

From the Law Offices of Alex J. Higgins

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Mental Disabilities in the Workplace: Expanded Protection for Employees

John suffers from a severe anxiety disorder. He suffers from panic attacks where he “shuts down” and cannot function. This sometimes happens at work. John misses deadlines and performs poorly under pressure. When it’s time for a performance evaluation, John’s manager gives him a low mark and places him on a performance improvement plan. John objects and produces a letter from his psychiatrist that his performance is “caused by a disability.” Does this psychiatrist’s opinion make any difference or can the employer simply insist that John meet the same work standards as anyone else?

Recent decisions have complicated this issue. It appears that employers cannot fire an employee – even an employee who violates a workplace rule -- if that violation was caused by a disability. While courts have also recognized an exception for “egregious conduct,” courts have not informed us what is meant by that term.

Understandably, employers claim this imposes an unreasonable burden and the law is too unclear to provide adequate guidance.

It is important to note that the Washington Law Against Discrimination (the “WLAD”) is very different from the federal ADA in several critical respects. First and foremost, the WLAD defines the term disability very broadly to easily encompass most mental disabilities.¹ The Washington State Human Rights Commission has consistently used the very broad definition of any “abnormal condition”. This would seem to encompass depression, mood disorder, anxiety disorder, and a host of other mental or psychiatric conditions.

The most recent case, *Gambini v. Total Renal Care*, 486 F.3d 1087, 1092 (9th Cir.2007), has caused a stir among defense lawyers. In that case, the plaintiff suffered from bi-polar disorder and allegedly frightened co-workers because of a “violent outburst.” This mainly involved throwing papers and knocking over some items on her desk. The employer cited that outburst as one of the reasons for terminating the employee. The Ninth Circuit noted that this behavior could be viewed as a manifestation of the plaintiff’s disability and that the jury should have been instructed as such:

It is undisputed that people who suffer from bipolar disorder struggle to control their moods, which may vacillate wildly from deep depressions to wild frenzies of hypomania.

¹ The WLAD has undergone an interesting set of convulsions in recent years. The Supreme Court attempted to narrow the definition in *McClarty v. Totem Elec.*, 157 Wash.2d 214, 221, 137 P.3d 844, 847 (2006), by adopting the ADA’s definition of a disability as “a physical or mental impairment that substantially limits one or more of [the individual’s] major life activities.” In response, the Washington Legislature swiftly rejected *McClarty*, amending the statute to define a disability as “a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact.” RCW 49.60.040(26) (a). The new legislation clarifies that a disability may be temporary or permanent, need not limit the ability to work generally or at a particular job, and need not limit any other activity within the scope of the WLAD. RCW 49.60.040(26) (b).

Hence the record is replete with examples of how Gambini's bipolar disorder manifested itself through her irritability, her “short fuse” and her sometimes erratic emotions.

Accordingly the jury was entitled to infer reasonably that her “violent outburst” on July 11 was a consequence of her bipolar disorder, which the law protects as part and parcel of her disability. In those terms, if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only.

Id., at 1094-1095.

The *Gambini* decision cited a ruling by the Washington Supreme Court opinion that “conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination.”² The Ninth Circuit continued, explaining the law more fully:

As a practical result of that rule, where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability. . . .

In *Riehl*, an employer terminated and refused to rehire an employee who began to suffer from depression and posttraumatic stress disorder (“PTSD”) after approximately five years of service. Evidence that the employee's mental disability motivated the adverse employment action included his supervisor's written comments about the employee's personality change after his illness, which “suggest[ed] he was not the same as the ‘old [Riehl]’ ” In light of his favorable performance reviews and promotions within the company, the supervisor's comments “suggest that [the employer's] decision to fire and/or not rehire Riehl was based on Riehl's personality difference, which may have been caused by his disability.” . . .

Hence the court held that a jury could reasonably find that the mental disability was a “substantial factor” in the adverse employment actions, making the critical point that under Washington law a plaintiff need not prove that the impermissible basis for the adverse employment action-mental disability-was itself “the determining factor”

Thus a decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws.

Gambini, 486 F.3d at 1093-94.

What are the limits of this rule? At some point, an employee's misconduct must “cross the line” such that no protection should be afforded? To find that point of demarcation, one must review the cases cited by the Washington Supreme Court in creating this principle. The Court relied on a Ninth Circuit decision from 2001, which specifically stated that no protection exists for an employee who engages in “egregious and criminal conduct.” *Humphrey* (*Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139-40, n. 18 (9th Cir.2001)) (citing, *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir.1996)). The *Newland* case, however,

² *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 152 (2004).

presented unusual facts -- the plaintiff went on a “drunken rampage” and tried to shoot people with an assault weapon. Not exactly a winning fact pattern. (Query: how did he find a lawyer to take his case?)

Employers criticize the ruling as another example of the “Ninth Circus” disconnect between theory and the practical realities of running a business. They argue that these decisions will paralyze employers and unfairly burden co-workers who will be forced to tolerate misconduct at work.

On the other hand, advocates for the disabled believe these rulings are necessary to protect individuals from unfair discrimination. A disabled worker should not be fired simply because his/her conduct makes other “uncomfortable” or because their personalities do not conform to the expectation of others. The fact that some people are “uncomfortable” with disabilities was one of the main reasons why the disabled needed protection in the first place.

The courts will undoubtedly struggle with how to apply this line of cases to specific fact patterns. The employer’s right to manage its workplace conduct will need to be balanced against the rights of the disabled to be free from discrimination.

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