



# Journal

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# EPLI ALERT: NINTH CIRCUIT RULING MAY SPUR INCREASE IN MENTAL DISABILITY DISCRIMINATION CLAIMS

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However, as seen in two published cases, the Ninth Circuit has taken a *stricter view*.

The most recent case is *Gambini v. Total Renal Care, Inc. dba DaVita*, 486 F.3d 1087 (Wash. 2007). Ms. Gambini worked for DaVita as a contracts clerk. After she had emotional breakdowns at work, she informed her manager that she had been diagnosed with bipolar disorder.

In the ensuing months, as the condition became more severe, Ms. Gambini became increasingly irritable and had difficulty concentrating or assigning priorities to tasks. Her managers noticed these behavioral and performance problems and called her into a meeting to discuss a performance improvement plan.

At the meeting the managers handed Ms. Gambini the PIP, which began, “Your attitude and general disposition are no longer acceptable in this department.” Ms. Gambini began to cry. After reading through the entire PIP, she threw it back across the desk, and in a flourish of profanities, expressed her opinion that it was unfair and unwarranted. Before slamming the door on the way out, Ms. Gambini hurled several choice profanities at her manager. There was a dispute about whether she warned her managers that they would “regret this.” Back at her cubicle, she was seen kicking and throwing things around.

The next day she checked into a hospital, and the HR manager put her on provisional FMLA leave. One day later, the HR manager terminated Ms.

Gambini for the misconduct during the PIP meeting. Ms. Gambini asked DaVita to reconsider, claiming that her behavior was caused by her bipolar disorder. The company refused to reconsider.

In the ensuing disability discrimination case, Ms. Gambini again asserted that her conduct was caused by her mental disability. Rejecting that claim, the trial court refused to instruct the jury that “conduct resulting from a disability is part of the disability and not a separate basis for termination.” The jury subsequently returned a defense verdict.

On appeal, the Ninth Circuit reversed and remanded for a new trial, finding that the jury instruction should have been given. The court examined Washington law and Ninth Circuit precedents. Finding both bodies of law to be identical, the court determined that conduct resulting from a disability is indeed protected.

The court noted: “The jury was entitled to infer reasonably that her ‘violent outburst’ [at the meeting] was a consequence of her bipolar disorder, which the law protects as part and parcel of 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.”

The second case is an earlier Ninth Circuit case titled *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128 (2001). In *Humphrey*, a hospital’s medical transcriptionist with obsessive compulsive disorder (OCD) was frequently tardy and absent.

While getting ready for work in the morning, she engaged in a series of obsessive rituals, such as repeatedly rinsing and re-washing her hair, getting dressed very slowly, and rechecking papers that she

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A recent holding by the United States Court of Appeals for the Ninth Circuit protects workplace misconduct resulting from a disability, expanding the potential for employer liability under the Americans with Disabilities Act (“ADA”) and state laws such as the California Fair Employment and Housing Act (“FEHA.”)

The case addresses this question: What happens when an employee with a mental disability misbehaves in the workplace? If the mental disability *causes* the employee to misbehave and violate workplace conduct rules, can the employer discipline the employee?

The common sense general rule in many jurisdictions is that an employer may avoid charges of disability discrimination if it can show that, for legitimate business reasons, it punished the employee’s violation of job-related rules of conduct or performance, even if such behavior resulted from a mental disability.



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needed. The hospital eventually terminated her employment for frequent tardiness and absenteeism. Although the trial court granted the hospital's motion for summary judgment, a Ninth Circuit appellate panel reversed. The court found that a jury could reasonably find the requisite causal link between a disability of OCD and the employee's absenteeism and conclude that the hospital fired her because of her disability.

The *Humphrey* court noted that the link between the disability and adverse action is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to the adverse action for performance inadequacies resulting from that disability.

The hospital learned that the employee's frequent tardiness and absenteeism was caused by OCD. As an accommodation, the hospital gave the employee a flexible start time, allowing the employee to begin her shift at any time during a 24-hour period. However, the employee continued to miss work. As a modified accommodation, she requested permission to work from home. Certain other employees had been permitted to work at home. The hospital denied the request because of the employee's disciplinary warnings for tardiness and absenteeism. After further absences, the hospital terminated her.

The Ninth Circuit found sufficient evidence for a jury to conclude that the hospital failed to reasonably accommodate the transcriptionist, and that its failure to accommodate the employee led to the termination.

The rule has limitations and exceptions. First, an employee must be able to perform the essential functions of the job, with or without reasonable accommodation. If disability-caused behavioral problems render the employee unable to perform essential job functions, the employer need not tolerate the misconduct. (Note that in the *Humphrey* case, there was a dispute about whether reporting for work was an essential function, given that some other workers worked from home.)


Second, there is an exception for drug or alcohol abuse. The text of the ADA authorizes discharges for misconduct or inadequate performance that may be caused by a "disability" in cases of alcoholism and illegal drug use: "[An employer] may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory

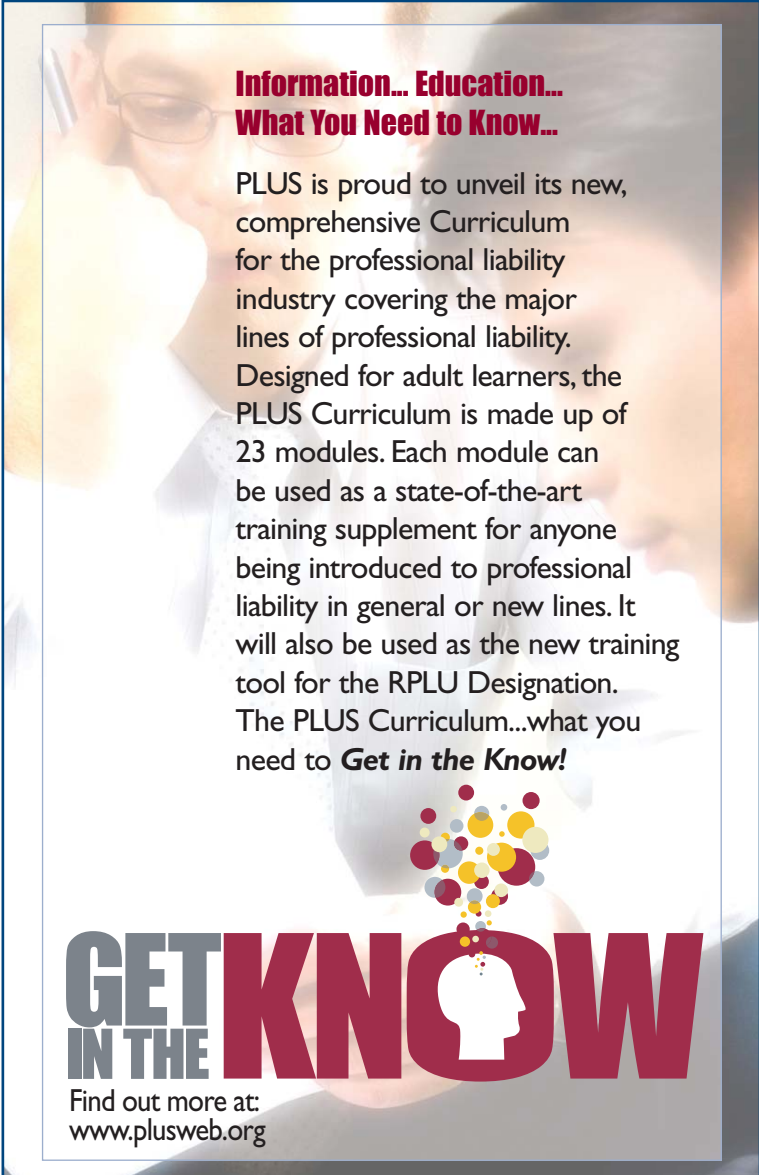
performance or behavior is related to the drug use or alcoholism of such employee."

In line with this provision, the Ninth Circuit (along with other circuits) has applied a distinction between disability-caused conduct and disability itself as a cause for termination in cases involving illegal drug use or alcoholism.

Third, courts have recognized that there is no duty to accommodate "egregious and criminal conduct" regardless of whether the disability is alcohol or drug-related. Credible threats of violence by an employee, as well as engaging in illegal, violent or dangerous conduct would disqualify an employee from protection.

So far there are no widespread reports of disability discrimination claims relating to conduct caused by a disability. The potential, however, exists.

According to the National Institutes of Health, mental disorders are common in the United States and internationally. An estimated 26.2 percent of Americans ages 18 and older—about one in four adults—suffer from a diagnosable mental disorder in a given year. When applied to the 2004 US Census residential population estimate for ages 18 and older, this figure translates to 57.7 million people. The NIH also reports that mental disorders are the leading cause of disability in the US and Canada for individuals age 15-44. While not all mental disorders qualify as mental disabilities under the law—particularly under the ADA's rigorous standards—these statistics reveal fertile ground for plaintiffs' attorneys to take full advantage of the Ninth Circuit's rulings. 



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