

attorneys' fees will be awarded to the prevailing employer. In this case, the appellate court upheld the award of fees to the prevailing employer, but the employee may appeal that decision.

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EMPLOYEE MISCONDUCT

Untouchable? Disciplining employees for disability-caused misconduct

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HR professionals regularly implement employee discipline and are adept at navigating the waters of reasonable accommodations for disabled employees. Mingling those two issues, however, can sometimes pull an employer in opposite directions when it's responding to, for example, a chronically tardy employee suffering debilitating side effects from medication or an employee whose rude or even threatening behavior is due to a psychiatric disability. Adding to this conundrum is the differing and evolving judicial and administrative guidance.

An inconsistent legal landscape

Throughout the early 2000s, the U.S. 9th Circuit Court of Appeal, which has jurisdiction over California, ruled that disciplinary action targeting disability-caused conduct could be construed as being directed toward the disability itself and therefore implicate disability discrimination laws. In three cases, the federal court overturned the lower court and either allowed the trial to proceed or ordered a new trial on Americans with Disabilities Act (ADA) disability discrimination claims. The cases were filed by:

- (1) A medical transcriptionist terminated for tardiness and absenteeism due to her obsessive-compulsive disorder (*Humphrey v. Memorial Hospitals Association*);
- (2) A heavy-equipment operator terminated for suffering an epileptic seizure while driving a county vehicle (*Dark v. Curry County*); and
- (3) A clerk with bipolar disorder terminated for outbursts that frightened coworkers (*Gambini v. Total Renal Care, Inc.*).

In each case, the court pronounced the rule that “conduct resulting from a disability is considered to be part of the disability” and therefore can't be considered as a separate basis for discipline.

In *Wills v. Superior Court*, the California Court of Appeal reached a different result in 2011. The court upheld

the termination of a court clerk who yelled and swore at coworkers, told them she would add them to her *Kill Bill* hit list, and sent numerous threatening e-mails. The employee challenged her termination under California's Fair Employment and Housing Act (FEHA), arguing that her misconduct occurred during a severe manic episode caused by her bipolar disorder.

The court questioned whether the 9th Circuit's decisions blurring the lines between “conduct” and “disability” were as unassailable as they first appeared, and it noted that all three decisions relied on an overly simplistic—and in some cases nonexistent—analysis. Therefore, the court ruled that when a workplace violence policy is violated, the employer may distinguish between disability-caused misconduct and the disability itself. The court didn't answer the question of whether the same rule would apply for misconduct not in violation of a workplace violence policy.

Also in 2011, the Equal Employment Opportunity Commission (EEOC) weighed in with its own interpretation of the ADA and issued guidance stating that an employee may be disciplined for disability-caused misconduct if the employer was previously unaware of the disability. The EEOC also affirmed that under the ADA, employers may discipline employees they know are disabled for violations of workplace standards that are job-related, are necessary for the business, and are applied equally to all employees.

Bottom line

While the courts have yet to offer comprehensive guidance, California employers can be reasonably confident in observing the following principles:

- Unless you know or should know about an employee's disability, you don't have to treat the employee any differently with respect to discipline. You should, however, document when you first learned of the disability and, in some instances, request an explanation from the employee if you reasonably suspect performance issues are caused by a disability.
- You should engage in an interactive process with all employees, including disciplined employees, to identify reasonable accommodations that could prevent future misconduct. This could include, for example, offering telecommuting or modified work arrangements available to other employees.
- If you later become aware that misconduct was caused by a disability, you don't have to retract an otherwise proper disciplinary action. You still may move forward with discipline if the misconduct violates a job-related rule that applies to all employees, such as requirements that employees deal appropriately with customers.



AGENCY ACTION

EEOC sees record year for monetary recovery. The Equal Employment Opportunity Commission (EEOC) has released data for the 2013 fiscal year showing that the agency obtained the highest monetary recovery in agency history—\$372.1 million. During the fiscal year, which ran from October 1, 2012, to September 30, 2013, the agency handled 93,727 charges of workplace discrimination, a 5.7% decrease from the 99,412 charges received in fiscal year 2012. As in previous years, retaliation under all statutes was the most frequently cited basis for discrimination charges, increasing in both actual numbers (38,539) and as a percentage of all charges (41.1%) from the previous year. This was followed by race discrimination (33,068/35.3%); sex discrimination, including sexual harassment and pregnancy discrimination (27,687/29.5%); and discrimination based on disability (25,957/27.7%).

OSHA focusing on cell tower safety. The Occupational Safety and Health Administration (OSHA) has announced it is collaborating with the National Association of Tower Erectors and other industry stakeholders to ensure that communication tower employers understand their responsibility to protect workers. An OSHA statement said that the agency is concerned about an increase in injuries and fatalities at communication tower worksites. In 2013, OSHA said there were 13 fatalities, more than the previous two years combined. Also, there were four worker deaths in the first five weeks of 2014. The agency has sent a letter to tower employers urging compliance and strict adherence to safety standards. It also has created a webpage targeting the issues surrounding communication tower work. Of the 13 fatalities in 2013, the majority were a result of falls.

JPMorgan Chase pays \$1.45 million to resolve sex discrimination suit. The EEOC has announced that financial giant JPMorgan Chase will pay \$1.45 million and revamp its procedures to settle a sex-based harassment lawsuit. The EEOC charged in its suit that JPMorgan Chase maintained a sexually hostile work environment toward female mortgage bankers assigned to its Polaris Park facility outside Columbus, Ohio. The EEOC alleged that female mortgage bankers not participating in sexually charged behavior and comments became ostracized and suffered economic consequences by being deprived of lucrative sales calls, training opportunities, and other benefits of employment. In addition to the monetary relief, the employer is to develop a call data retention system so that assignments of sales calls can be accessed and analyzed to ensure they are being equitably distributed among mortgage bankers. ❖

- In any event, you may discipline employees for violations of ADA-compliant rules against alcohol and substance abuse and other major misconduct.

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EMPLOYER NEGLIGENCE

Employer not liable for employee's poison gift to coworker

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A staffing company hired an employee to work at Kaiser. The employee poisoned her Kaiser coworker, who then sued the staffing company. The California Court of Appeal held that the staffing company wasn't vicariously liable because the employee acted outside the course and scope of her employment when she maliciously poisoned her coworker.

A poisonous workplace relationship

AMN Healthcare, Inc., d/b/a Nursefinders, is a medical staffing company. Nursefinders assigned Theresa Drummond to work as a medical assistant at a Kaiser facility. Drummond had a disagreement with her Kaiser coworker, Sara Montague, about the stocking of rooms and the placement of lab slips. Drummond raised her voice on one occasion, but Montague didn't consider the incident serious enough to report. Shortly afterward, Drummond summoned her inner mixologist, took carbolic acid from a Kaiser examination room, and poured it into Montague's water bottle. Montague survived the poisoning.

Montague and her husband sued Nursefinders, alleging that Drummond was engaged in her employment when she poisoned Montague, giving rise to liability under a theory of *respondeat superior* ("let the master answer"). Montague also claimed Nursefinders negligently hired, retained, supervised, and trained Drummond.

The trial court dismissed the case without a trial on two grounds. First, it held that Nursefinders, as a staffing agency, was absolved of vicarious liability because it had no control over Drummond, who was considered a "special employee" of Kaiser while working there. Second, the trial court held that Drummond's creation of a carbolic cocktail fell outside the scope of her employment. Montague appealed, and the court of appeal affirmed the decision.

Vicarious liability for employee's wrongful conduct

The doctrine of *respondeat superior* permits an employer to be held vicariously liable for wrongful acts committed by an employee within the "scope of employment." The public