BARKER KOUMAS & OLMSTED
A PROFESSIONAL LAW CORPORATION

Legal Update

Firm Newsletter October 2007

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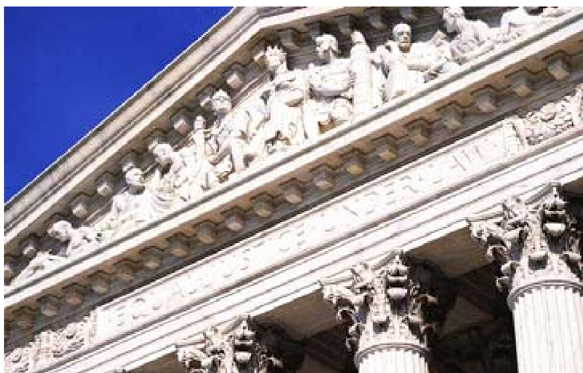

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MISBEHAVING EMPLOYEES MAY BE PROTECTED BY ADA AND FEHA

By Christopher W. Olmsted

A recent holding by a U.S. Ninth Circuit Court of Appeal protects workplace misconduct resulting from a disability, expanding the potential for employer liability under the 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 criteria, even if such behavior resulted from a mental disability.

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.

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In the ensuring 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 mangers 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, she 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 her 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.

"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."

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 rewashing her hair, getting dressed very slowly, and rechecking papers that she 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 her disciplinary warnings for tardiness and absenteeism. After further absences,

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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 Humphries 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. Engaging in illegal, violent or dangerous conduct would disqualify an employee from protection, along with any credible threats of violence.

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 Institute 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 U.S. 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 U.S. and Canada for ages 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.

California employers should be on the alert. The ADA certainly covers businesses in our state; more importantly, the California Fair Employment and Housing Act ("FEHA") is typically interpreted to provide at least as much protection as the ADA, and in many ways provides more protection. Accordingly, employers should carefully consider these Ninth Circuit cases when dealing with behavioral problems caused by a disability.

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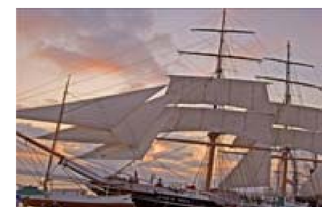
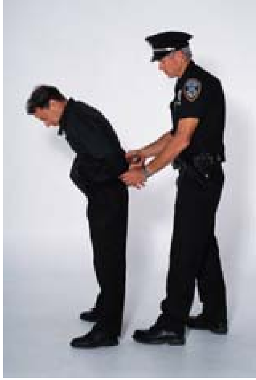
PRACTICAL TIPS:

- **Employers are not required to guess whether employees have disabilities. In fact doing so can leave to liability on account of a perceived disability. Follow normal discipline rules unless and until a disability is known to exist.**
- **The employer's obligation to act arises when the employee discloses the disability or requests reasonable accommodation.**
- **Employers *may* have the right to seek medical evaluations where the employee claims behavioral problems based on a disability. Consult legal counsel in the even that this issue arises.**



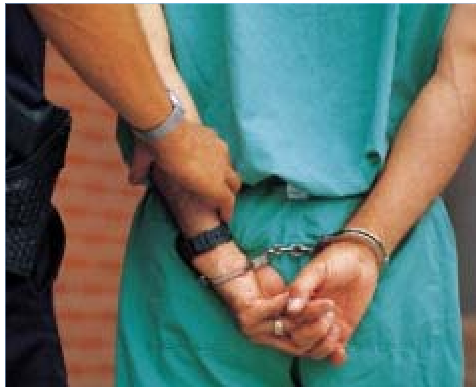


WORKPLACE NO HAVEN FOR CRIMINAL EMPLOYEE

By Michael Gates and Christopher Olmsted

Anthony Cochenour, the owner of Frontline Processing discovered a very disturbing problem. One of the company employees, Jeffrey Ziegler, was accessing child pornography in the workplace.

The company's IT technician had installed a firewall that permitted the company to constantly monitor Internet usage of every employee. The tech noticed the illegal behavior, and preserved the evidence by copying all of the access data off of Mr. Ziegler's hard drive. He reported the problem to Mr. Cochenour, who in turn contacted the FBI.



An FBI agent promptly began an investigation. Meanwhile, the IT tech obtained a key to Mr. Ziegler's office and made a copy of the computer hard drive. Later, corporate counsel contacted the FBI agent and told him that a search warrant would not be necessary; the company would deliver the computer to the FBI.

The FBI arrested Mr. Ziegler and he was subsequently prosecuted. His lawyer filed a motion to suppress the evidence found on the computer. Likening his workplace computer to a desk drawer or file cabinet, Mr. Ziegler's defense attorney argued that his computer should be protected by the Fourth Amendment's guarantee against unreasonable searches and seizures.

Did the do-gooder employer and the FBI spoil the criminal case? Obviously without the computer, the prosecution could not prove its case.

The answer turned on whether the employee had a reasonable expectation of privacy in the workplace, and, in particular, as to the computer.

The Fourth Amendment protection against illegal government searches in the workplace—and the related issue of privacy rights in the workplace—are evolving legal issues. Employees do have workplace privacy rights, but the rights are far from absolute.

A criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a legitimate expectation of privacy in the place searched or the item seized.

The court found that the use of a password to access Ziegler's work computer and the lock on Ziegler's private office door was sufficient evidence of an expectation of privacy.

The existence of a master key, which the IT employees used to enter Ziegler's office, did not invalidate the reasonable expectation of privacy. To hold otherwise, the court reasoned, would defeat the legitimate privacy interest of any hotel, office, or apartment occupant.

Although the ruling started off seeming to favor Ziegler, the prosecution had one saving grace. The FBI had not seized the computer. Rather, Frontline had given it to the FBI and consented to a search of the hard drive.

The court ruled that Frontline could give valid consent to a law enforcement agency to conduct a search of the contents of Ziegler's hard drive because "the computer is the type of workplace property that remains within the control of the employer even if the employee has placed personal items in [it]."

Although use of each Frontline computer was subject to an individual log-in,

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COURT POSTPONES FEDERAL NO-MATCH RULE

By Elizabeth Koumas

In our September Legal Update, we informed employers about a new rule issued by the Department of Homeland Security (DHS) describing the steps an employer must take when it receives a "no-match" letter from the DHS or the Social Security Administration.

The regulation was to go into effect on Sept. 14, 2007.

However, a federal court in San Francisco has temporarily stopped implementation of this rule until October 1, 2007, as a result of a restraining order sought by the AFL-CIO and other unions.

The temporary restraining order was issued based on an argument that U.S. immigration laws do not provide the government with authority to require additional verification after hiring, beyond the standard I-9 Form process.

The unions also argue, among other things, that the government's records are unreliable. Many innocent workers, the unions contend, will find themselves unemployable due to government error, rather than on the basis of their true legal eligibility to work in the U.S.

On October 1, another federal court will consider whether to extend the injunction until the unions' case can be resolved.

We will keep you apprised of the developments relating to this new rule.

In the meantime, continue to adhere to the I-9 process. Employers wishing to act on no-match letters should check with legal counsel before terminating employees.

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the IT employees had complete administrative access to any Frontline employee's computer. The company had installed a firewall that monitored Internet traffic. Monitoring was routine, and the IT department reviewed the log created by the firewall on a regular basis. Upon their hiring, Frontline employees were apprised of the company's monitoring efforts through training and an employment manual, and they were told that the computers were company-owned and not to be used for activities of a personal nature.

In this context, according to the court, Ziegler could not reasonably have expected that the computer was his personal property, free from any type of control by his employer. The contents of his hard drive were work-related items that contained business information and which were provided to, or created by, the employee in the context of the business relationship. Ziegler's downloading of personal items to the computer did not destroy the employer's common authority.

Thus the employer had the power to consent to a search, the computer files were admissible evidence. Mr. Ziegler was forced to enter a plea agreement.

"Employees do have workplace privacy rights, but the rights are far from absolute."

<u>PRACTICAL TIPS</u>:

- **Notify employees that all company property -- including private offices, computer hard drives, vehicles and cell phones -- is subject to monitoring and search at the employer's discretion.**
- **Report illegal conduct and cooperate fully with law enforcement investigations.**
- **Consult with legal counsel when faced with investigations of private employee property and workspaces.**

WHY GO TO THE TROUBLE OF SETTING UP A LIVING TRUST?

By David Barnier

Simply stated, a living trust allows the costs and time delays of Probate Court to be avoided.

By putting ownership of property into a living trust, property is transferred at death by contract rather than under Probate laws, which apply if only a will is in place or if no living trust or will is in place. For any estate with assets greater than $100,000, the lack of a living trust will result in as much as 8% of the estate being paid to the executor of the estate and the attorney who assists with administering the estate.

The transfer of assets under a living trust is a more simple process than Probate and can be completed in far less time than Probate.

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For the typical person or married couple with over $100,000 in assets, the establishment of a living trust is likely to allow the designated beneficiaries to save thousands of dollars in expenses.

The distribution of assets under a living trust can be accomplished with less stress and in far less time.

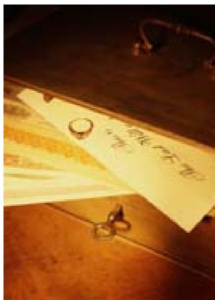
Transfers of assets after death are done by the successor trustee pursuant to the instructions given within the living trust document. This is accomplished without any court involvement, making the process simpler. The successor trustee is the person designated to make post-death transfers. Typically, the successor trustee is directed to immediately transfer all assets pursuant to the distribution terms. The distribution terms of a living trust will be drafted in a manner similar to the distribution terms that most people associate with a will.

While a living trust achieves the benefit of avoiding court involvement in the distribution process, there is also a safety mechanism in place to ensure that the successor trustee performs as directed. If any family member believes that the successor trustee is not complying with the distribution terms of the living trust, that family member still can use Probate Court to object to the successor trustee's distributions.

A living trust also allows for the coordination of estate planning between a husband and wife in a manner that cannot be accomplished by two wills. A husband and wife can very easily coordinate a joint living trust by which the survivor will receive all assets and by which a distribution plan will be locked in after the first spouse passes away to ensure that distributions to children and beneficiaries are preserved as was intended during both spouses' lifetimes.

In summary, a living trust offers a person all of the opportunities that the common will offers. All of the property distribution options of a will exist in a living trust. However, a living trust also provides cost and time savings as described above, as well as a more convenient method for creating complex distribution terms. A will is limited and requires more time and expense.

Contact David Barnier for information on our firm's estate planning services. Call (619) 682-4040, or you may email him at djb@barkerkoumas.com



Reminder Regarding New Rule For Use of Social Security Numbers

Employers are reminded that come January 1, 2008, employers must include only the last four digits of an employee's Social Security number or other personal identification number on an itemized wage statement. Employers should take steps now to make sure payroll processes are updated to ensure compliance with this law by the start of the new year.

For more information, please contact Elizabeth Koumas at ejk@barkerkoumas.com or (619) 682-4040.

CALIFORNIA LEGISLATURE SENDS NEW EMPLOYMENT LAWS TO GOVERNOR

By Christopher W. Olmsted

Our politicians in Sacramento have been preoccupied with universal healthcare and budget shortfalls, but they have not forgotten about employment law.

The legislature has passed a few employment law bills that are now awaiting approval or veto by the governor.

Employment Law Contracts

A.B. 1043 would make void and unenforceable as against public policy any provision in an employment contract that requires an employee, as a condition of obtaining or continuing employment, to use a forum other than California, or to agree to a choice of law other than California law, to resolve any dispute with an employer regarding employment-related issues that arise in California.

This bill seems to be a reaction to a 2006 California case entitled *Olinick v. BMG Entertainment*, which permitted a New York choice of law clause in an employment contract.

If signed by the governor, the law could particularly affect multi-state companies. For example, that a company headquartered Nevada could not require employment disputes be resolved in Nevada instead of California. Similarly, that company could not require that employment lawsuits filed in California be decided under Nevada law.

For obvious reasons, employers may prefer another state's laws and courts to California's more rigorous labor laws and liberal courts.

An employer operating in several states may also prefer employment contracts specifying a particular state law and state forum for uniformity and simplicity. Keeping track of labor laws in several states can be a challenge.

Bereavement Leave

S.B. 549 creates a legal entitlement to bereavement leave.

California law provides a number of leave rights, but currently, there is no requirement that employers permit employees to take time off for bereavement. Many companies offer bereavement leave as a benefit.

This bill, if enacted, would prohibit an employer discharging, disciplining, or in any manner discriminating against an employee for inquiring about, requesting, or taking bereavement leave.

The maximum length of the leave would be four days, and it would be unpaid. The leave could be taken upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner.

Independent Contractor Penalties

S.B. 622 creates substantial penalties for employers who wrongfully misclassify workers as independent contractors.

Currently, employers who misclassify workers as independent contractors face enforcement actions by the EDD for taxes and the DIR for failure to secure workers' compensation insurance. Employees can also file claims for missed overtime and other wage and our rights.

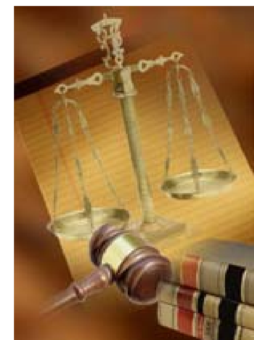
This law, if enacted, would add penalties of between $5,000 and $25,000 for each misclassified employee.

Family and Medical Leave

A.B. 537 would increase the circumstances under which an employee is entitled to protected leave pursuant to the California Family Rights Act by (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a serious health condition, (2) expanding the definition of "parent" to include an employee's parent-in-law, and (3) permitting an employee to also take leave to care for a seriously ill grandparent, sibling, grandchild, or domestic partner.

The governor has a few weeks to review these bills. This publication will report the governor's action in an upcoming issue.

"Our politicians in Sacramento have been preoccupied with universal healthcare and budget shortfalls, but they have not forgotten about employment law. "



UPCOMING SEMINARS

BEHAVIORAL PROBLEMS IN THE WORKPLACE

Date: TBA, November, 2007
Time: TBA, 3 hour workshop
Location: TBA
Topics:

- How does an employer deal with behavioral problems not directly related to job performance?
- What are the warning signs that a problem may be dangerous, rather than just quirky personality traits?
- How does an employer respond to behavioral problems caused by protected mental disabilities?
- What other legal risks develop when personality issues become the subject of discipline?

In September, we co-presented a luncheon presentation at the monthly chapter meeting of the North County Personnel Association. The presentation addressed how to deal with weird, disruptive, disturbing, or even threatening employee behavior in the workplace. The topic was well-received, and so we have agreed to present a 3 hour workshop in November. It is open to the public, so please register!

For a pdf of the complete agenda, and for registration information, contact Kristin Isbell at (619) 682-4040 or kai@barkerkoumas.com.

LAST CHANCE TO REGISTER!

LEAVES OF ABSENCE IN CALIFORNIA

This month, Chris Olmsted and Elizabeth Koumas will present a day long training seminar on FMLA, CFRA, and other protected employee leaves.

Date: October 25, 2007

Time: 8:30 a.m. to 4:30 p.m.

Location: Horton Grand Hotel, San Diego California

Topics Include:

- Federal Family And Medical Leave Act (FMLA) And California Family Rights Act (CFRA)
- California Pregnancy-Related Disability Law Length Of Leave Entitlement
- Interaction Between Family Leave Laws And Disability Laws
- Workers' Compensation
- Strategies For Handling Employee Leaves
- Other Protected Leaves

The seminar will be presented through Lorman Educational Service. For a pdf of the complete agenda, and for registration information, visit our home page at www.barkerkoumas.com, or contact Kristin Isbell at (619) 682-4040 or kai@barkerkoumas.com.

CEB SEMINAR: UTILIZING DISPOSITIVE MOTIONS

Date: October 6, 2007
Time: 9:00a.m.-12:00p.m. *Location*: San Diego County Bar Association

Join Elizabeth J. Koumas and other panel members as they discuss strategies and practical tips related to dispositive motions.

ADDITIONAL UPCOMING SEMINARS

We've got plenty in store for you in the upcoming months. Currently we are planning seminars on several topics, including:

- Employee Performance Reviews and Discipline (November 207).
- Employment Law Developments—2007 in Review (early 2008).
- California Employment Law A to Z (spring 2008).

We are also asking for feedback on topics of interest. Is there a topic that you would like to hear about? Email cwo@barkerkoumas.com or ejk@barkerkoumas.com.

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