and make Alfred feel that there was something wrong with him for wanting to help poor kids, storms into Mr. Sawyer's office and raps him on the head with his cane. Mr. Sawyer is not badly hurt, but he pretends to be unconscious, and then he tells Doris that she must commit Kris to a mental hospital. Doris reluctantly agrees, but without her knowledge Kris is tricked into getting into a taxi that takes him to Bellevue. In the cab, Mr. Sawyer falsely tells Kris that Doris knew all about it. Depressed because he thinks Doris was in on the scam, Kris purposely fails the psychological tests given to him and is committed.

The rest of the movie consists of Doris's love interest, handsome attorney Fred Gaily (John Payne), initiating court proceedings to get Kris out of the mental hospital by proving that Kris really is Santa Claus and therefore not delusional. Mr. Macy, who commits perjury testifies under oath that he believes Kris is the real Santa Claus, fires Mr. Sawyer on his way out of the courtroom. Meanwhile, Kris is trying to convince the jaded Doris and her unimaginative daughter, Susan (played by young Natalie Wood) to believe in him . . . and in love. I won't say anything more because I don't want to spoil the ending if you haven't seen it.

So, that was 1947. How would this story work today?

1-Parade Santa would be sent to an employee assistance program. Then he would return at the end of his 12-week job-protected leave under the Family and Medical Leave Act and would be entitled to bump Kris out of his job. Macy's would have to allow him time off work periodically to attend Alcoholics Anonymous meetings as a reasonable accommodation under the Americans with Disabilities Act. (He'd be entitled to FMLA leave for the AA meetings, too.) Even though parade Santa would be entitled to restoration to a "substantially equivalent position" after his FMLA leave, Macy's can claim that no such position is available for a Santa Claus in February, so they make him a file clerk until their "Christmas in July" promotion.

2-After being fired by Doris, Kris would go straight to the Equal Employment Opportunity Commission and file a disability discrimination charge, contending that he either had an actual psychological disability or was "regarded as" having one. Just to make sure he'd covered all the bases, Kris would add a claim for age discrimination since he's "a little older than [his] teeth" and reverse sex discrimination since the person who terminated him was a woman.

3-Kris would also retain a personal injury lawyer who would tell him that he has a wrongful termination claim as well because he was fired (in part) for refusing to push unwanted goods on innocent little children who believed that he was Santa Claus. Surely this is an unfair and deceptive trade practice, and a violation of some public policy!

4-On the other hand, Doris is to be commended for promptly reinstating Kris before incurring significant back-pay liability. Mr. Macy should give her a bonus.

5-The test administered to Kris by Mr. Sawyer was a "medical examination" within the meaning of the ADA and could not be given to him after he started work unless it was "job-related and consistent with business necessity." But since Kris was coming back after having been fired, Doris might be able to claim that it was a

lawful post-offer, pre-employment medical examination. In light of the new Genetic Information Non-Discrimination Act, let us hope that Mr. Sawyer did not ask Kris about his family history.

6-It is unclear whether the "psychoanalysis" that Mr. Sawyer provided to Alfred was part of a voluntary wellness program, and therefore permissible under the ADA. If not, then Alfred could also file an ADA charge against Macy's for conducting an unlawful medical examination, as well as a workers' compensation claim for his depression.

7-Mr. Sawyer would file another workers' compensation claim against Macy's for his injuries suffered when Kris hit him with the cane. Macy's would send Mr. Sawyer for an independent medical evaluation, which would say he was engaging in "symptom magnification." Macy's would also hire a private detective to conduct video surveillance of Mr. Sawyer's activities. Armed with this evidence, Macy's would be able to get a clincher agreement at mediation for "only" a few thousand dollars. Because Macy's had no workplace violence policy in place, its workers' compensation premiums would quadruple in 1948.

8-Meanwhile, Kris now has another "regarded as" ADA claim to add to his long list, after being tricked into going to the mental hospital. Even though Doris really did not know what Mr. Sawyer was doing, Mr. Sawyer acted with apparent authority, making Macy's liable for his actions.

9-Mr. Sawyer will sue Macy's for wrongful discharge and intentional infliction of emotional distress based on his termination. First, he will say he was terminated for trying to prevent workplace violence, and surely that is a violation of some public policy! Second, it was unnecessarily humiliating -- or should we say, "*extreme and outrageous*" -- for Mr. Macy to have terminated him in the courtroom, in front of all those people. Even worse, it was right before Christmas, and we know what the Supreme Court says about adverse employment action right before Christmas.

10-Kris, Doris, and the toy department manager will sue Macy's under the Fair Labor Standards Act for failing to include their bonuses in the calculation of their regular rates. Since Doris and the toy manager are managers for whom the "regular rate" calculation would not apply, they'll claim that they were misclassified and are actually non-exempt. On the advice of their attorney, they will file their suit "on behalf of themselves and all others similarly-situated."

I could go on all day! Please add to my list.

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