

New Ninth Circuit Case Highlights Difficulty of Dealing With Mentally Disabled Employees

Legal Alert
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Garvey Schubert Barer Legal Update, April 26, 2007.

Governing federal case law has made it difficult for employers to enforce common sense conduct rules when an employee claims to have, or has, a mental disability.

This difficulty was highlighted in March, when the Ninth Circuit Court of Appeals held that because an employer knew that an employee had a bipolar disorder, it could not terminate the employee based on a violent outburst (which included throwing a memo at a supervisor, swearing and kicking and throwing things), and co-worker requests that the employee not be allowed to return to work. Instead, the Court ruled that the employer had to examine whether the conduct was caused by the disability and, if it was, to determine whether a reasonable accommodation was available to assist the employee in performing the essential functions of the job. *Gambini v. Total Renal Care* (9th Cir. 03/08/2007).

The Court's opinion does not mean that refraining from violent outbursts cannot be a job requirement. It does mean, however, that in a disability situation, an employer has to examine whether there are accommodations that will allow an employee to refrain from such behaviors.

This situation comes up in many different contexts. For example, a person with depression has excessive unexcused absences, a person with ADD does not meet performance standards, a person with anger management issues behaves inappropriately, or an employee with bipolar condition has interpersonal difficulties.

GSB's online subscription resource - [AdviceOnline](#) - provides more detailed "tips" on what to do when you have an employee with a known or suspected mental disability and the employee violates neutral conduct rules. However, at a minimum, we recommend that you:

1. **Look out for red flags.** If a disabled employee is falling short of your expectations and his/her disability could be the cause, then you should address the situation proactively.
2. **Administer your normal discipline (short of termination), but also obtain written evaluation from either the employee's physician or an independent physician.** Ask the physician whether the disability is causing the performance problems and whether an accommodation would allow the employee to meet expectations. If a physician determines that the disability caused the policy violation, then consider whether rescinding the

discipline is appropriate.

3. Do not terminate the employee unless:

- a. You have written medical support either that (i) the employee is not disabled or (ii) the disability is not causing the performance problems; or
- b. There is no reasonable accommodation that would allow the employee to perform the job's essential functions; or
- c. A reasonable accommodation exists, but it would cause you an undue hardship (hard test to satisfy); or
- d. You can show that the employee poses a direct threat to himself or herself (and you have objective medical support on this point); or
- e. You are willing to take the legal risks.

Now, more than ever, it is important for you to have up-to-date systems to help you comply with disability accommodation laws. GSB's online resource - [AdviceOnline](#) - contains a wealth of easy-to-use sample forms, letters and tools to help you establish and administer your disability accommodation process.