The Americans with Disabilities Act

Does it Protect Employees from Termination for Misconduct Stemming from Mental Disabilities?

— by Siona D. Windsor —

On a daily basis, numerous municipal employers in the United States are faced with evaluating the permissible legal responses to an employee who displays threatening, violent, severely angry, or similar egregious or criminal conduct (misconduct) in the workplace. Many times, an employee claims that the misconduct is the result of a disability cognizable under the Americans with Disabilities Act of 1990 (ADA),[1] and requests reasonable accommodation when faced with discipline or discharge for the misconduct. The majority of federal appellate courts addressing the issue have concluded that the ADA does not protect employees from discharge for this type of misconduct, even when it is caused by the disability. These holdings are based on a conclusion that an employee who engages in this misconduct is not a "qualified employee" deserving of protection under the ADA.

However, a minority of federal courts have reached a different conclusion, as exemplified by a recent decision of the U.S. Court of Appeals for the Ninth Circuit. In *Gambini v. Total Renal Care, Inc.*, the court held that, where the misconduct stems from the disability, discharge for the misconduct amounts to termination because of the disability.[2] Thus, unless reasonable accommodation presents an undue hardship or the employer can raise the direct threat defense, the discharge violates the ADA.

This article will survey federal precedent addressing an employer's ability to discharge an employee for misconduct stemming from a mental disability, and examine the impact of the *Gambini* case.[3] It will also provide some practical tips for employers faced with deciding on the appropriate response to an employee's misconduct stemming from a mental disability.

The Act

The ADA prohibits an employer from discriminating against a disabled individual in job application procedures, hiring, advancement, discharge, compensation, training, and other aspects of employment.[4] The term "disability" means an individual: (a) with a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) who has a record of such an impairment; or (c) is regarded as having such an impairment.[5] The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[6] The ADA defines discrimination as the failure of an employer to make reasonable accommodation for an otherwise qualified individual with a disability, unless the employer can show that the accommodation would impose an undue hardship.[7]

To sustain a claim of disability discrimination under the ADA because of discharge from employment, the former employee must show that he is disabled within the meaning of the ADA; that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he was terminated because of the disability.[8]

An employer who discharges an employee can defend against a claim of ADA discrimination by proving: (1) the individual is not "qualified" to perform the essential job functions, even with reasonable accommodation;[9] (2) that accommodation would pose an undue hardship;[10] (3) the employee poses a direct threat to himself or others;[11] or (4) the misconduct, even though resulting from drug or alcohol abuse, is deserving of discharge under the same qualification standards for employment, or job performance and behavior, applicable to all other employees.[12] A provision —42 U.S.C. § 12114(c)(4)—codifies an employer's authority to discharge an employee for alcohol or drug-related misconduct, consistent with how it would treat the same conduct by non-disabled employees. Stated differently, there is a statutorily-created distinction between discharge for misconduct caused by drugs or alcohol, and discharge because of a drug or alcohol disability.

The provisions of the ADA do not specifically address the discharge for misconduct / discharge for disability dichotomy beyond the context of drug and alcohol-related misconduct. However, several courts interpreting the ADA have extended this dichotomy to egregious or criminal misconduct stemming from other disabilities. The application of this extension in the various circuits is the focus of the next two parts of this article. In brief, the federal circuits are split on this issue: the majority upholds the dichotomy, finding that a disabled employee loses the protections of the ADA by engaging in egregious behavior or criminal misconduct; the minority position requires an employer to engage in an analysis of whether the employee can

be reasonably accommodated or poses a direct threat to himself or others, before discharge for disability-caused misconduct is permissible.

Cases Supporting the Dichotomy

There is a long line of cases[13] from the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits (or district courts within these circuits) that hold that egregious conduct—such as physical violence or threatening coworkers or supervisors,[14] angry outbursts,[15] or criminal conduct[16]—is misconduct for which an employer can discharge the employee, even when the conduct stems from a mental disability. These decisions recognize the dichotomy between discharging an employee because of a disability, which may be unlawful discrimination under the ADA, and discharging an employee because of the misconduct associated with a mental disability. Based on these cases, the latter results in a determination that the misconduct means that the employee is not a "qualified individual" protected by the ADA. Thus, an employer need not defend its discharge of a disabled employee by showing there was no reasonable accommodation possible, or that the employee posed a direct threat to himself or others.[17] Relying on the standard related to drug and alcohol cases, many courts find that nothing in the ADA suggests that disabled persons should not be held to the same standards of conduct in the workplace as non-disabled employees.[18]

Practitioners in this area will also find support for the "discharge for misconduct vs. discharge for disability" dichotomy in the Equal Employment Opportunity Commission (EEOC) *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*.[19] Courts are entitled to give this EEOC Guidance deference.[20] In October 2008, the EEOC also issued a fact sheet, *Americans with Disabilities Act: Applying Performance and Conduct Standards To Employees With Disabilities*, that supports an employer's ability to discharge an employee for misconduct stemming from a disability under appropriate circumstances.[21]

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The EEOC Guidance provides that an employer may discipline an employee for violating a workplace conduct standard even if the misconduct results from the disability, provided that the standard is job-related and consistent with business necessity. It further explains that an employer has the right to maintain a workplace free from violence or threats of violence, and to discipline disabled employees for misconduct in violation of this principle, so long as it would similarly discipline an employee without a disability. In support of this principle, the EEOC Guidance refers to the 1991 Federal Register comment that:

> The Commission has revised the second sentence of the interpretive guidance on § 1630.16(b) to state that an employer may hold individuals with alcoholism and individuals who engage in the illegal use of drugs to the same performance and conduct standards to which it holds "all of its" other employees. In addition, the Commission has deleted the term "otherwise" from the third sentence of the guidance. These revisions clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and non-disabled, to the same performance and conduct standards.[22]

The EEOC Guidance clarifies that the duty to reasonably accommodate does not require an employer to excuse past misconduct,[23] but does require accommodation where the misconduct is not so egregious as to make the employee unqualified for the position, and it also provides some helpful examples describing this distinction.

Cases Rejecting the Dichotomy

The Second, Ninth and Tenth Circuits have rejected the doctrine that a disabled employee can be held to the same workplace conduct rules regarding egregious behavior or misconduct as non-disabled employees, except in the context of misconduct stemming from alcohol or drugs. Last year, in *Gambini v. Total Renal Care*,[24] the U.S. Court of Appeals for the Ninth Circuit faced, for the first time, the discharge for misconduct dichotomy for egregious behavior (as opposed to merely performance issues, such as excessive absences) outside the drug or alcohol context. The employee, Gambini, was discharged after a meeting with her supervisors, called to discuss her substandard performance. Gambini attended, but responded with a profanity-laced tirade before storming out. Prior to the outburst, she had informed her supervisors that she was seeking medical treatment for her bipolar disorder. Several coworkers had expressed their concerns about Gambini's outburst; one employee specifically asked that Gambini be prevented from returning to work. Shortly after she was terminated, Gambini notified her employer that her outburst was a consequence of her bipolar disorder and asked that the decision to terminate her be reconsidered. When the employer refused, Gambini sued, claiming that the employer discriminated against her in violation of the federal Family and Medical Leave Act and the Washington Law against Discrimination.[25] The district court entered judgment

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following a jury verdict in the employer's favor, and Gambini appealed.

The Ninth Circuit held that the district court erred in rejecting a proposed jury instruction that "conduct resulting from a disability is part of the disability and is not a separate basis for termination."[26] The court reasoned that, "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability."[27] Thus, the jury was entitled to infer that Gambini's violent outburst was a consequence of her bipolar disorder, which the law protected as part of her disability.[28]

In reaching this result, the *Gambini* court was interpreting the state anti-discrimination law; however, it relied on federal precedent interpreting the ADA in reaching its decision.[29] In particular, *Gambini* considered and applied the reasoning of *Humphrey v. Memorial Hosp. Ass'n*,[30] a case involving termination for excessive tardiness and absences. The *Humphrey* court rejected the disability vs. disability-caused misconduct dichotomy, except in the alcohol and drug context.[31] Instead, it found that:

> 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.[32]

The *Humphrey* court left open the possibility that egregious or criminal conduct, even unrelated to alcohol and drugs, might be an additional exception to the alcohol and drug misconduct dichotomy.[33] The court in *Gambini* did not consider whether the employee's outburst was "egregious conduct" not deserving of ADA protection. Further, it did not analyze whether the rule in *Humphrey* should be limited to disability-caused performance issues versus misconduct issues, nor did it analyze or distinguish the existing EEOC Guidance references supporting the misconduct dichotomy. However, in response to an *amicus* argument, the *Gambini* court rejected the suggestion that its decision provided absolute protection from adverse employment actions based on disability-related conduct, pointing to the direct threat defense, and the inability to reasonably accommodate, as two bases for the discharge.[34] Since *Gambini*, there have been no cases that have applied its holding to arguably egregious or criminal conduct stemming from a mental disability.[35]

Clearly, municipalities governed by the Second, Ninth or Tenth Circuits must engage in a reasonable accommodation analysis and, possibly, a "direct threat" analysis, if available, before imposing employee discipline. However, even for municipalities located within federal circuits recognizing the misconduct dichotomy, prudence may still dictate a cautious approach, including going through a reasonable accommodation analysis.

The U.S. Court of Appeals for the Tenth Circuit, in *Hartog v. Wasatch Academy*[36] (a case cited with approval by the court in *Humphrey*), has also rejected the egregious conduct dichotomy. The Tenth Circuit concluded that under the ADA, an employer should normally consider whether misconduct stemming from a mental disability can be accommodated, and held that termination is only permitted under one of the affirmative defenses under the ADA (e.g., undue hardship or direct threat).[37] Otherwise, the employer must tolerate an employee's eccentric or unusual behavior caused by a mental disability, so long as the employee can perform the essential functions of the job.

In the Second Circuit case of *Sista v. CDC Ixis North America, Inc.*,[38] the court below had found that a former employee was not qualified for his position because of egregious misconduct stemming from a mental disability. Therefore, the plaintiff could not establish a prima facie case under the ADA. On appeal, the Second Circuit upheld the discharge decision, but held that the district court had erred in determining that plaintiff could not prove he was a qualified individual because of his misconduct. Although misconduct could certainly provide a legitimate and nondiscriminatory reason to terminate an employee, it was distinct from the issue of the minimal qualifications for performing a job. Therefore, a finding of misconduct could not preclude a plaintiff from meeting his prima facie burden of showing qualification for the job.[39] However, it is unclear if this case presents a softening of the Second Circuit's position on the misconduct dichotomy as it cited, with approval, the Seventh Circuit case of *Palmer v. Circuit Court of Cook County*[40] and its misconduct dichotomy reasoning for discharge, but rejected the ability to uphold the discharge on the basis of the plaintiff not meeting a prima facie case under the ADA.[41]

Post-*Gambini* Guidance

Given this split in the circuits, what should a practitioner do when the municipal client is considering discharging an employee because of misconduct stemming from a mental disability?

Clearly, municipalities governed by the Second, Ninth or Tenth Circuits must engage in a reasonable accommodation analysis and, possibly, a "direct threat" analysis, if available, before imposing employee discipline. However, even for municipalities located within federal circuits recognizing the misconduct dichotomy, prudence may still dictate a cautious approach, including going through a reasonable accommodation analysis. Here's why: A human resources manager or a supervisor (and certainly the advising municipal lawyer) trying to decide what discipline is appropriate knows (or is aware of) far less

at this stage of the process than he will know after spending two or three years litigating an ADA claim of unlawful discharge. Litigation invariably changes the landscape from how it looked on the day discipline was imposed, and affects the municipality's options in defending a case. Therefore, at the outset, it may be beneficial to support the discharge under several different theories, in case—as time goes by—the law or the facts foreclose or weaken the misconduct dichotomy discharge defense. The approach recommended below will give the municipality's attorney greater flexibility in defending the case, thereby potentially increasing the chances of success.

Generally, an employer deciding on the discipline to impose for misconduct stemming from a mental disability should try to justify the discharge on as many theories as are supportable. For employees who have permanent rights to employment (i.e., cause rights[42]), this means a municipal employer should first conduct a "just cause" analysis to decide whether discharge is appropriate.[43] Having a strong workplace violence policy (one that clearly lays out the consequences for violence and threats of violence) will enhance the likelihood of finding cause for termination. If this analysis establishes that an employee who was not disabled is deserving of discharge, the employer should take a further step and consider whether there is any evidence that a reasonable accommodation (such as leave to obtain treatment) should be permitted where the employee has requested possible accommodation, or the employer has clear notice of the need for an accommodation. An employer may also have the option of considering whether a termination is supportable because the employee poses a significant threat to the health and safety of others, or to himself. For at-will employees, where the employer believes that there could be an ADA challenge to a discharge decision, the employer should still analyze whether discharge would have been imposed on a non-disabled employee for the same or similar misconduct. As above, if the conclusion is that discharge is appropriate, the employer is still advised to engage in a reasonable accommodation analysis.

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Employers faced with analyzing whether to reasonably accommodate or to discharge because of a direct threat will often need to rely on competent medical evidence. This can be done by sending the employee to an employer-selected doctor for a "fitness for duty" evaluation that addresses the likelihood of similar conduct in the future, and whether the employee presents a direct threat to himself or to others. Generally, employers rely on medical documentation provided by the employee to answer these questions. The reason municipalities tend to rely on employee-provided medical documentation is because of the minimal cost and the practical reality that an employee's treating doctor will have a better history of the employee. However, a countervailing consideration is that a treating doctor develops a rapport with the patient-employee and may be less likely to provide an opinion harmful to the employee's chances for continued employment, especially in the mental health context. Therefore, an opinion by an employer-retained doctor may more objectively assess the employee's fitness for duty.[44]

After concluding the discharge analysis, employers in the Second, Ninth and Tenth Circuits will only be able to sustain a discharge for misconduct stemming from a mental disability where there is no reasonable accommodation, or the employee poses a direct threat. In the other circuits, if there is arguably a reasonable accommodation available, the employer will need to weigh the risk of relying on the misconduct dichotomy in deciding whether to proceed with the termination. Factors to consider include the egregiousness of the misconduct, the employee's length of service, prior instances of assistance and accommodation that had not been successful, and clear, documented warnings given regarding the disciplinary consequences for a failure to stop the misconduct.

In close cases, an employer may want to consider using a "last chance" agreement in lieu of termination. These agreements offer the employee a chance to avoid termination in return for complying with the specified performance or conduct standards set out in the agreement. The agreement generally provides that further instances of specified misconduct by the employee will or may result in termination. There is a host of issues that must be considered in utilizing these agreements in the context of a disabled individual, including the validity of a particular agreement under the ADA, whether discharge under a "last chance" agreement would violate the ADA, and whether the agreement constitutes a reasonable accommodation, but the scope of these issues is beyond this article.[45]

Finally, employers in the Second, Ninth or Tenth Circuit faced with defending an ADA challenge to a discharge for egregious or criminal conduct stemming from a mental disability should argue for the application of the misconduct dichotomy. Although this appears contrary to recent holdings, *Gambini* left many questions unanswered. For example, that court did not consider whether the employee's outburst was "egregious conduct" not deserving of ADA protection (as has been suggested by the Ninth Circuit in *Newland v. Dalton*[46]), nor did it analyze whether the rule in *Humphrey* should be limited to disability-caused performance issues versus misconduct issues. Further, the *Gambini* court did not analyze or distinguish the EEOC Guidance supporting the misconduct dichotomy. Cases presenting examples of extreme misconduct may well be distinguishable from *Gambini*. The strong, well-reasoned precedent in most other federal circuits—that disabled employees who engage in egregious or criminal conduct are not qualified under the ADA—together with the EEOC Guidance supporting the dichotomy, provide support for such an argument. Further, there are few cases in the Second, Ninth and Tenth Circuits

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following the rationale of *Gambini* and similar cases, so there is no long, well-established law in this area. Ultimately, the issue may have to be resolved by the U.S. Supreme Court.

Conclusion

The federal circuit courts are split on whether an employer may discharge an employee for egregious or criminal conduct stemming from a disability without consideration of the provisions of the ADA, because the conduct makes the employee not a qualified individual. Until this conflict is resolved, municipalities located within the Second, Ninth and Tenth Circuits' jurisdictions should proceed cautiously when terminating a disabled employee under these circumstances. Municipalities within federal circuits that have recognized the "disability versus disability misconduct" dichotomy have more flexibility in concluding that a disabled employee whose egregious or criminal misconduct stems from a disability may be treated like a non-disabled employee in the same or similar circumstances. However, municipal employers may still wish to exercise caution, given the split of authority on the subject.

Notes

1. 42 U.S.C. § 12101 *et seq*. Title 1 addresses discrimination in employment; 42 U.S.C.A. §§ 12111 to 12117. In September 2008, Congress passed the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), which took effect January 1, 2009. See endnotes 5, 6, and 21 for the ADAAA's possible impacts on terminations for misconduct. References to the ADA will refer to the case and statutory law existing prior to the effective date of the ADAAA.
2. 486 F. 3d 1087 (9th Cir. 2007).
3. *Id*. The scope of this article does not address individual state laws, regulations, and constitutional provisions addressing disability discrimination.State and local laws applicable to a particular municipality must be consulted when analyzing the permissible scope of employer actions impacting a disabled employee's or applicant's terms and conditions of employment. Further, some cases discussed in this article may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions.
4. 42 U.S.C. § 12112 (a) (West 2008).
5. 42 U.S.C.A. § 12102 (2) (West 2008). The ADAAA retains the three-part definition of disability, but adds new provisions with the intent that "disability" be construed broadly to counter recent Supreme Court precedent that narrowed who qualified as a "disabled" person. Significant changes include (1) "substantially limits" will no longer be defined as either "significantly restricted" or "severely restricted"; (2) "major life activities" now include major bodily functions; (3) generally, the ameliorative effects of mitigating measures cannot be considered in assessing whether an individual has a disability; (4) impairments that are episodic or in remission may be disabilities if they are substantially limiting, when active; and (5) the "regarded as disabled" prong can be met if an employment decision was made because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits, or is perceived to limit, a major life activity (unless the impairment is minor and transitory). At this juncture, it is not clear how case law development under the ADAAA will impact an employer's ability to terminate disabled employees for misconduct. However, after the ADAAA's enactment, the Equal Employment Opportunity Commission (EEOC) published a fact sheet on applying employer conduct standards to employees with disabilities. This fact sheet strongly supports the conclusion that the ADAAA will not prohibit the termination of disabled employees for misconduct under certain circumstances, discussed below.
6. 42 U.S.C.A. § 12111(8) (West 2008). The ADAAA changes this definition to "qualified individual," striking from the definition "with a disability." For a list of the specific changes made by the ADAAA, see the EEOC *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008*, available at http://www.eeoc.gov/ada/amendments_notice.html.
7. 42 U.S.C. § 12112 (b)(5) (West 2008).
8. Kaplan v. City of N. Las Vegas, 323 F. 3d 1226, 1229-30 (9th Cir. 2003).
9. Tyndall v. National Educ. Centers Inc. of Calif., 31 F. 3d 209 (4th Cir. 1994).
10. 42 U.S.C.A. § 1211 (West 2008).
11. 42 U.S.C. § 12113(b) (West 2008); 29 C.F.R. § 1630.15(b) (1991). A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (1991). *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 78-79 (2002).
12. 42 U.S.C.A. § 12114(c)(4) (West 2008). Current illegal drug users are not qualified individuals under the ADA when an employer takes employment action on the basis of such use. 42 U.S.C.A. § 12114(a) (West 2008). *See also*, 42 U.S.C.A. § 12210 (West 2008). However, a person may still be qualified under the ADA if he or she is no longer using drugs and has been successfully rehabilitated, or is participating in a supervised rehabilitation program. An alcoholic is not automatically excluded from protection under the ADA due to his current use of alcohol, as it is not a "drug" within the meaning of the Act. 42 U.S.C.A. § 12114(b)(1) to (3) (West 2008).
13. Rehabilitation Act cases are also cited, as Section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794 (barring disability discrimination in programs receiving federal financial assistance), and the ADA are construed similarly with regard to terms, conditions and privileges of employment. S. Rep. No. 101-116 at 25 (1989).
14. Rose v. Laskey, 110 Fed. Appx. 136, 137 -139 (1st Cir. 2004) (employee suffering from depression who threatened supervisor, whether the threat was hollow or not, was not qualified under ADA); Sever v. Henderson, 220 Fed. Appx. 159, 161-62 (3d Cir. 2007) (no violation of Rehabilitation Act for employer to terminate postal worker for threatening coworker, even if behavior stemmed from alleged mental disability. Employer entitled to hold him to "qualification standard"); Pence v. Tenneco Auto. Operating Co. Inc., 169 Fed. Appx. 808, 811 (4th Cir. 2006) (discharge for threatening coworker sustained, where employer honestly believed the employee guilty of misconduct); Jones v. Am. Postal Workers Union, 192 F. 3d 417, 429 (4th Cir. 1999) (no ADA violation in discharging postal employee for threatening his supervisor. After incident, employee hospitalized and discharged with diagnosis for schizophreniform disorder and post-traumatic stress syndrome, with good prognosis for full return to work); Hamilton v. Southwestern Bell Tel. Co., 136 F. 3d 1047, 1052 (5th Cir. 1998) (ADA does not insulate emotional or violent outbursts blamed on an impairment; an employee who is fired for outbursts at work directed at fellow employees has no ADA claim); Sullivan v. River Valley Sch. Dist., 197 F. 3d 804, 813 (6th Cir. 1999) (threatening other employees disqualifies one from a job); Chapa v. Adams, 168 F. 3d 1036, 1039 (7th Cir. 1999) ("People who threaten to kill their supervisors are not 'qualified' for [employment] even if their threats are hollow"); Palmer v. Circuit Court of Cook County, 117 F. 3d 351, 353 (7th Cir. 1997) (discharge of social worker against ADA challenge upheld; court finding social worker not a qualified individual under the ADA and, therefore, no reasonable accommodation analysis required, where delusional paranoia disorder caused her to make violent threats against coworkers and supervisors); Crawford v. Runyon, 79 F. 3d 743 (8th Cir. 1996) (threats against supervisor warranted discharge against employee's claim of pretext for termination for stress-related mental disorders); Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989), *aff'd*, 1990 WL 45737 (D.C. Cir. 1990) (a former employee unable to refrain from

physical violence toward supervisor due to obsessive compulsive disorder (OCD) and adjustment disorder was not otherwise qualified under the Rehabilitation Act).

15. Calef v. Gillette Co., 322 F. 3d 75, 86-87 (1st Cir. 2003) (discharge of employee who claimed misconduct stemmed from Attention Deficit Hyperactivity Disorder, ADHD, upheld where the employee had long history of anger and verbal and physical confrontation problems at work. He was fired for refusing to work a shift, becoming angry, saying irrational things to his superiors, and scaring them with his behavior. The ADA did not require an employer to retain employee who displayed threatening behavior that made coworkers feel unsafe, even if the behavior is part of a disability); Gray v. Champion Int'l Corp., 134 F. 3d 371 (6th Cir. 1997) (table) (court upholds discharge of employee for extended outburst where employee claimed the tirade stemmed from psychological condition and medication; employee was previously disciplined for outbursts and warned that termination was possible. ADA did not require employer to retain employee who engaged in egregious misconduct); Ray v. Kroger Co., 264 F. Supp. 2d 1221, 1228-29 (S.D. Ga. 2003); *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003) (discharge of grocery clerk with Tourette's Syndrome upheld where disability caused him to blurt out profanities and racial slurs at customers; court found the requested reasonable accommodation of acceptance and understanding of this conduct was unreasonable as a matter of law).

16. Harris v. Polk County, Iowa, 103 F. 3d 696 (8th Cir. 1996) (county attorney could refuse to hire a legal secretary previously convicted for shoplifting, even though the applicant claimed her criminal conduct stemmed from a mental disability, because an employer could hold disabled employees to the same standard of law-abiding conduct as all other employees).

17. *Palmer*, 117 F. 3d at 353.

18. *See, e.g.*, Williams v. Widnall, 79 F.3d 1003, 1006 (10th Cir. 1996); *Calef*, 322 F.3d at 86-87 (relying on *Johnson v. N.Y. Hosp.*, 96 F.3d 33 (2d Cir. 1996) (per curiam) and *Williams v. Widnall*); *Jones*, 192 F. 3d at 429 (relying on *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832-33 (9th Cir. 1995)); Despears v. Milwaukee County, 63 F. 3d 635, 637 (7th Cir. 1995); Maddox v. Univ. of Tenn., 62 F. 3d 843, 846-48 (6th Cir. 1995); Little v. F.B.I., 1 F. 3d 255, 259 (4th Cir. 1993); *Gray*, 134 F. 3d at 371 (relying on *Maddox v. Univ. of Tennessee*); *Palmer*, 117 F. 3d at 353 (relying on *Johnson v. N.Y. Hosp.*); Newland v. Dalton, 81 F. 3d 904, 906 (9th Cir. 1996); and *Harris*, 103 F. 3d 696. Note, however, that cases not recognizing the "disability vs. misconduct stemming from the disability" dichotomy point to 42 U.S.C.A. § 12114(c)(4), confining this distinction to misconduct stemming from drugs and alcohol. *See* Den Hartog v. Wasatch Acad., 129 F. 3d 1076, 1085-88 (10th Cir. 1997).

19. The document is available at http://www.eeoc.gov/policy/docs/psych.html (last modified on Feb. 01, 2000) (hereinafter "EEOC Guidance"). The topic sections of the EEOC Guidance are not numbered.

20. E.E.O.C. v. Dinuba Med. Clinic, 222 F. 3d 580, 588-89 (9th Cir. 2000) (according deference to the EEOC Guidance).

21. *See* Section III.B in http://www.eeoc.gov/facts/performance-conduct.html. It is not clear if a court would give this fact sheet the same deference as the EEOC Guidance; nevertheless, the EEOC published this fact sheet post-ADAAA enactment and it appears that the EEOC's position on termination for misconduct stemming from a disability has not changed.

22. EEOC Guidance, *supra* note 19, citing Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35,726 (July 26, 1991). 56 Fed. Reg. 35,733 refers to revisions that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction), and non-disabled, to the same performance and conduct standards," *available at* http://www.eeoc.gov/policy/docs/902cm.html (last modified on Feb. 01, 2000).

23. *Id.* Because of this, the EEOC Guidance encourages employees with disabilities to request accommodations before their condition results in misconduct.

24. Gambini v. Total Renal Care, 486 F. 3d 1087 (9th Cir. 2007).

25. WASH. REV. CODE §§ 49.60.010 *et seq.* (2007).

26. *Gambini*, 486 F. 3d at 1093.

27. *Id.*

28. *Id.* at 1094.

29. *Id.* at 1093.

30. 239 F. 3d 1128, 1139-40 (9th Cir. 2001) (termination of employee with OCD, whose obsessive thoughts and rituals made it very difficult to get to work on time; court overturned summary judgment in favor of the employer, finding that termination for excessive tardiness and absences due to OCD was an impermissible termination because of the disability).

31. *Id.* at 1140 n.18. The *Humphrey* court cited *Newland v. Dalton*, 81 F. 3d 904, 906 (9th Cir. 1996) (holding that an employer may fire an employee who went on a "drunken rampage" and attempted to fire an assault rifle at individuals in a bar) and *Collings v. Longview Fibre Co.*, 63 F. 3d 828, 832 (9th Cir 1995) (discharge for drug-related misconduct at the workplace) as examples where disabled employees were held to the same conduct standards as non-disabled employees because of their alcohol or drug problems.

32. *Id.* at 1139-40 (internal citations omitted).

33. *See Newland*, 81 F. 3d at 906 (9th Cir. 1996) ("Attempting to fire a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability"). *Humphrey* rejected that such an exception would be applicable to absences or tardiness resulting from a disability. *Humphrey*, 239 F. 3d at 140.

34. *Gambini*, 486 F. 3d at 1095.

35. Cases that have addressed substantive ADA issues relying on *Gambini* are *Manning v. Tacoma Pub. Sch.*, No. C06-5078 RBL, 2007 WL 2495138, *1 (W.D. Wash. Aug. 30. 2007) (summary judgment regarding ADA discrimination claim denied where possible knowledge of disability, ADHD, coupled with discharge for inattention to detail may point to termination being partially motivated by disability) and *Collins v. The Boeing Co.*, No. C06-1843RSM, 2008 WL 943152, *6 (W.D. Wash. Apr. 07, 2008) (summary judgment for employer granted where a plumber was fired for misuse of a computer and presented no medical evidence tying the misuse to his depression, and distinguishing *Gambini* where such medical evidence was presented).

36. 129 F. 3d 1076, 1085-88 (10th Cir. 1997) (court upholds discharge under "direct threat" defense where discharged boarding school teacher's adult bipolar son had attacked, and threatened to attack, school community members, finding that, under the "direct threat" principle, an employer may discipline an employee who poses a significant risk to the health or safety of others in the workplace. The fact that an employer may discipline an employee whose "disability-caused misconduct" threatens the safety of others in the workplace, however, does not mean that the employer may discipline an employee whose disability-caused misconduct does not pose such a "direct threat" and does not otherwise violate reasonable job-related qualifications consistent with business necessity, or fall within another ADA exception to protection).

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probable cause was sufficient to support his traffic stop and any subsequent arrest. Rodriguez's constitutional rights were not violated even if his detention was an arrest, since the initial stop was permissible. *United States v. Rodriguez-Rodriguez,* No. 07-2214, 2008 WL 5340311 (10th Cir. Dec. 24, 2008).

Extra-Jurisdictional Arrests

Engleman, while staying with his parents in Oklahoma, noticed some prowlers and dialed 911. The call was routed to the local county sheriff's office, located in Arkansas, and Deputy Sheriff Murray and others were sent to investigate. The call was taken from a telephone number with an area code assigned to northwestern Arkansas, and the address given was a street address in Arkansas. While en route, the officers learned of an outstanding warrant for Engleman. The officers arrived and informed the parents about the warrant, and located Engleman in the home. Both Engleman and his father took the position that, as the house was actually in Oklahoma, not in Arkansas, the officers could not arrest Engleman. (Arkansas law authorized law enforcement officers to execute its arrest warrants "in any county in the state," but did not authorize out-of-state arrests.) Nonetheless, the officers arrested Engleman and took him to the county jail. Engleman brought suit under 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth Amendment, and that the arrest in Oklahoma was unreasonable under the Fourth Amendment: by arresting him in Oklahoma on an Arkansas warrant, Deputy Murray exceeded his jurisdictional authority, which violated Engleman's Fourth Amendment right to be free from unreasonable seizures. In the course of litigation, a satellite positioning system revealed that, while the postbox for the Engleman property was in Arkansas, the actual house itself was located in Oklahoma. The defendants moved for summary judgment, arguing that they were entitled to qualified immunity.

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Inside IMLA *continued from page 5*

These revenues help support our advocacy program and some of our other services, such as this magazine and our e-newsletters. The revenues also support some of our newer projects. As you know, we have started some groups for people with common interests. These groups include dedicated listservs and regular conference calls. The groups include "code enforcement," "coastal communities," "capital cities," "sports cities," "university cities/college towns," "counties," and will include "border communities," and "young lawyers." While the listservs are fairly inexpensive to operate, the conference calls are another matter. These groups provide great opportunities for our members to network with attorneys in other communities with common interests and common practice areas. We need additional revenues to sustain them.

Enough whining! We have a terrific program planned for the Seminar in April and we are already developing, with the City of Miami, a program for the Annual Conference that will be one of our best ever. If you have a construction project that has been affected by the economic slowdown and is late, in default, or you have claims, you will not want to miss our Annual Construction Law program, scheduled for March 1–3, 2009 in San Diego. **ML**

The Americans with Disabilities Act *continued from page 11*

Accord, Jarvis v. Potter, 500 F.3d 1113, 1121-22 (10th Cir. 2007) (court upholds termination of a postal worker who suffered from post-traumatic stress disorder, PTSD, and who would physically attack coworkers who startled him, under a "direct threat" defense).
37. *Id.* at 1087.
38. Sista v. CDC Ixis North America, Inc., 445 F. 3d 161 (2d Cir. 2006).
39. *Id.* at 169-74.
40. 117 F. 3d 351, 353 (7th Cir. 1997).
41. *Sista,* 445 F. 3d at 172-73. *But see* Husowitz v. Runyon, 942 F. Supp. 822, 832 (E.D.N.Y. 1996) (noting the Second Circuit rejects the distinction between a handicapping condition and specific conduct resulting from the condition in determining if an employer's decision to take action against an employee is based on the plaintiff's disability, relying on *Teahan v. Metro-North Commuter R.R. Co.*, 951 F. 2d 511, 515-17 (2d Cir. 1991)).
42. The majority of municipal employees have property interests in their employment, requiring cause for discharge. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (employees who can be discharged only for cause have a constitutionally-protected property interest in their tenure and cannot be fired without due process).
43. Generally, "just cause" factors include: (1) whether the employee had forewarning or foreknowledge of possible disciplinary consequences of his misconduct; (2) whether the employer's policy or rule is reasonably related to the orderly, efficient, and safe operation of the agency; (3) whether a fair investigation was conducted prior to imposing discipline; (4) any proof of misconduct; (5) whether the policy or rule was applied evenhandedly to all similarly-situated employees; (6) whether the punishment fit the severity of the conduct, in light of progressive discipline; and (7) any mitigating circumstances. *See* Discipline & Discharge in Arbitration, 33-35 (Norman Brand, ed., BNA Books 1998).
44. *See* Pence v. Tenneco Auto. Operating Co., Inc., 169 Fed. App. 808, 811 (4th Cir. 2006) (upholding an employer's decision to send an employee to the employer's doctor for medical evaluation for egregious behavior before interviewing him).
45. An excellent resource that addresses these questions is Beth Bates Holliday, Annotation, *Use of "Last Chance" or "Return to Work" Agreements Under Americans with Disabilities Act,* 6 A.L.R. Fed. 2d 453 (2005).
46. *See supra,* note 33. **ML**

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