Managing Difficult Behaviors in the Workplace

By: Jennifer Brown Shaw and Evan D. Beecher

Dealing with inappropriate workplace behavior can be challenging for employers. Sometimes the problem is an employee's abrasive personality or unprofessional conduct. In other situations, an employee may be engaging in "bad" behavior due to a disability or medical condition.

When employee misconduct is potentially related to a disability or medical condition, employers are more limited in their options to address the situation because of the federal Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA).

ADA/FEHA Prohibitions on Disciplining Employees for Disability-Related Conduct

Under the ADA, it is generally unlawful to discharge or discipline an employee for misconduct that arises out of a disability. For example, the Ninth Circuit Court of Appeals ruled that an employer violated the ADA when it terminated an employee for shouting, cursing and throwing papers at her supervisor because the employee's misconduct was related to her bi-polar disorder. *Gambini v. Total Renal Care Inc.*, 486 F.3d 1087 (2007)

In another case, the same court held that the employer ran afoul of the ADA when it fired an employee for poor attendance caused by her obsessive-compulsive disorder, even though the employee clearly violated the employer's attendance policy. *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (2001)

These decisions do not necessarily mean that an employer must retain an employee who is violent or who makes threats in the workplace. Indeed, the federal Equal Employment Opportunity Commission (EEOC) maintains that employers may generally enforce workplace rules prohibiting violence, threats of violence, stealing or destruction of property. Similarly, the California Labor Code requires employers to maintain a safe workplace. Consistent with these principles, some California courts have found that when there is a threat to safety, employers do not need to accommodate violent behavior, even when it arises from a disability.


Determining Whether Employee Misconduct is Disability Related

It is not always clear that employee misconduct is disability related. In a recent decision, *Weaving v. City of Hillsboro*, 2014 U.S. App. Lexis 15762, 2014 WL 3973411 (2014), the Ninth Circuit Court of Appeals provided helpful guidance to employers regarding this issue.

Weaving, a police officer, sued the city for disability discrimination under the ADA based on his termination for misconduct, which he claimed was related to his Attention Deficit Hyperactivity Disorder (ADHD). Weaving worked for the city since 2006 and generally received positive performance feedback. He disclosed his ADHD diagnosis as part of a pre-employment medical evaluation, which he passed. During the evaluation, Weaving also disclosed that he had "intermittent interpersonal communication issues" with others. He later passed another medical evaluation as part of a promotion. Both evaluations had a psychological component.

In 2009, the city placed Weaving on paid administrative leave to investigate several conflicts between Weaving and his peers and subordinates. Notably, Weaving apparently had little difficulty working with his superiors, but allegedly terrorized his co-workers. During his leave, Weaving consulted a clinical psychologist who decided that his ADHD may have contributed to his
problems at work but opined that Weaving could still perform his duties. Weaving then requested that the city return him to work, and provide “all reasonable accommodations” to allow him to interact with other employees. In the course of a “fitness-for-duty examination,” two medical professionals found that Weaving was fit for his job (i.e., he could perform the essential functions of his position without an accommodation). At that point, the city decided that Weaving was not “disabled” and terminated his employment.

A jury found that the city violated the ADA because Weaving had a disability and the city terminated him because of conduct that related to his disability. The city appealed, arguing that Weaving did not have a disability as the term is defined under the ADA because he was not “substantially limited” in the major life activities of working or interacting with others.

On appeal, the Ninth Circuit first considered whether Weaving was “substantially limited” in the major life activity of working. Because Weaving’s supervisors recognized his knowledge and technical competence and selected him for high-level assignments and two medical professionals found him psychologically “fit for duty,” the court concluded that no jury could reasonably find Weaving substantially limited in his ability to work.

The court then rejected Weaving’s claim that he was substantially limited in the major life activity of “interacting” with others. Reviewing its own and other circuits’ decisions, the court found that merely failing to “get along” with others (a normative function) is not the same as being unable to “interact” with others (a mechanical function). In other words, Weaving clearly did not have difficulty communicating with others, as he had no issues with his supervisors. As the court explained, “One who is able to communicate with others, though his communications may be at times offensive, ‘inappropriate, ineffectve, or unsuccessful,’ is not substantially limited in his ability to interact with others within the meaning of the ADA.”

The Weaving decision is based on the court’s interpretation of the ADA regulations (including the 2008 ADA Amendments Act, which somewhat loosened the interpretation of the “substantially limits” requirement). Because the FEHA uses the term “limits” and not “substantially limits” in defining whether an individual is “disabled,” it’s unclear the extent to which California courts will adopt the Weaving court’s reasoning.

However, the decision is instructive because it recognizes that an employee who does not relate to or “get along” with others may not qualify for protection under the ADA.

**Practical Tips for Employers**

Fortunately for employers, not all employees blame a medical or psychological condition for inappropriate workplace behavior. If the employee does not link his/her conduct to a disability and the condition is not obvious (or otherwise known by an employer), the employer may proceed with appropriate discipline, up to and including termination. Of course, when an employee raises a disability as a “defense” to the conduct, the employer should work with the employee and the employee’s health care provider to determine if the conduct is, in fact, disability-related and if so, whether any appropriate accommodations may alleviate or eliminate the behavior.

In some situations, it may be appropriate for an employer to request a fitness-for-duty examination, like the city did in Weaving. Under the ADA/FEHA, an employer may only require an employee to undergo a medical examination (i.e., a fitness-for-duty examination) if the examination is “job-related and consistent with business necessity.”

As recently affirmed by the First District Court of Appeal in *Kao v. The University of San Francisco*, 229 Cal.App.4th 427, an examination is job-related and consistent with business necessity if the purpose is to ensure that the employer can operate its business safely and efficiently.

In *Kao*, a professor began exhibiting signs of uncontrollable anger and outbursts that co-workers interpreted as threats to their personal safety. The university ordered him to undergo a fitness-for-duty examination to determine if he could safely remain in the workplace. The professor refused, arguing that a “clear the air” meeting or letter would be sufficient to alleviate his co-workers’ fears. The university then fired him for refusing to participate in the examination.

The court agreed with the university, finding that the university acted reasonably by requiring the professor to be examined by a licensed professional who could evaluate whether he was actually a threat to others. Disabilities will not be implicated in every case of “bad” employee behavior, but when they are, it’s important for employers to consider their obligations under the ADA and the FEHA before taking any disciplinary action against the employee.

**Side Bar: Best Practices**

Dealing with “bad” employees can be difficult. To avoid running afoul of the ADA, the FEHA and other laws, employers should:

- Ensure complaints and reports of employee misconduct are properly documented.
- Request appropriate medical documentation if an employee claims the inappropriate conduct is caused by a medical condition or medication.
Never directly ask an employee whether interpersonal conflicts and/or bad behavior are related to a disability or medical condition.

Obtain a second opinion (at the employer's expense) if the employee's documentation is inadequate.

Engage in the interactive process with the employee and his/her health care provider to determine whether a reasonable accommodation may alleviate or eliminate the misconduct.

Maintain confidentiality and share sensitive information only with those who have a need to know.

Consider requiring the employee to undergo a fitness-for-duty examination, even if a disability is not present, so long as doing so is "job-related and consistent with business necessity."

Ensure workplace policies and training sessions address bullying and other persistent demeaning or inappropriate behaviors, with a goal of stopping inappropriate conduct before it causes workplace problems or leads to a legal claim.

Partner with legal counsel before disciplining an employee for disability-related misconduct.

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