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Mis-Firing For Misconduct

by D. Gregory Valenza

A client seeking advice about firing an employee who curses, throws things, or even makes threats of bodily harm expects a green light. A competent employment lawyer usually may oblige without significant risk. Usually,

"Obey now, grieve later," is a well-worn maxim of workplace law. But its edges have frayed as the law has evolved, primarily in the context of disability discrimination claims.

For example, Maria Menchaca worked as a student counselor for the Maricopa Community College District in Arizona. A 1991 automobile accident caused injury to her brain. Upon her return to work, the district provided her with several adjustments to her duties as a job coach. Years later, a student complained Menchaca shouted and spoke disrespectfully in class. She took leave under the Family and Medical Leave Act and later returned to work with significant restrictions. The district provided additional adjustments to her course load and responsibilities.

In January 2006, Denise Bowman, the new Department Chair, met with Menchaca to discuss her responsibilities. Bowman reminded Menchaca she was supposed to work 35 hours per week, and had not done so the prior week. Hours after the meeting, Menchaca confronted Bowman, telling her that if she "reported Menchaca's comings and goings to the administration," Menchaca would "come back and kick [Bowman's] ass."

Menchaca immediately told management she had a meltdown and was having trouble coping with job-

related (and unrelated) stress. After consulting with her doctor, Menchaca took another leave of absence. Menchaca's doctors later approved her return to work, but with restrictions limiting her contact with students. There were no open jobs to which Menchaca could transfer that matched her needs. The district therefore terminated her employment.

Menchaca sued the district in federal court under the Americans with Disabilities Act (ADA). The district argued in a motion for summary judgment that its decision to discharge Menchaca was legitimate and non-discriminatory. The district pointed out that Menchaca's threat violated its violence policy and also constituted a crime in Arizona.

No matter. The district ran into 9th Circuit caselaw, under which it is generally a violation of the ADA to discharge an employee for misconduct that arises out of a disability. For example, the 9th Circuit has held that if an employer discharges an employee for poor attendance caused by the employee's obsessive-compulsive disorder, the employer is in effect discharging because of a disability rather than violation of its attendance rules. See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001). As the court explained: the hospital's "stated reason for Humphrey's termination was absenteeism and tardiness. For purposes of the ADA ...conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."

Humphrey did not involve employee misconduct. But the 9th Circuit extended its holding in *Gambini v. Total Renal Care Inc.*, 486 F.3d 1087 (9th Cir. 2007). There, an employee with bi-polar disorder was discharged after she cursed, shouted, and threw papers at her supervisors during a meeting about her performance. Reversing a verdict in favor of the employer, the court held the jury should have been instructed: "Conduct resulting from the disability...is part of the disability and not a separate basis for termination."

Following *Gambini*, The district court in *Menchaca v. Maricopa Cmty. College Dist.*, 595 F. Supp. 2d 1063 (D. Ariz. 2009), decided Menchaca's conduct was part of her disability and, therefore, denied the district's motion for summary judgment. The court opined that the facts of Menchaca's case were similar to those presented in *Gambini*. The court declined to follow another 9th Circuit case, *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1995), which upheld termination of an employee who went on a drunken rampage. He claimed his conduct arose out of alcoholism.

The district court in *Menchaca* held that her conduct, even if illegal, was not sufficiently "egregious" to fall within the *Newland* line of authority: "Menchaca's statement that she would "kick [Bowman's] ass" is plainly more akin to a profanity-laced outburst containing a veiled threat *Gambini* than to an attempt to fire an assault rifle at individuals in a bar."

The courts outside the 9th Circuit's borders are less tolerant of violent conduct, even if attributable to a disability. For example, the 2nd Circuit in *Sista v. CDC Ixis N. Am. Inc.*, 445 F.3d 161, 165 (2006), held that the employer's decision to discharge the plaintiff because of his shouting and veiled threats was legitimate, even though the plaintiff claimed a mental disability caused the outbursts.

More recently, a federal district court upheld the discharge of an employee claiming that his bi-polar disorder - the same disability claimed in *Gambini* - excused his misconduct. See *Celendrielo v. Tennessee Processing Center*, 22 Am. Disabilities Cas. (BNA) 1153 (M.D. Tenn. 2009). Celendrielo viewed assault rifles and other violent content online at work. He altered and displayed a company poster by substituting a picture of Charles Manson for another image. His office computer contained photographs of an assault rifle in his home. Confronted about his conduct, he claimed bi-polar disorder affected his judgment. The employer fired him anyway.

Celendrielo sued under the Tennessee Human Rights Act, which courts interpret consistent with the ADA. Accepting Celendrielo's bi-polar disorder was a disability, the court agreed with Tennessee Processing Center that "[t]aking action because of fear of potential violence is a legitimate non-discriminatory reason for an adverse employment action." The court in *Celendrielo* relied on a 7th Circuit opinion, which concisely stated: "if an

employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act.... The Act does not require an employer to retain a potentially violent employee." See *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997).

The 7th Circuit in *Palmer* therefore recognized what the courts in *Menchaca* and *Gambini* did not: to require an employer to overlook evidence of violent conduct "would place the employer on a razor's edge - in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."

California statutes and case law require employers to ensure a safe workplace, and to protect employees from violent co-workers. Employers in the 9th Circuit attempting to comply with the ADA face the Hobson's choice of risking liability to third parties if an employee with a disability engages in actual "egregious, criminal" conduct, or risking liability to the employee for disability discrimination.

The court in *Gambini* pointed out employers may challenge whether the employee is "qualified," i.e., he or she can perform essential job functions with or without reasonable accommodation. Second, the court continued: "even if a plaintiff were to establish that she's qualified, under the ADA the defendant would still be entitled to raise a 'business necessity' or 'direct threat'

defense against the discrimination claim.... [Third,] [d]efendant may also raise the defense that the proposed reasonable accommodation poses an undue burden "

The court's attempt to blunt its own holding is cold comfort for employers. "Undue burden," "business necessity," and "direct threat," are notoriously difficult defenses for employers to prove. As to whether the plaintiff is a "qualified individual," employers will be forced to argue that accommodating threats and the like are not "reasonable." But the court in *Gambini* already suggested tolerance of a plaintiff's misconduct indeed is a form of reasonable accommodation.

For now, employers' best hope may be that a California appellate court will refuse to follow *Gambini*. The 9th Circuit's decision is not binding on California courts. *Elliott v. Albright*, 209 Cal. App. 3d 1028, 1034 (1989) ("Where the federal circuits are in conflict, the authority of the [9th] Circuit...is entitled to no greater weight than decisions from other circuits."). But unless or until an appellate court in California expressly refuses to follow *Gambini*, employers have few satisfactory options for addressing employees' potentially violent misconduct arising from known disabilities.

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