



Employers May Discipline for Threats of Violence Caused by a Disability

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On July 28, the Ninth Circuit Court of Appeals held, in *Mayo v. PCC Structural, Inc.*, that the Americans with Disabilities Act (ADA) does not protect employees who threaten to kill coworkers, even when the threats are caused by a disability. After several recent decisions holding that disability-caused misconduct cannot form a basis for discharge, the court clarified that certain egregious misconduct can disqualify a disabled employee from receiving the ADA's protection, even when caused by the employee's disability.

State of the Law. Both federal and Washington courts apply the *McDonnell Douglas* burden-shifting framework to disability discrimination cases. Under that framework, the plaintiff must first make a prima facie case of discrimination. The prima facie case is a low hurdle, and the plaintiff is usually able to make one. If the plaintiff does so, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse action (here, discharge). If the employer offers a legitimate reason, the plaintiff must show that the employer's reason is actually a pretext for discrimination.

In *Humphrey v. Mem'l Hosps. Ass'n*, decided in 2001, an employee's obsessive compulsive disorder prevented her from regularly and predictably showing up for her job. The Ninth Circuit held that "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." Thus, when the employee made a prima facie case of discrimination, the employer could not use her irregular attendance as a nondiscriminatory basis for her discharge. In 2007, the Ninth Circuit applied that rule to a more-egregious scenario in *Gambini v. Total Renal Care, Inc.*—an employee's profanity-laced temper tantrum that was allegedly caused by plaintiff's bi-polar disorder. The Ninth Circuit decided *Gambini* under Washington's Law Against Discrimination (WLAD), which is often interpreted in accordance with the ADA. These cases left some employers feeling helpless when trying to deal with employee misconduct that was arguably caused by a disabling psychological disorder.

Facts. Plaintiff Timothy Mayo worked at PCC Structural for 12 years before being diagnosed in 1999 with major depressive disorder. Despite his depression, Mayo was able to work for more than 10 years thanks to treatment and medication. In 2010, however, a group of workers, including Mayo, believed that a supervisor was bullying them. One of Mayo's coworkers complained about the supervisor, and as part of PCC's investigation, Mayo, the coworker, and PCC's Human Resources Director met to discuss the supervisor's behavior.

Shortly after that meeting, Mayo began making threatening comments in startling detail. Mayo told a coworker that he "felt like coming down [to PCC] with a shotgun and blowing off" the heads of the supervisor and another manager. Mayo told the coworker not to worry because the killing would occur while the coworker was off the premises. Mayo told another coworker that he planned to "come down [to PCC] on day shift to take out management." He told a third coworker that he "wanted to bring a gun down [to PCC] and start shooting people." He further explained to the third coworker that all he would have to do "is show up [at PCC] at 1:30 in the afternoon [because] that's when all the supervisors would have their walk-through."

When the coworkers reported Mayo's threats, PCC promptly investigated. A Human Resources Manager asked Mayo whether he planned to carry out his threats, and Mayo answered that he couldn't guarantee that he wouldn't. PCC immediately suspended him, barred him from company property, and called the police.

That night, a police officer visited Mayo to discuss the threats. Mayo admitted to making the threats, to owning several guns, and that he had "two or three" people (i.e., targets) in mind. He added that he had not yet decided which gun to use. The officer asked Mayo whether he planned to carry out the threats, and Mayo responded "Not tonight."

With Mayo's consent, the officer took Mayo to the hospital, where he remained in custody for six days. After Mayo's hospital stay, he took leave under the Family and Medical Leave Act (FMLA) for two months. At the end of his leave, a treating psychologist cleared Mayo to return to work, stating that he was not a violent person. Nonetheless, PCC discharged Mayo before he could return to work.

Lower Court. The district court granted PCC's motion for summary judgment, reasoning that Mayo was not a "qualified individual" under the ADA because he made violent threats. Only "qualified individuals" are entitled to protection under the ADA and under the WLAD. A person is "qualified" if the person can perform the essential functions of the position with or without reasonable accommodation.

Ninth Circuit's Decision. Mayo argued that PCC could not offer a legitimate basis for his termination (the second step of the *McDonnell Douglas* framework) because his threats were caused by his disability, i.e., his depression, and were therefore protected as part of his disability. The court, however, held that *Humphrey* and *Gambini* did not apply because Mayo failed to show that he was "qualified," and thus failed to even make a prima facie case. The burden therefore never shifted to PCC to offer a legitimate, nondiscriminatory basis for Mayo's discharge. The court opined that "[a]n essential function of almost every job is the ability to appropriately handle stress and interact with others" and held that "[a]n employee whose stress leads to serious and credible threats to kill his coworkers is not qualified to work for the employer regardless of why he makes those threats." The Court distinguished *Gambini*, noting that it had not considered whether the *Gambini* plaintiff was a qualified individual under the ADA and that it had specifically reserved the issue by noting that the employer in that case was free to argue that issue on remand.

Take Home. Under federal law, employers may discipline employees for credible threats of violence against coworkers, and Washington courts are likely to follow this common-sense approach. For misconduct that is less extreme, employers should carefully consider whether the misconduct shows that the employee cannot perform the essential functions of the job, even with an accommodation.

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