msk

employers may discipline violent or threatening behavior, even when caused by a mental disability

MSK Client Alert

April 25, 2011

practice areas

employment litigation & counseling

labor & employment

labor litigation & counseling

Employers have faced a dilemma under laws prohibiting discrimination on the basis of disability: what happens when an employee engages in **misconduct**, but the misconduct is attributable to that employee's disability? Can an employer discipline or terminate that employee, or would that constitute impermissible discrimination "because of" a disability?

Fortunately, the California Court of Appeal has just determined that, if the misconduct involves "threats or violence against coworkers," the employer is free to take the same action against a disabled employee that it would against a nondisabled employee. In *Wills v. Superior Court of Orange County* (No. G043054, Dist. 4, April 13, 2011), the Court of Appeal affirmed the trial court's grant of summary judgment to the employer on this issue.

The plaintiff in *Wills* had been diagnosed with bipolar disorder, and shortly afterwards, she began working as a court processing specialist, and later as a court clerk, for the Orange County Superior Court. In July 2007, she reported to work at the Anaheim Police Department's lockup facility and rang the buzzer for entry, but had to wait outside for several minutes before being admitted. When she went inside, she yelled angrily and swore at Anaheim Police Department employees, accusing them of intentionally leaving her outside in the heat. She told one officer that she was adding him and another employee to her "Kill Bill" list. (The two employees understood this comment to refer to the Quentin Tarantino movie, in which the main character makes a list of people she intends to kill.) Other employees who witnessed the plaintiff's outburst also saw it as threatening to the officer and the other employee.

This event occurred at the beginning of a severe manic episode (although the plaintiff was unaware of this at the time). A few days afterwards, she was placed on medical leave for treatment of her manic state. While on leave, she forwarded a profane and threatening cell phone ringtone to several people,

including one coworker, and also sent numerous rambling, emotional, and often angry emails to friends, family members, and coworkers. One coworker reported these emails to the Orange County Superior Court. A few weeks later, the plaintiff's manic episode ended, and she was cleared to return to work. But her employer placed her on administrative leave and investigated the event at the Anaheim Police Department and the complaints regarding the ringtone and email messages. During the investigation, the plaintiff's doctor submitted a letter explaining that the plaintiff suffered from bipolar disorder, that her disorder caused her behavior during those incidents, and that the plaintiff never posed a danger to anyone.

When the investigation was complete, the employer terminated the plaintiff's employment, citing the threatening behavior as a ground for termination. In the ensuing litigation, there was no dispute that the plaintiff's bipolar disorder caused the threatening behavior at issue and that her employer learned about the mental disability before deciding to terminate her. The employer argued that it was entitled to terminate her because it believed that she had violated the employer's written policy against threatening conduct and that this was a legitimate nondiscriminatory reason for her termination. The trial court agreed, granting summary judgment to the employer.

In affirming the trial court's decision, the Court of Appeal noted that no reported California case addressed the issue of whether the California Fair Employment and Housing Act ("FEHA") equates disability-related misconduct with the disability itself. The Court turned to numerous federal cases decided under the Americans with Disabilities Act ("ADA") for guidance. The Court noted that, while three federal Ninth Circuit decisions appeared to endorse the plaintiff's position that disability-related misconduct is considered part of the disability, these cases seemed to be based on a misreading of another federal decision arising in another circuit, and none of them involved "threats or violence against coworkers." In contrast, the Court found, other federal decisions, as well as the EEOC's Enforcement Guidance, endorse the proposition that "an employer may terminate an employee for disability-caused misconduct involving threats or violence against coworkers." Specifically, the Court held that "misconduct involving threats or violence against coworkers is properly considered as a legitimate, nondiscriminatory reason for terminating the employee," thereby shifting the burden to the employee to demonstrate that this reason was pretextual. As the Court of Appeal explained, "We believe our interpretation of FEHA strikes the appropriate balance between protecting employees suffering from a disability and allowing employers to protect their employees and others from threats of violence and the fear that a hostile or potentially violent employee will act on those threats." Slip Op. at 21-29.

Wills thus supports the right of a California employer to discipline and terminate employees who engage in violent or threatening behavior against coworkers, even if the misconduct is caused by a disability. To this end, it will undoubtedly help if the employer has a written policy against such violent or threatening conduct already in place, as did the employer in *Wills*.

ASK MSK - Q&A Section

Q: Does an employer have a duty to **accommodate** an employee's mental disability, or give that employee a "second chance," when that employee's mental disability causes disruption in the workplace?

A: If the employee could have controlled his or her conduct (such as by taking medication) and failed to do so, there is likely no duty to accommodate, as a prior California appellate decision, *Brundage v. Hahn* (57 Cal.App.4th 225 (1997)), held that "reasonable accommodation" does not include "excusing a failure to control a controllable disability or giving an employee a 'second chance' to control the disability in the future." Still, unless the disruption includes violence or threats, the employee may argue that his or her disability is not "controllable" and employers should tread carefully.

Q: Do employers have an obligation to accommodate an employee's illegal use of drugs, considered either as a disability (addiction) or as a therapy (medical marijuana)?

A: No. The current illegal use of drugs is specifically excluded from the definition of "disability" under the ADA and the California Supreme Court has held (in *Ross v. RagingWire Telecommunications, Inc.*) that California employers need not accommodate an employee's use of medical marijuana. Still, employers do have obligations to accommodate treatment or rehabilitation needs experienced by people who have been addicted to drugs in the past, as well as by people who are currently alcoholics.

los angeles
t 310.312.2000
f 310.312.3100

new york
t 212.509.3900
f 212.509.7239

washington, dc
t 202.355.7900
f 202.355.7899