My Disability Made Me Do It! When Is Accommodation of Disability-Related Misconduct Required?

Orange County Bar Association
June 11, 2016

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May an employer discipline or terminate an employee with a disability for misconduct that is caused by or related to the disability? The answer depends on a variety of factors, including principally in which federal circuit the workplace is located. In most circuits, the employer may discipline or terminate an employee for violating a workplace conduct standard that is job related and consistent with business necessity, even if the misconduct was the result of the employee's disability. In some circuits, including the Ninth, the employer's right to discipline or terminate such an employee may be more circumscribed, depending upon the nature of the offense and the context in which it was committed.

The Early View

Following the enactment of the Americans with Disabilities Act (ADA), the rule developed that an employer may discipline an employee for misconduct, even if that misconduct is the result of a covered disability. The first key case in this regard was *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997). In that case, a behavioral therapist in a residential care facility for autistic and severely behavior-disordered adolescents and adults who was responsible for administering prescription medication to facility residents twice attempted to kill herself by overdosing on medication, albeit away from the workplace. After she was terminated, the EEOC filed suit, alleging that the employer violated the ADA by terminating her. The employer moved for summary judgment, arguing that the employee was not qualified for a position involving the handling of prescription medication, having disqualified herself by twice trying to kill herself via overdoses. The EEOC argued that the suicide attempts were simply manifestations of the employee's disability and firing her for that reason was the equivalent of firing her for her disability. The district court, rejecting the EEOC's argument, awarded summary judgment for the employer.

The EEOC then appealed to the First Circuit. The agency used the same rationale there. It argued that the ADA should have barred the employee's removal from her position because "the ADA prohibits adverse employment action that is based on conduct related to a disability to the same extent that it prohibits adverse employment action based on the underlying disability itself." The First Circuit disagreed. It observed: "To the extent that the EEOC is arguing that conduct connected to a disability always must be considered to be action 'because of' a disability, that is too broad a formulation." Other courts reached similar conclusions, holding that an employer need not accommodate misconduct growing out of a disability by excusing that misconduct or by giving employees who engage in such misconduct a "second chance." *See, e.g., Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995)(police officer fired for erratic behavior as a result of his failure to take his medication need not be accommodated by

being given a second chance); *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997)(employee with mental disorders terminated for threatening to kill her supervisor not protected); *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1219 (5th Cir. 1998)(employee who struck and screamed profanities at a subordinate not protected by the ADA even though he alleged his conduct resulted from his prior Posttraumatic Stress Disorder).

The EEOC's Position

In its *Enforcement Guidance on Psychiatric Disabilities Under the ADA* (reprinted at 405 Fair Empl. Prac. Man. (BNA) 7461 *et seq.*) issued in 1997, the EEOC maintained that an employer may discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity. Similarly, in its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (reprinted at 405 Fair Empl. Prac. Man. (BNA) 7601 *et seq.*), the EEOC maintained that an employer need not withhold discipline or termination of an employee who, because of a disability, violates a conduct rule that is job-related for the position in question and consistent with business necessity. The agency explained:

> An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

The EEOC further took the position that, except where the punishment for the offense is termination, an employer must provide a reasonable accommodation for a disabled employee who violates a conduct rule to enable such employee to meet such a conduct standard in the future, barring undue hardship. But, since reasonable accommodation is always *prospective*, according to the EEOC, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.

In its online guidance entitled *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* (www.eeoc.gov/facts/performance-conduct.html), the EEOC states, in paragraph 9:

> **If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?**
>
> Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.

The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:

- prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work);

- prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (e.g., pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work;

- require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts); and

- prohibit drinking or illegal use of drugs in the workplace.

Paragraph 10 goes on to state, in relevant part:

> **What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?**
>
> If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.

Most Courts Have Applied the EEOC's Approach

Most courts have taken the same approach as the EEOC. For example, in *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999), the plaintiff told the postmaster of the post office where he worked that he planned to kill his supervisor, and he also handed the postmaster a suicide note. He was fired, and he sued under the ADA. The Fourth Circuit held that summary judgment should have been granted to the defendant, explaining: "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 the misconduct is related to a disability."

In *Spath v. Hayes Wheels International-Indiana, Inc.*, 211 F.3d 392 (7th Cir. 2000), the plaintiff was fired for violating a plant rule against filing a false report. He had filed a workers' compensation claim stating that he had been injured when he slipped and fell while sweeping up, although two other employees later came forward and gave statements indicating that the plaintiff had fallen while tossing a ball of duct tape around with co-workers. He sued under the ADA, alleging that the employer failed to accommodate his organic brain syndrome, mild mental retardation, and dependent personality disorder, which he alleged caused him to deny involvement in the horseplay incident. The Seventh Circuit roundly rejected his claim, noting: "In essence, Spath is asking this Court to extend the ADA so as to prevent an employer from terminating an employee who lies, just because the lying is allegedly connected to a disability. We are of the opinion that the ADA does not require this."

In *Jovanovic v. In-Sink-Erator Division of Emerson Electric Co.*, 201 F.3d 894 (7th Cir. 2000), an employee who suffered from asthma and "Barrett's esophagus" sued under the ADA after he was fired for excessive absenteeism. The Seventh Circuit affirmed summary judgment for the employer, finding that the plaintiff was not a qualified individual with a disability. The court observed: "Common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job."

In *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000), the plaintiff was fired after receiving numerous disciplinary warnings for tardiness. During the course of the multi-step disciplinary procedure, the plaintiff disclosed that she suffered from Obsessive-Compulsive Disorder and that it was the cause of her tardiness. She sought an "accommodation" in the form of being allowed to clock in late without reprimand whenever she arrived, which the employer rejected as unreasonable. It was not until she was told that she was being terminated that she sought a leave of absence. The Eleventh Circuit affirmed summary judgment for the employer, finding that punctuality was an essential function of the plaintiff's job as a store department manager and that to require the employer to accommodate her by allowing to come to work whenever she wanted was unreasonable.

In *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001), the plaintiff was fired after being arrested for possession of cocaine. He sued, claiming that his drug addition "compelled" him to possess illegal drugs and that his misconduct (drug possession) could not be separated from his disability (drug addiction). The Seventh Circuit affirmed the dismissal of his complaint, stating that it had "little trouble separating" the plaintiff's misconduct from his alleged disability.

Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003), involved an employee with Attention Deficit Hyperactivity Disorder (ADHD) who was fired following a series of incidents of disruptive and threatening behavior which he attributed to his ADHD. The First Circuit affirmed summary judgment for the employer. It explained: "Put simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. Such an employee is not qualified."

In *Macy v. Hopkins County School Board*, 484 F.3d 357 (6th Cir. 2007), a teacher was fired for threatening to kill a group of students and other inappropriate and disruptive conduct. She sued under the ADA, alleging that her conduct was the product of an earlier head injury.

The Sixth Circuit affirmed summary judgment for the employer, noting: "[T]his court has repeatedly stated that an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualifies the employee from his or her job" (citing *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999); *Brohm v. JH Props., Inc.*, 149 F.3d 517, 521-22 (6th Cir. 1998); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1182-83 (6th Cir. 1997); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 845-48 (6th Cir. 1995)).

In *Bodenstab v. County of Cook*, 569 F.3d 651 (7th Cir. 2009), the plaintiff, an anesthesiologist at a county hospital, was fired after he threatened to kill his supervisors and co-workers. The court rejected his ADA claim, holding that the employer did not have to accommodate his threats, even if they were somehow related to his disability.

Courts in these cases have refused to excuse an employee's misconduct just because it may have been caused by a protected disability. They have treated disability-related misconduct in one of two ways. Either an employee is deemed unqualified by virtue of such misconduct (as the misconduct prevents the employee from performing an essential function of the job), or the employer is not required to accommodate the misconduct by excusing it, at least not retroactively. Not all courts have taken such an approach, however.

A Different View Emerges

The first court to take a different view was the Tenth Circuit in *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997), which involved a teacher who was fired from a private academy as a result of his mentally ill son's physical attacks against a former schoolmate and threats against the headmaster and the headmaster's children. The district court granted summary judgment against the teacher on his ADA claim, which he had brought under the ADA's "association" provision. *See* 42 U.S.C. § 12112(b)(4). Like the courts in the cases mentioned above, the district court drew a distinction between disability and misconduct resulting from the disability, and it held that the latter is not protected under the ADA

Although the Tenth Circuit affirmed, it did so on different grounds. It rejected the district court's distinction between disability and misconduct resulting from the disability. Although it quoted the EEOC's position set forth in that agency's *Enforcement Guidance on Psychiatric Disabilities and the Americans With Disabilities Act* that "as a general rule, an employer may *not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity," it then took a significant step further. It accepted the plaintiff's argument that because Congress only expressly permitted employers to hold illegal drug users and alcoholics to the same objective standards of conduct as other employees even though their disability causes misconduct or poor performance (*see* 42 U.S.C. § 12114(c)(4)), Congress implicitly did not intend to extend the same employer prerogative to discipline employees with *other* disabilities – even where the discipline is "job-related and consistent with business necessity." The court went on to cite the provisions of the ADA which permit an employer to refuse to make a reasonable accommodation that amounts to an "undue hardship" (42 U.S.C. § 12112(b)(5)(A)) and which allows an employer to take action against an employee who poses a "direct threat" to the health or safety of others in the workplace (42 U.S.C. § 12113(b)). It maintained: "The availability of these

affirmative defenses establishes that there are certain levels of disability-caused conduct that need not be tolerated or accommodated by employers. However, the necessary corollary is that there must be certain levels of disability-caused conduct that have to be tolerated or accommodated."

The *Den Hartog* court went on to explain:

> [T]he language of the ADA, its statutory structure, and the pertinent case law, suggest that an employer should normally consider whether a mentally disabled employee's purported misconduct could be remedied through a reasonable accommodation. If so, then the employer should attempt the accommodation. If not, the employer may discipline the disabled employee only if one of the affirmative defenses [permitting employer action where the employee poses a direct threat to others in the workplace or not requiring accommodations that are "undue hardships"] applies. Otherwise, the employer must tolerate eccentric or unusual conduct caused by the employee's mental disability, so long as the employee can satisfactorily perform the essential functions of his job.

Although the *Den Hartog* court found the "direct threat" defense to apply based on the teacher's son's violent and threatening conduct, its formulation of the case represented a distinct departure from prior law. It suggests that unless employee misconduct involves either alcohol or drug use, or a direct threat of violence, an employer must attempt to accommodate such misconduct instead of disciplining it if the misconduct can be related to some disability, unless the employer can show that an accommodation would be an "undue hardship."

A federal district court relied on *Den Hartog* to produce a very peculiar result in *Walsted v. Woodbury County*, 113 F.Supp.2d 1318 (N.D. Iowa 2000). That case involved a county custodian with an IQ in the borderline mentally retarded range but who was never diagnosed with any specific mental disorder. After the plaintiff removed and hid the wallet of a co-worker, she was criminally prosecuted and convicted of theft. She was also suspended without pay and referred to the county's employee assistance program, and her manager gave and explained to her a memo outlining the county's expectations of her on the job. Approximately two years later the plaintiff was observed on videotape removing automobile registration stickers from the Department of Motor Vehicles. She told an investigator that she used the stickers as "decorations" on packages she wrapped when she became bored at work. She was again convicted of theft, and her employment was terminated as a result. She sued under the ADA and the court denied the employer's motion for summary judgment.

The employer in *Walsted* argued that the plaintiff was not qualified to perform the essential functions of the job as a custodian, which included being "responsible and accountable for seeing that all papers, documents and belongings remain undisturbed in the respective offices." The court never really addressed this point except to note in passing, rather remarkably, that "with the exception of the two incidents of theft, Walsted performed satisfactorily in her employment with Woodbury County as a custodian." The court determined that qualification should be considered in light of potential reasonable accommodations, and then held that there

were issues of fact as to whether the employer accommodated the plaintiff. The court found that the employer's forgiveness of the first theft incident and the coaching it provided in the aftermath was not a sufficient accommodation, and it agreed with the plaintiff that the county could have provided her with better supervision and training as opposed to firing her. It noted that the county did not claim that additional training or instruction for the plaintiff would "impose undue financial or administrative burdens, or require a fundamental alteration in the nature of the program."

The *Walsted* court additionally found issues of fact regarding whether the employer failed to participate in the "interactive process" of attempting to identify a reasonable accommodation. It first concluded that even though the plaintiff never identified herself as disabled, the county had "more than enough information to put it on notice that Walsted had a disability." According to the court, this information was that (1) the plaintiff's first two supervisors knew she needed more training, (2) the plaintiff was taking reading classes, (3) one of the plaintiff's evaluations indicated that she needed "a better understanding of the tools and products in order for her to be more effective and productive," and (4) she was never required to mix chemicals or cleansers because she had difficulty reading the labels. The court concluded that it was "obvious" that the plaintiff was disabled. It based its finding not on any expert medical or psychological testimony, *but rather upon the testimony of another custodian*, who testified that it was "obvious" to her that the plaintiff suffered from a "significant learning disability."

The *Walsted* court went on to declare that it seems "only fair" that before the county discharged the plaintiff, "it should have informed her that the stickers she believed were wrapping stickers with virtually no value, were, in fact, license stickers with value." Thus, the court determined that instead of firing the plaintiff for her second conviction for stealing in the workplace, the employer should have accommodated her *again* by providing her with more training on why it is wrong to steal.

The *Walsted* court concluded its opinion by rejecting the notion that it is lawful to terminate a disabled person for stealing. It acknowledged an earlier Eighth Circuit case, *Harris v. Polk County*, 103 F.3d 696 (8th Cir. 1996), wherein the court affirmed summary judgment against a court stenographer who tried to get her job back after being convicted of shoplifting. The *Harris* court explained that the ADA does not require employers to "overlook infractions of the law," and that "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees." The *Walsted* court dismissed this language as dicta, however, and declined to follow it. Instead, it decided to follow *Den Hartog*, and held that since the plaintiff's stealing was not connected with alcoholism or drug use, her employer could not discipline her for the misconduct as it grew out of a disability.

The New View Gains Traction

Walsted is a bizarre and rather troubling decision, but given that it was a federal district court case, its impact was limited. Then the Ninth Circuit reached a similar result in *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001). *Humphrey* involved a medical transcriptionist with Obsessive-Compulsive Disorder who engaged in a series of obsessive rituals that hindered her ability to arrive at work on time. She would rinse her hair for up to an hour, and if, after brushing her hair, it didn't "feel right," she would return to the shower

to wash it again. This process of washing and preparing her hair could take up to three hours. She would also dress very slowly, repeatedly check and recheck for papers she needed, and pull out strands of her hair and examine them closely because she felt as though something was crawling on her scalp. Once she realized that she was late for work, she would panic and become embarrassed, making it even more difficult for her to leave her house and get to work. Following a course of disciplinary warnings for her poor attendance, the plaintiff discussed possible accommodations with her supervisors. She was asked if she wanted some time off and she declined. Among the other accommodations offered was the opportunity to have a flexible start-time arrangement in which the plaintiff could begin work any time within a 24 hour period on days on which she was scheduled to work, which she accepted. She nevertheless continued to miss work. She then asked to be able to work from home. Her request was denied on account of her disciplinary record for absenteeism and tardiness. When her poor attendance continued, she was terminated, and she sued under the ADA.

The district court granted summary judgment for the employer but the Ninth Circuit reversed. It rejected the employer's argument that the plaintiff was not "qualified" under the ADA on account of her inability to show up for work and to notify her employer in advance of her absence. While the plaintiff conceded that regular and predictable job performance was an essential function of the medical transcriptionist position she held, the Ninth Circuit observed that "regular and predictable attendance is not per se an essential function of all jobs." The court went on to find that the plaintiff was a "qualified individual" under the ADA so long as she was able to perform the essential functions of her job "with or without reasonable accommodation," and that either of two potential reasonable accommodations might have made it possible for the plaintiff to perform the essential functions of her job – granting her a leave of absence or allowing her to become a "home-based transcriptionist."

The court rejected the employer's argument that a leave of absence was not a required accommodation because its effectiveness would be speculative. It maintained: "[T]he ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation." The court also rejected the employer's argument that its obligation to offer leave as an accommodation ended when the plaintiff first declined it in favor of the flex-time arrangement. It explained that the plaintiff's attempt to perform her job functions "by means of a less drastic accommodation does not forfeit her right to a more substantial one upon the failure of the initial effort."

The court then addressed the proposed work-at-home accommodation. It maintained that "working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship for the employer." Noting that the employer already permitted some of its transcriptionists to work at home, the Ninth Circuit found that physical attendance could not be considered an essential function of the job.

The court in *Humphrey* then went on to hold that the plaintiff's termination for absenteeism was unlawful if the absenteeism was caused by Obsessive-Compulsive Disorder. Citing *Den Hartog*, the Ninth Circuit observed:

> For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability.

The court continued by noting that "[t]he text of the ADA authorizes discharges for misconduct or inadequate performance that may be caused by a 'disability' in only one category of cases - alcoholism and illegal drug use." The *Humphrey* court cited an earlier case, *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir.1996), which held that an employer could terminate an employee who went on a "drunken rampage" and attempted to fire an assault rifle at individuals in a bar, and noted that an additional exception might apply in the case of "egregious and criminal conduct" regardless of whether the disability is alcohol- or drug-related, but that absenteeism and tardiness would not qualify.

The *Humphrey* court also determined that the same result would apply under California state law as under the ADA. It cited *Brundage v. Hahn*, 57 Cal.App.4th 228 (1997), which is peculiar because *Brundage* reached the opposite conclusion under state law on similar facts. *Brundage* involved an employee with Bipolar Disorder who disappeared from work for about six weeks while she was "gambling, eating, talking to people and driving around" in Nevada, and she was fired as a result. The employee sued under the ADA and California state law, arguing that her absenteeism should have been excused because it was the result of her mental disorder, but the court of appeal disagreed. It maintained that "the ADA does not mandate giving a second chance to an employee who abandoned her job."

In *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006), the plaintiff was a county public works employee with epilepsy. He would experience an "aura" that would warn him of an approaching seizure, usually an hour or so beforehand. One morning before work he experienced an "aura" but he went to work anyway. While he was driving a county pickup truck on a public road, he had a seizure. Fortunately, no one was injured. The county sent him for a fitness-for-duty examination and the physician who examined the plaintiff found him unfit for duty. The plaintiff's employment was terminated. He appealed his termination to the board of county commissioners. They affirmed his termination, noting that he "acted irresponsibly, recklessly, and with a total disregard of the safety of himself, other employees, and members of the public."

He sued, and the county was awarded summary judgment. The Ninth Circuit reversed. It found a dispute of fact that precluded summary judgment in that the reasons given by the plaintiff's supervisor (that he was unfit for duty) and the board of county commissioners (that he engaged in misconduct) for the plaintiff's termination differed. The court went on to maintain that because one of the stated bases for the plaintiff's termination was misconduct and the misconduct was related to the plaintiff's disability, the basis for the plaintiff's termination was discriminatory.

In addition, the Ninth Circuit found the basis for the plaintiff's termination to be pretextual because other, non-disabled, employees had accidents in county vehicles but were not

terminated. The court observed, rather remarkably: "It was not until an accident occurred that was caused by a seizure, that the plaintiff's fitness for duty was called into question." The court also maintained that the county had an obligation to explore whether a reasonable accommodation of the plaintiff was possible. Potential accommodations identified by the court included a leave of absence and reassignment to a different job. The court observed that the county could not rely on the "direct threat" defense under the ADA because safety standards are subject to modification through a reasonable accommodation that will allow a disabled employee to meet them.

In *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007), the plaintiff had notified her supervisors that she had Bipolar Disorder and that she was experiencing mood swings that she was attempting to control via medication. When she subsequently was given a performance improvement plan, she threw the document across the room and shouted profanities at the managers involved. She then went to her cubicle and began kicking and throwing things. She was fired, and she sued. She lost at trial but the Ninth Circuit reversed. The court held that the trial court should have given the jury the instruction that "[c]onduct resulting from a disability is part of a disability and not a separate ground for termination." The court suggested, however, that the employee might not have prevailed if:

- The employee was not qualified as a result of her misconduct;
- The employer could show that it was an "undue hardship" to accommodate misconduct; or
- The employee posed a direct threat to the health or safety of self or others.

In *Brown v. City of Salem*, 19 A.D. Cases 29 (D. Ore. 2007), the plaintiff was a 911 call dispatcher with sleep apnea who was terminated after falling asleep at work on numerous occasions. The court found an ADA violation in the employee's termination, noting that the plaintiff's falling asleep at work was caused by his sleep apnea. Citing *Dark* and *Humphrey*, the court explained that "conduct resulting from the disability is considered to be a part of the disability and termination based on that conduct is unlawful."

In *Menchaca v. Maricopa Community College District*, 595 F.Supp.2d 1063 (D.Ariz. 2009), the plaintiff, who suffered emotional disturbances related to a traumatic brain injury, told her supervisor that if she reported the plaintiff's comings and goings to the college administration, "I'll come back and kick your ass." Following her termination she sued. The defendant moved for summary judgment, asserting that the plaintiff had been terminated for her misconduct (including her threatening remark to her supervisor). It acknowledged "that the rule in the Ninth Circuit is that conduct resulting from a disability is considered to be a part of the disability and is not a separate basis for termination," yet it argued that the plaintiff's threat met the exception for "egregious and criminal" misconduct recognized by the courts in *Newland* and *Humphrey*. The court concluded otherwise, finding the situation more akin to the employee's emotional outburst in *Gambini* than the plaintiff's firing an assault rifle in a bar in *Newland*.

Citing "Common Sense," the Ninth Circuit Reaches More Moderate Results in Two Cases

In *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), the plaintiff, a neo-natal intensive care (NICU) nurse with fibromyalgia, missed multiple days of work. The hospital attempted several accommodations regarding her attendance but the plaintiff requested an exemption from the hospital's attendance policy altogether. The hospital refused and when the plaintiff continued to miss work she was terminated. She sued and the district court awarded summary judgment for the employer.

The Ninth Circuit affirmed. Distinguishing *Humphrey* as an "unusual case" where the employee could effectively perform all of her job duties at home, the court observed that most jobs require regular attendance. Citing "common sense," the court maintained that an employee who cannot show up for work is not qualified, and it noted that "the notion that on-site regular attendance is an essential job function could hardly be more illustrative than in the context of a neo-natal nurse." The court also roundly rejected the plaintiff's argument that exempting her from the hospital's attendance policy would be a reasonable accommodation. It observed that to do so would exempt her from one of the essential functions of her job, i.e., regular attendance, and that such is not required as a reasonable accommodation.

In *Mayo v. PCC Structurals, Inc*., 795 F.3d 941 (9th Cir. 2015), the plaintiff had been diagnosed with Major Depressive Disorder but was able to work as a welder for years without incident. Things took a turn for the worse, however, when he and some coworkers felt a supervisor was bullying them. They met with the human resources director to discuss the behavior and after the meeting, the plaintiff told one coworker that he felt like coming to work with a shotgun and "blowing off" the heads of the supervisor and another manager. He told a second coworker that he planned to show up on the day shift to "take out" management. He told a third that he wanted to bring a gun to the company and "start shooting people" and that he could shoot supervisors during their daily plant walk-through at 1:30 p.m.

Concerned coworkers reported the threats to management. A human resources manager called the plaintiff and asked if he planned to carry out his threats. He said he "couldn't guarantee" that he wouldn't do that, and the HR manager immediately suspended him from work. The plaintiff went on a medical leave which included six days in custody at a hospital. At the end of his leave, his psychologist cleared him to return to work but the employer terminated his employment. He sued under Oregon's counterpart to the ADA, claiming that his threats were caused by his disability and that his termination amounted to disability discrimination.

The district court awarded summary judgment for the employer and the Ninth Circuit affirmed. The court noted that "an essential function of almost every job is the ability to appropriately handle stress and interact with others." Therefore, reasoned the court, even if the plaintiff was disabled, he could not meet his burden of showing that he was qualified for his job at the time he was fired. Again citing common sense, the court maintained that the plaintiff became disqualified when he threatened to kill his coworkers regardless of whether the threats stemmed from his mental disorder.

A contrary rule, the court recognized, would have placed employers in an impossible position. The court disagreed that employers "must simply cross their fingers and hope that violent threats ring hollow. All too often Americans suffer the tragic consequences of disgruntled employees targeting

and killing their coworkers." The court continued: "While the ADA and Oregon disability law protect important individual rights, they do not require employers to play dice with the lives of their workforce."

The *Samper* and *Mayo* cases are refreshing departures from the Ninth Circuit's usual approach of finding miscreant but ill employees to be victims of disability discrimination after receiving employer discipline. Yet it is difficult to imagine that even the Ninth Circuit could have reached different results on the given facts. The *Mayo* court did emphasize that its holding should be read only to address the "extreme facts" in the case of an employee making serious and credible threats of violence. It specifically stated that off-handed expressions of frustration or inappropriate jokes will not necessarily render an employee not qualified. It also stated that employees who are simply rude, gruff, or unpleasant do not automatically fall into the same category as the plaintiff in *Mayo*.

A California Court Tries to Make Sense of It All

In *Willis v. Superior Court*, 195 Cal.App.4th 143 (2011), a court clerk with Bipolar Disorder threatened to put a police officer and police department employee on her "Kill Bill" list for leaving her standing outside in the heat. This occurred at the outset of a manic episode which led to the plaintiff going on medical leave. While on leave the plaintiff sent a ringtone with a violent message and rambling e-mails with threatening themes to her co-workers. When she returned from leave she was fired for violating the court's policy against threatening conduct. She sued for disability discrimination, relying on *Humphrey, Dark* and *Gambino.* The trial court awarded summary judgment against the plaintiff and the appellate court affirmed.

The appellate court criticized *Humphrey, Dark* and *Gambino* for finding in *Den Hartog* a bright-line rule holding that disability-caused misconduct is always protected as part of the disability itself. It read *Den Hartog* differently, and consistently with the EEOC's position that a disabled employee may be held to the same standards as a nondisabled employee if the standards are job-related and consistent with business necessity. Nonetheless, it issued a more narrow holding that, under California's Fair Employment and Housing Act (FEHA), an employer may distinguish between disability-caused misconduct and the disability itself when the misconduct includes threats or violence against coworkers. It specifically expressed no opinion on whether FEHA permits an employer to distinguish between disability-caused misconduct and the disability itself in any factual setting other than threats or violence against coworkers. Whether future California courts will find themselves to be bound by the analysis of *Humphrey, Dark* and *Gambino* remains to be seen.

Under What Circumstances, Then, Must An Employer Accommodate Disability-Related Misconduct?

Under current California and Ninth Circuit law, employee misconduct that is caused by or related to a disability may have to be accommodated, depending on the following criteria:

1. Is the misconduct the result of illegal drug use or alcohol abuse?

The Ninth Circuit in *Humphrey* and the Tenth Circuit in *Den Hartog* recognize that

employees who abuse alcohol or use illegal drugs may be held to the same disciplinary standards as other employees. Therefore, employees who are found possessing illegal drugs, missing work on account of alcohol or drug abuse, or are caught driving under the influence of drugs or alcohol will not be able to escape the consequences of their misconduct.

2. Is the misconduct "egregious and criminal"?

The Ninth Circuit in *Newland* recognized this exception. The situation in *Newland*, however, was quite extreme (firing an assault rifle in a bar). Less egregious or non-criminal conduct might not qualify.

3. Does the misconduct involve threats of violence or harm?

Mayo and *Willis* recognize that issuing death threats or other threats of harm to supervisors or co-workers is not protected.

4. Does the misconduct render the employee unqualified for the job?

Samper recognizes that an employee who, because of a disability, cannot perform the essential function of a job even with accommodations is not "qualified" for protection. Where attendance is concerned, however, the employer should be able to show that regular and predictable attendance is an essential function of the job.

5. Will it be an undue hardship for the employer to accommodate the misconduct?

Implicit in the Ninth Circuit's opinion in *Gambini* was the notion that the employee's emotional outburst for which she was terminated occurred behind closed doors with only members of management present. Had she directed such an outburst at a customer or client the result may well have been different. The employer always has the undue hardship defense, and the applicability of that defense will depend upon the context in which the misconduct occurred, among other factors.