



Potential Dangers of Stereotyping Employees With Mental Illness

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A recent Ninth Circuit Court of Appeals decision illustrates the perils of stereotyping employees with a current or prior mental illness. *Josephs v. Pacific Bell*, 443 F.3d 1050 (9th Cir. 2006). In *Josephs*, the Court held that an employer violated the Americans with Disabilities Act ("ADA") for terminating an employee after learning that he previously had been found *not guilty by reason of insanity* for attempted murder. While this may seem remarkable at first glance, the decision makes more sense when viewed through the prisms of the ADA.

Josephs v. Pacific Bell: Reported Facts before Termination. Josephs was a service technician with Pacific Bell. Service technicians perform unsupervised, in-home telephone installation or repair. On his Pacific Bell employment application, Josephs checked "NO" in answer to the question, "Have you ever been convicted of, or are you awaiting trial for a felony or misdemeanor?"

Pacific Bell hired Josephs in 1997. After Josephs had been working for approximately three months, Pacific Bell lawfully obtained Josephs' criminal history. The criminal history revealed that Josephs had been arrested in 1982 for attempted murder and was found not guilty by reason of insanity. Pacific Bell also learned that Josephs had been convicted in 1985 for a 1982 misdemeanor battery on a police officer. Pacific Bell suspended Josephs pending further investigation.

In its investigation, Pacific Bell additionally discovered that Josephs had been committed to, and had spent two and one-half years in, a California state mental hospital between 1982 and 1985. Thereafter, he spent six months in a board-and-care mental health facility. Based on these facts, Pacific Bell terminated Josephs "due to fraudulent entries on [his] application." Josephs filed a grievance seeking reinstatement. His grievance was denied, and he subsequently filed a federal lawsuit against Pacific Bell for alleged violations under the ADA.

Josephs v. Pacific Bell: Reported Facts after Termination. The litigation surrounding Josephs' termination revealed that Pacific Bell terminated Josephs for reasons other *than* for fraudulent entries on his employment application. Specifically, as the rationale behind Pacific Bell's decision to terminate Josephs' employment, Pacific Bell representatives cited the following concerns relating to Josephs' mental health history:

- The supervisor of Josephs' immediate supervisor "wanted to eliminate the possibility of having someone in the business that had an emotional dysfunction that might cause this type of behavior."
- Josephs' union representative testified that another manager expressed concerns about employing someone with Josephs' background to work in individuals' homes because he might "go off" on a customer. When the union representative proposed a transfer to a different job that did not involve customer service, the manager replied that "people can still walk by," and that "they were not going to bring someone like that back . . . [because] they had an image to uphold."
- A Pacific Bell manager allegedly stated that the company could not afford to have people "out there" who had been released from a mental institution.

Notably, the cited concerns that Josephs' mental health history might interfere with his job performance were contrary to the opinion of Josephs' immediate supervisor, who testified that "Josephs was performing well on the job and would probably be an asset to [Pacific Bell]." Further still, Pacific Bell produced no evidence that Josephs was engaging in misconduct on the job, nor did it ask Josephs to complete a "fitness for duty" medical evaluation.

Josephs v. Pacific Bell: What Went Wrong? A person is considered to be disabled under the ADA if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is "regarded as" having such an impairment. Under the "regarded as" provision, an employee is considered disabled if he or she is regarded by her or his employer as having a physical or mental impairment that substantially limits one or more major life activities.

The ADA does not explicitly include mental illness in its definition of disability; however, the interpretative regulations provide that "mental impairments" are included within the term "disability," and indirectly define this phrase to include "any mental or psychological disorder, such as . . . emotional or mental illnesses." Previously, courts have held that cognizable illnesses like bi-polar mood disorder, obsessive-compulsive disorder, depression, and panic disorders constitute mental impairments under the ADA. In contrast, courts generally do not consider "stress" to be an ADA recognized impairment. In each case, however, the ADA requires that the impairment must *substantially* limit a major life activity. In *Josephs*, there was no evidence of any such limitation.

At trial, a jury ruled that Pacific Bell violated the ADA by terminating Josephs and for refusing to re-hire him. The jury apparently concluded that Pacific Bell was not acting on any specific concerns related to Josephs' job performance when it terminated his employment. Pacific Bell appealed the jury finding and the Ninth Circuit affirmed, holding that Pacific Bell had improperly relied on stereotypes of mental illness while ignoring other evidence that Josephs was safe and otherwise qualified to perform his job.

Lessons Learned. Based on this case, employers should consider the following guidelines:

- Focus on employee conduct - not labels or stereotypes - when evaluating an individual who may have a mental illness.
- If you suspect an employee of having a mental illness that may pose a threat to others in the workplace, direct the employee to complete a medical examination. Ensure that the medical examination is job related and consistent with business necessity.
- Train managers and supervisors on the anti-discrimination requirements of the ADA and state laws governing persons with physical and mental disabilities. Note that under the [Washington Law Against Discrimination](#) (RCW 49.60.010, *et seq.*), the impairment must substantially limit the individual's ability to perform his or her job in order for a legally protected disability to be recognized.

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