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THE ADA AND ENFORCEMENT OF CONDUCT RULES

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A. Drug And Alcohol Policies

The text of the ADA makes only one specific reference to "disability-caused misconduct," where an employer is authorized to disregard the fact that the misconduct or prior performance may be caused by a disability and where the employer can hold the disabled person to exactly the same conduct as a non-disabled person. Specifically, the ADA provides that 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 alcoholism or drug use of such employee.

42 U.S.C. § 12114(c)(4) (1994); *see also* 42 U.S.C. § 12114(a) (1994) (providing that the term "qualified individual with a disability" under the ADA shall not include illegal drug users when the covered entity acts on that basis).

Therefore, "unsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the ADA or Rehabilitation Act." *Mauerhan v. Wagner Corp*., 649 F.3d 1180 (10th Cir. 2011) (quoting *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998); *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (holding that "drug-related misconduct is a legitimate, non-discriminatory reason for termination"). Employers need not tolerate employees under the influence of alcohol in the workplace, 42 U.S.C. § 12114(c)(1),(2), and may hold an employee who is an alcoholic to the same standards of performance and behavior as non-alcoholics. 42 U.S.C. § 12114(c)(4). *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 n. 5 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997).

For example, in *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998), the plaintiff, Burch, was a Coca-Cola manager and a recovering alcoholic. After some inappropriate behavior at a company-sponsored dinner, Burch checked himself into Charter Hospital to undergo treatment for alcohol abuse. After his release, Burch requested that he be returned to his job. Instead, Coca-Cola terminated Burch for his behavior at the dinner.

Burch sued under the ADA, and the jury awarded him more than seven million dollars in punitive and compensatory damages. On appeal, the Fifth Circuit reversed the award and rendered judgment against Burch. One of Burch's claims was that Coca-Cola violated the ADA's reasonable accommodation requirement by refusing his request to return to work after his treatment at Charter Hospital. The Fifth Circuit held that this was not a proper reasonable accommodation claim because a "second chance" or a plea for grace is not an accommodation as contemplated by the ADA. *Id*. at 319-20. As part of its decision, the *Burch* court noted that:

> Coca-Cola cites a number of cases for the proposition that employers are under no obligation to accommodate misconduct that is the product of an employee's alcoholism. These cases are a correct interpretation of section 12114(c)(4), which

> permits employers to hold alcoholic employees to the same standard of conduct as nonalcoholic employees. Section 12114(c)(4), unlike the pre-1992 Rehabilitation Act, does not require employers to excuse violations of uniformly-applied standards of conduct by offering an alcoholic employee a "firm choice" between treatment and discipline. *Id*. at 319 n.14 (citing *Maddox v. University of Tenn*., 62 F.3d 843, 848 (6th Cir. 1995) (granting employer's summary judgment motion where alcoholic football coach failed to rebut employer's evidence that it terminated him for misconduct); *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993) (affirming dismissal of alcoholic FBI agent's ADA claim where "it plainly appears that the appellant was fired because of his misconduct [being drunk on duty], not because of his alcoholism"); *Rodgers v. County of Yolo Sheriff's Dep't*, 889 F.Supp. 1284, 1291 (E.D. Ca. 1995) (granting employer's summary judgment motion in Rehabilitation Act case involving an alcoholic police officer where evidence was "unrefuted and demonstrates that plaintiff['s] termination was based on poor performance"); *see also Collings v. Longview Fibre Co*., 63 F.3d 828, 831-32 (9th Cir. 1995) (affirming grant of summary judgment for employer of drug abusing employees where employees failed to rebut employer's contention that they were terminated for drug-related misconduct; specifically, no showing that other employees had been treated differently for engaging in similar conduct and no showing that employer knew employees were former drug abusers), *cert. denied*, 516 U.S. 1048 (1996)).

See also Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001) (ADA did not prevent employer from discharging employee who drove under the influence of alcohol, despite the fact that employee was an alcoholic); *Pernice v. City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001) (ADA did not prevent employer from dismissing drug-addicted employee who was arrested for possession of drugs).

B. Policies Prohibiting Violence

The ADA covers physical and mental disabilities. Sometimes, a mental disability can cause an employee to act violently or emotionally unstable. The question then follows: if the employer terminates an employee because of misconduct caused by their mental disability, has the employer terminated the employee "because of a disability," and thus violated the ADA? The EEOC says "no":

> 30. May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?
>
> Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity. For example, nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability. Other conduct standards, however, may not be

> job-related for the position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 30, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html (endnotes omitted).

The courts have agreed with the EEOC. Below are a few cases that illustrate this point.

1. *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047 (5th Cir. 1998)

Hamilton worked for Southwestern Bell for approximately 20 years. Approximately four months before he was fired, he rescued a drowning woman. As a result of the experience, he began to suffer mental disturbances and extreme fatigue. After he struck a co-worker, he was referred to a social worker and psychiatrist, both of whom diagnosed him with post-traumatic stress disorder ("PTSD"). Several weeks later, Hamilton slapped a physically smaller female manager, and loudly called her a "f_ _ _ing bitch!" Southwestern Bell terminated Hamilton for this misconduct.

Hamilton sued Southwestern Bell under the ADA. The court concluded that even if Hamilton was disabled as a result of PTSD, he was terminated not because of his disability, but "rather because he violated Bell's policy on workplace violence." The court concluded by stating:

> The cause of Hamilton's discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment. The nature of the incident, shown by the record, presents a clear case in which Hamilton was fired for his misconduct in the workplace. We adopt for an ADA claim the well-expressed reasoning applied in the context of a protected activity-retaliatory discharge claim: the rights afforded to the employee are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. Hamilton cannot hide behind the ADA and avoid accountability for his actions.

Id. at 1052 (footnote omitted).

2. *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999)

Seaman was employed as a store manager by CSPH, which owns and operates numerous Domino's pizza stores in the Dallas-Fort Worth area. Over period of several months in 1996, he frequently left the pizza store he managed unattended, and he had numerous other performance problems. Seaman told his boss that he believed his problems were caused by bipolar disorder and sleep apnea, although he had been diagnosed with neither condition.

In March 1996, he gave his boss a doctor's note stating that he was "emotionally and physically exhausted" and demonstrated "clinical criteria for a Major Depressive Reaction." The

following month, he was counseled for disruptive comments on the job, and in response Seaman filed a charge of discrimination with the EEOC. Two days later, he repeatedly yelled at his boss during a heated argument and was fired.

In the ensuing lawsuit, Seaman claimed, among other things, that he was fired in retaliation for filing his EEOC claim. The district court granted summary judgment against all of Seaman's claims, and the Fifth Circuit affirmed. Specifically, regarding his retaliation claim under the ADA, the Fifth Circuit concluded, "[t]hat Seaman mentioned his EEOC complaint to [his boss] moments before the termination does not, absent other evidence, constitute sufficient proof that the termination was retaliatory. Seaman may not use the ADA as an aegis and thus avoid accountability for his own actions." *Id*. at 301 (footnote omitted).

3. *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997)

Palmer was a social service case worker for the Circuit Court of Cook County. She was diagnosed as having major depression and delusional (paranoid) disorder. As a result of her paranoia, Palmer became convinced that her supervisor was harassing her and was trying to orchestrate a case against her.

Palmer called one of her co-workers and said, "I'm ready to kill her [the supervisor]. I don't know what I'll do. Her ass is mine. She needs her ass kicked and I'm going to do it . . . I want [the supervisor] bad and I want her dead." In another call to the supervisor herself, Palmer said, "your ass is mine, bitch." Palmer was terminated for her threats.

Writing for the Seventh Circuit, Judge Richard Posner affirmed summary judgment against Palmer, stating "if an employer fires an employee because of the employee's unacceptable behavior, the fact that the behavior was precipitated by mental illness does not present an issue under the Americans with Disabilities Act." *Id*. at 352 (citations omitted); *see also Bodenstab v. County of Cook*, 569 F.3d 651, 659 (7th Cir. 2009) (anesthesiologist fired for making threats had no ADA claim, even if a mental disability caused him to make the threats); *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 172 (2d Cir. 2006) ("[t]his approach ensures that this Court, like every other court to have taken up the issue, does not read the ADA to require that employers countenance dangerous misconduct, even if that misconduct is the result of a disability"); *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (stating in similar case that, "[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct [in this case threats], even if the misconduct is related to a disability."); *Carrozza v. Howard County, Maryland*, 847 F. Supp. 365, 367-68 (D. Md. 1994) (ADA plaintiff's loud, abusive and insubordinate behavior in workplace justified termination, even if it was caused by her bipolar mental disorder). Simply put, "the ADA does not insulate emotional or violent outbursts," *Hamilton*, 136 F.3d at 1052, and is not "a license for insubordination at the workplace," *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 262 (1st Cir. 2001); *see also Williamson v. Bon Secours Richmond Health System, Inc.,* 34 F. Supp. 3d 607, 613 (E.D. Va. 2014) ("The ADA does not protect employees who make terroristic threats against the lives of their fellow employees—even if those threats are the unfortunate byproduct of the employee's disabling mental illness.").

C. Policies Against Lying, Dishonesty, Theft, Or Other Intentional Gross Misconduct

In *Spath v. Hayes Wheels Intern.-Indiana, Inc*., 211 F.3d 392 (7th Cir. 2000), the employer fired the plaintiff after he was injured while engaging in horseplay, and then when confronted with the facts, lied about the incident. The plaintiff sued his employer and argued with respect to his failure to accommodate claim, "that his organic brain syndrome, mild mental retardation, and dependent personality disorder . . . caused him to deny involvement in the horseplay incident because he sometimes does not remember what he was doing or what he might have said in the past." *Id*. at 395 n. 5. The Seventh Circuit rejected the plaintiff's argument, explaining that, "[i]n essence, *Spath* is asking this Court to extend the ADA . . . to prevent an employer from terminating an employee who lies, just because the lying is allegedly connected to a disability." *Id*.; *see also Fullman v. Henderson*, 146 F. Supp. 2d 688, 698–99 (E.D. Pa. 2001) (employee lawfully fired for filing a false workers' compensation claim, notwithstanding his alleged disability).

The EEOC gives examples of employees who claim they stole or intentionally tampered with equipment because of their disabilities:

> Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard – a prohibition against employee theft – that is job-related for the position in question and consistent with business necessity.
>
> Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard – a rule prohibiting intentional damage to equipment – that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 30, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html.

While the EEOC's guidance may suggest that any employee who violates company policy by taking company property without promptly paying for it can be fired, irrespective of any ADA issue, that would be wrong, as demonstrated by the case of *Equal Employment Opportunity Commission v. Walgreen Co*., 34 F. Supp. 3d 1039 (N.D. Cal. 2014), which was decided in April 2014. There, Josephina Hernandez, an 18-year employee with Type II diabetes, suffered a hypoglycemic attack at work. She opened a $1.39 bag of potato chips from a cart and ate some of them, without obtaining permission to do so first, and without paying for them first. Ten minutes later, when she started feeling better, she went to pay for the chips, but no one was

at the counter, so she returned to working. While she was working, the Assistant Store Manager found the open bag of chips and asked Hernandez whose chips they were. Hernandez said they were hers. Later on, Walgreens' Loss Control Supervisor asked Hernandez for a written statement about the incident, and Hernandez wrote, "My sugar low, not have time." As a result, the Store Manager fired Hernandez for violating Walgreens' anti-grazing policy. Walgreens took the position that the anti-grazing policy was a zero-tolerance policy and no one had ever been caught violating the policy and not been fired.

The EEOC sued Walgreens under the ADA. Walgreens moved for summary judgment, and the Court denied the motion in April 2014. In finding trial-worthy issues, Judge William Orrick rejected Walgreens' attempted reliance on out-of-circuit cases instead of binding Ninth Circuit authority. Although the Ninth Circuit makes an exception from its general rule for worker misconduct involving egregious criminal conduct – or stemming from drug or alcohol use – Walgreens failed to show Hernandez's action was criminal or egregious, the judge ruled.

The company's arguments that Hernandez failed to accommodate herself because she did not bring candy to work that day and that she never asked to be permitted to consume store merchandise without first paying for it as an accommodation likewise were without merit, the court said. Thus, the court found that because under circuit precedent Walgreens' explanation for firing Hernandez was not a legitimate, nondiscriminatory reason, the EEOC did not need to show pretext.

The EEOC's claim does not conflict with the agency's guidance, which states that employers need to show business necessity when taking employment action against a disabled employee for workplace misconduct, the judge found. He also took judicial notice of an EEOC regulation limiting the type of documents employers may use as a defense against liability for discrimination, and found that Walgreens did not show the guidance it cited met the regulation's standard.

In July 2014, the parties settled the case. According to the consent decree settling the suit, Walgreens agreed to pay Hernandez $180,000.00 and to post its revised policy regarding accommodation of disabled employees on its employee intranet site. The company will also provide anti-discrimination training, make periodic reports to the EEOC, and post a notice regarding the decree for three years.

The *Walgreens* case teaches that anyone with decision-making responsibilities at a company should have good training on EEO issues such as the ADA, said David Fram, director of ADA and EEO services at the Denver-based National Employment Law Institute. "What I think this case stands for is the idea that an employer has to look very carefully … and can't willy-nilly enforce every policy without looking at the facts," he remarked. http://www.shrm.org/legalissues/federalresources/pages/diabetic-potato-chips.aspx.

A case at the other end of the spectrum is *Sper v. Judson Care Center, Inc.*, 29 F. Supp. 3d 1102 (S.D. Ohio 2014), where the plaintiff was fired for failure to comply with narcotics distribution procedures. The plaintiff blamed her failure on an adverse reaction caused by a drug she was taking for trigeminal neuralgia. The plaintiff claimed that firing thus amounted to disability discrimination. In rejecting her ADA claim, the court held:

> Assuming that she is disabled under the ADA – a point which Judson disputes – the problem with Plaintiff's syllogism is that it has been squarely rejected by the Sixth Circuit. So long as the employee's misconduct is related to the performance of her job, an employer may discipline or terminate the employee even if her misconduct was caused by her disability. *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 366 (6th Cir. 2007) *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp*., 681 F.3d 312, 315–16 (6th Cir. 2012) (en banc); *Brohm v. JH Prop., Inc*., 149 F.3d 517, 521 (6th Cir. 1998); *Maddox v. University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995) *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315–16 (6th Cir. 2012) (en banc); *Chandler v. Specialty Tires of Am. (Tenn.), Inc.*, 134 Fed. Appx. 921, 928–29 (6th Cir. 2005).
>
> In this case, assuming that Plaintiff's failure to follow the established narcotics distribution protocol was caused by the side effects of her medication, and hence was caused by her disability, this misconduct was clearly related to the performance of her job. Plaintiff admitted in her deposition that she was impaired at work, was in no condition to treat patients, and has no idea what happened to the medication. Plaint. Dep. at 106, 176. Indeed, as mentioned above, Plaintiff has no idea whether she gave the medication to the right patients or not. It hardly needs to be said that someone in Plaintiff's condition that night would be disqualified from safely performing her job as a nurse.

Id. at 1110.

Similarly, in *Foley v. Morgan Stanley Smith Barney FA Notes Holdings, LLC*, 566 Fed. Appx. 874 (11th Cir.), *cert. denied*, 135 S. Ct. 438 (2014), the plaintiff took a company computer without authorization, and then disclosed that he had done so because his previously undisclosed bipolar condition made him fear that Morgan Stanley had been using the computer to spy on him. Morgan Stanley fired the plaintiff for violating its company policies. In rejecting the plaintiff's ADA claim, the Eleventh Circuit Court of Appeals stated:

> Lastly, Foley's contention that there is direct evidence to support his discrimination claims also fails. Foley failed to show any direct evidence that Morgan Stanley knowingly terminated him because of his bipolar disorder. He relies on the fact that Morgan Stanley made its termination decision immediately after it learned that Foley had removed his office computer. However, that is not direct evidence of discrimination. That is evidence of Morgan Stanley's adherence to company policy.

Id. at 875.

D. Policies Or Work Rules Requiring Courtesy Towards Coworkers, Neat Dress, Or Completely "Normal" Or Non-Frightening Behavior

The clear lines regarding an employer's right to discipline employees for acts of violence, threats of violence, intentional destruction of property, and lying – even if the conduct is caused

by a disability – start to break down somewhat when it comes to other, less egregious situations, such as policies requiring courtesy towards coworkers or customers, neat dress, or completely "normal" behavior. In the case of *Den Hartog v. Wasatch Acad*., 129 F.3d 1076 (10th Cir. 1997), the Tenth Circuit probed this issue, and stated that:

> [T]he language of the ADA, its statutory structure, and the pertinent case law, suggest that an employer should normally consider whether a mentally disabled employee's purported misconduct could be remedied through a reasonable accommodation. If so, then the employer should attempt the accommodation. If not, the employer may discipline the disabled employee only if one of the affirmative defenses articulated in 42 U.S.C. §§ 12113, 12114 (1994) applies. **Otherwise, the employer must tolerate eccentric or unusual conduct caused by the employee's mental disability, so long as the employee can satisfactorily perform the essential functions of his job**.

Id. at 1088 (bold added).

A handful of other courts have followed this logic, including the statement that unless an affirmative defense applies, or the employee cannot satisfactorily perform the essential functions of their job, the employer must tolerate eccentric or unusual conduct caused by the employee's mental disability. *See, e.g., Chandler v. Specialty Tires of America (Tennessee), Inc.,* 134 Fed. Appx. 921, 929 (6th Cir. 2005) (applying language from *Den Hartog* to mean that suicide attempt by mentally disabled employee could not alone be basis for employee's termination without running afoul of the ADA); *Walsted v. Woodbury County*, 113 F. Supp. 2d 1318, 1340-42 (N.D. Iowa 2000) (following *Den Hartog* and denying employer's motion for summary judgment). The EEOC also agrees with this logic, giving the following example:

> Example C: An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability, which was exacerbated during this time period.
>
> The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees.

> Therefore, rigid application of these rules to this employee would violate the ADA.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 30, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html.

In more recent guidance, the EEOC amplified on this topic in great detail. For example, it stated:

> 9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?
>
> Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.
>
> The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:
>
> - prohibit inappropriate behavior between coworkers (*e.g.*, employees may not yell, curse, shove, or make obscene gestures at each other at work);
>
> - prohibit employees from sending inappropriate or offensive e-mails (*e.g.*, those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (*e.g.*, pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work;
>
> - require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (*e.g.*, factories with machinery with accessible moving parts); and
>
> - prohibit drinking or illegal use of drugs in the workplace. [*See* Question 26.]
>
> Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several

factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be especially critical when the violation concerns "disruptive" behavior, which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable. The following examples illustrate how different results may follow from application of these factors in specific contexts.

Example 14: Steve, a new bank teller, barks, shouts, utters nonsensical phrases, and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve and he explains that he has Tourette Syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics sufficiently during the job interview, he cannot control them throughout the work day; nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.

Example 15: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics which do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

Example 16: Assume that Steve has all the severe tics mentioned in Example 14, but he now works in a noisy environment, does not come into contact with customers, and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers. Steve's condition would not necessarily make him unqualified for a job in this environment.

Example 17: A telephone company employee's job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example 18: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances, it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself.

EEOC Enforcement Guidance on The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities, at question 9 (Sept. 3, 2008), available at http://www.eeoc.gov/facts/performance-conduct.html (endnotes omitted).

An interesting case that demonstrates the struggle to fit the plaintiff's conduct into the right analytical framework is *Gambini v. Total Renal Care, Inc*., 486 F.3d 1087 (9th Cir. 2007). The plaintiff in Gambini suffered from bipolar disorder, which affected her job performance and

behavior at work. Her supervisors knew of her bipolar disorder. *Id*. at 1091. Her supervisors developed an improvement plan and discussed it with the plaintiff. After reading the plan, the plaintiff threw it back across her supervisor's desk, and used "a flourish of several profanities [to] express[ ] her opinion [the plan] was both unfair and unwarranted." *Id*. at 1091. The plaintiff then stormed out of the office and returned to her cubicle where she kicked and threw various items. The defendant later terminated the plaintiff's employment, rather than give her FMLA leave that she had requested. *Id*. at 1092.

The plaintiff sued, alleging disability discrimination and wrongful termination. A jury returned a verdict in the employer's favor on both claims. The *Gambini* court reversed on the discrimination claim, finding the trial court improperly refused to instruct the jury that conduct caused by a disability is part of the disability and not a separate basis for termination. *Id*. at 1093–1095. It is important to note that the evidence showed the defendant terminated the plaintiff because her outburst generally frightened her coworkers (in fact one coworker asked that she not be allowed to return to work), not because she made any threat against her supervisors or any other coworker. *Id*. at 1094. Indeed, the *Gambini* court did not characterize the misconduct as threats or violence against coworkers, but as behavior that frightened coworkers. *Id*. at 1094–1095. That said, *Gambini* seems to represent either an outlier case, or the furthest a court has gone in concluding that inappropriate behavior cased by a disability cannot be the basis for termination. It seems very likely that more conservative courts of appeals would have decided the case differently.

In a somewhat similar fact pattern, a district court in Minnesota granted summary judgment for the employer in the case of *Walz v. Ameriprise Financial, Inc.*, 22 F. Supp. 3d 981 (D. Minn. 2014). There, the plaintiff, Marissa Walz, suffered from Bipolar I Disorder, which is characterized by extreme mood swings from depression to mania that may cause significant difficulty in one's job or relationships. Walz had been hospitalized with mania approximately six times in her life. Between 2005 and 2011, she took several leaves of absence from Ameriprise, three of which she attributed to her disorder.

On March 16, 2012, Walz was in a meeting with the marketing department when she turned to a coworker and said, "Stop interrupting me; you don't know what you're talking about," and then stood up and began scribbling notes on the white board "in an aggressive, fast, and illegible manner." Other similar incidents involving rudeness, inappropriate comments, and odd behavior followed, and several coworkers complained. When her supervisor confronted Walz about her conduct, Walz insulted him and said she was doing his job.

In July 2012, Walz's mania returned. Walz disrupted a meeting by interrupting her coworkers and aggressively talking over them. A few days later Walz again disrupted a meeting by talking over others, refusing to let them finish, and intimidating people who did not agree with her. Several of her coworkers complained and one stated that because of Walz she dreaded coming to work. As a result, Walz was terminated. Three days later, she was hospitalized for mania. In 2013, Walz filed suit, alleging Ameriprise discharged her because of her bipolar disorder and failed to accommodate her, in violation of the ADA. The court granted summary judgment for Ameriprise, stating:

> "As a general rule, an employer may not hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity." *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086 (10th Cir. 1997). That is, an employer must make reasonable accommodations for a disabled employee, but need not tolerate misconduct that would result in termination of a non-disabled employee. *See Harris v. Polk Cnty., Iowa*, 103 F.3d 696, 697 (8th Cir. 1996) (employers may hold disabled employees to the same standards of law-abiding conduct as other employees, therefore it was not discriminatory for the employer to refuse to hire the plaintiff based on a shoplifting conviction caused by mental illness); *Breiland v. Advance Circuits, Inc.*, 976 F.Supp. 858, 865 (D. Minn. 1997) (Doty, J.) (ADA does not require employers to ignore employees' violation of workplace policies).
>
> The EEOC always considers certain conduct standards job-related and consistent with business necessity, including prohibitions on violence and insubordination as well as requirements that "employees show respect for, and deal appropriately with, clients and customers." EEOC, Applying Performance and Conduct Standards to Employees with Disabilities § III(B)(9) (Jan. 20, 2011), http://www.eeoc.gov/facts/performance-conduct.html# conduct. But generally, whether a conduct standard meets this test requires a fact-specific inquiry and depends on factors such as the symptom of the disability affecting the employee's conduct, the nature of the job, the specific conduct at issue, and the working environment. *Id*. For example, a man who barks or shouts loudly due to his Tourette Syndrome may be dismissed from a position as a bank teller when customers and coworkers complain because his disability-caused behavior is disruptive to coworkers and interferes with his ability to serve customers. *Id*. On the other hand, he may not be legally dismissed for those same behaviors if he is employed in a noisy warehouse where he does not work with customers and his vocalizations do not distract coworkers—regardless of whether his coworkers may be uncomfortable with him. *Id*.
>
> Here, Walz's job entailed maintaining good relationships with other departments in the company. So requiring her to act appropriately and courteously toward coworkers was job-related and consistent with business necessity. Walz's disrespectful and aggressive behavior breached this standard.

Id. at *4-5.

E. Policies Regarding Tardiness Or Absenteeism

Tardiness or absenteeism caused by a disability is not subject to the same sort of treatment under the ADA as acts of violence, threats, or lies that are caused by a disability. While an employer may ordinarily safely terminate an employee who commits an act of violence, makes threats of violence, tells material lies, or commits other similar acts of misconduct in violation of workplace rules without concern about ADA liability, the same

cannot be said when it comes to terminating an employee who suffers from tardiness or absenteeism that is caused by a disability. As the EEOC states:

> 19. Does the ADA require employers to modify attendance policies as a reasonable accommodation, absent undue hardship?
>
> Yes. If requested, employers may have to modify attendance policies as a reasonable accommodation, absent undue hardship. Modifications may include allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times (*e.g.*, allowing an employee to work from 10 a.m. to 6 p.m. rather than the usual 9 a.m. to 5 p.m. schedule required of all other employees), and providing periodic breaks.

EEOC Enforcement Guidance on The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities, at question 19 (Sept. 3, 2008), available at http://www.eeoc.gov/facts/performance-conduct.html (endnotes omitted).

For example, in *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790 (8th Cir. 2007), the employer terminated the employee for tardiness. The employee was confined to a wheelchair due to a rare condition commonly known as brittle bone disease. He answered telephone calls from customers of Convergys's clients. Because of his condition, and the layout of the Convergys facility, he was often tardy when returning from lunch. When he was confronted about this, he asked for an extra few minutes than normal to return from lunch. Convergys denied that request, and then fired him when he continued to return tardy from lunch. The employee sued under the ADA and won. The company appealed, arguing that allowing the plaintiff to return late from lunch was not legally required. In rejecting that argument, and affirming the jury's verdict for the plaintiff, the court stated:

> Convergys avers that any accommodation that provided Demirelli with extra time was unreasonable because it required Convergys to eliminate the essential punctuality requirement. We disagree. There is no precise test for what constitutes a reasonable accommodation, but an accommodation is unreasonable if it requires the employer to eliminate an essential function of the job. *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1102 (8th Cir. 1999); *Dropinski v. Douglas County, Neb.*, 298 F.3d 704, 709 (8th Cir. 2002). Whether an accommodation is reasonable is a question of fact to be decided by a jury. *Fjellestad*, 188 F.3d at 957; *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 896 (7th Cir. 1996).
>
> The district court determined that punctuality is an essential job function. In order to fulfill this essential job function, the record evidence is clear that Demirelli requested an extra 15 minutes to return from his lunch break. Viewing the evidence in a light most favorable to the jury verdict, we believe that an extra 15 minutes is a reasonable accommodation. First, Convergys puts forth no evidence showing that extending Demirelli's lunch break by 15 minutes would eliminate its punctuality requirement. An additional 15 minutes would merely create a different time for Demirelli to return from his lunch break. Contrary to Convergys's assertion, this modified work schedule would not create an open-

> ended schedule where Demirelli would be free to return from lunch at his pleasure or at unpredictable times. Second, the record evidence also shows that by granting Demirelli an extra 15 minutes, 62 of Demirelli's 65 lunch tardies would have been eliminated. Lastly, the ADA itself recognizes extra time as a reasonable accommodation. "[R]easonable accommodation may include . . . job restructuring; part-time or modified work schedules." 42 U.S.C. § 12111(9)(B) (emphasis added); *see also* 29 C.F.R. § 1630.2.
>
> Accordingly, we believe that there is sufficient evidence to support the jury's conclusion that the accommodations proposed by Demirelli were reasonable.

Id. at 796-97 (footnote omitted).

In *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002), the plaintiff was a medical transcriptionist. Her performance was always very highly rated. However, in 1989 she began engaging in a series of obsessive rituals in the morning (such as washing her hair repeatedly for three hours) that caused her to be tardy or absent very frequently. The company wrote Ms. Humphrey up for her tardiness many times, which only caused her morning rituals to become worse.

In 1995, Humphrey was watching an episode of the *Oprah Winfrey Show* on obsessive compulsive disorder (OCD). Humphrey concluded she suffered from OCD and soon received medical confirmation of that fact from her doctor. Her doctor wrote a letter to the company specifically stating that Humphrey suffered from OCD and that her tardiness and absenteeism was caused by OCD. The doctor also explained in the letter that the OCD was a "disability" under the ADA and that a short leave of absence might help him treat Humphrey's OCD and "get the symptoms better under control."

Humphrey met with her supervisor about her doctor's letter. The two arranged for Humphrey to have a flexible starting time as an accommodation. Nonetheless, Humphrey continued to miss work and also to be late even under a flex time arrangement. Her supervisor warned her about her continuing absenteeism and tardiness. In response, Humphrey sent her supervisor an e-mail asking for a new accommodation: that she be allowed to work at home. In reply, her supervisor summarily denied her request on the grounds that "work at home" is only permitted for employees who, unlike Humphrey, had clean disciplinary records. Shortly thereafter, Humphrey was absent two more times, and was fired.

Humphrey sued under the ADA. In reversing a summary judgment that had been entered for the company – and rendering judgment in Humphrey's favor – the Ninth Circuit held that as a matter of law the company violated its duty to engage in the interactive process once Humphrey asked for the "work at home" accommodation. *Id*. at 1139. The court also found that since Humphrey's termination was linked to absenteeism and tardiness that was caused by her disability (her OCD) that she was entitled to a jury trial on the question of whether she was terminated "because of her disability," and, thus, in violation of the ADA.

Finally, in rejecting the company's rationale for denying Humphrey's request to work at home – that she had prior discipline on her record – the court held, "[i]t would be inconsistent

with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record does not constitute an appropriate basis for denying her a work-at-home accommodation." *Id*. at 1137.

In 2011, telecommunications giant Verizon Communications agreed to pay $20 million and provide significant equitable relief to resolve a nationwide class disability discrimination lawsuit filed by the EEOC. The suit, filed against 24 named subsidiaries of Verizon Communications in the U.S. District Court for the District of Maryland, said the company unlawfully denied reasonable accommodations to hundreds of employees and disciplined and/or fired them pursuant to Verizon's "no fault" attendance plans. The consent decree settling the suit represents the largest disability discrimination settlement in a single lawsuit in EEOC history. The EEOC charged that Verizon violated the ADA by refusing to make exceptions to its "no fault" attendance plans to accommodate employees with disabilities. Under the challenged attendance plans, if an employee accumulated a designated number of "chargeable absences," Verizon placed the employee on a disciplinary step which could ultimately result in more serious disciplinary consequences, including termination.

The EEOC asserted that Verizon failed to provide reasonable accommodations for people with disabilities, such as making an exception to its attendance plans for individuals whose "chargeable absences" were caused by their disabilities. Instead, the EEOC said, the company disciplined or terminated employees who needed such accommodations.

In addition to the $20 million in monetary relief, the three-year decree includes injunctions against engaging in any discrimination or retaliation based on disability, and requires the company to revise its attendance plans, policies and ADA policy to include reasonable accommodations for persons with disabilities, including excusing certain absences. Verizon must provide mandatory periodic training on the ADA to employees primarily responsible for administering Verizon's attendance plans. The company must report to the EEOC about all employee complaints of disability discrimination relating to the attendance policy and about Verizon's compliance with the consent decree. The company also agreed to post a notice about the settlement. Finally, Verizon will appoint an internal consent decree monitor to ensure its compliance. The settlement applies to certain Verizon wireline operations nationwide that employ union-represented employees.

On the other hand, when an employee is simply incapable of coming to work regularly, and coming to work regularly is an essential function of the job (as it normally is), then the ADA permits an employer to terminate the employee. *See, e.g., Taylor-Novotny v. Health Alliance Medical Plans, Inc.,* 772 F.3d 478, 489-91 (7th Cir. 2014).

F. Must Discipline Be Rescinded if An Employee Breaks A Conduct Rule Because Of A Disability?

Sometimes, employees only disclose their alleged disability after they have been given discipline for the alleged effects of the disability. For example, consider an employee with sleep apnea who is fired for sleeping on the job, but then discloses for the first time in their termination meeting that they have sleep apnea, and blame their condition for the fact that they fell asleep on

the job. Does the employer have to rescind the termination, or may it proceed with termination? The court decisions addressing this question have concluded that the employer may proceed with termination. *See Jones v. Nationwide Life Ins. Co.,* 696 F.3d 78, 90 (1st Cir. 2012) ("When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be "too little, too late.'"); *Buie v. Quad/Graphics, Inc*., 366 F.3d 496 (7th Cir. 2004) (eleventh-hour declaration of disability does not insulate an unruly employee from the consequences of his prior misdeeds); *Davila v. Qwest Corp*., 113 Fed. Appx. 849, 854 (10th Cir. 2004) ("[A]s many cases have recognized in various contexts, excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA."); *Conneen v. MBNA Am. Bank N.A*., 334 F.3d 318, 331-33 (3d Cir. 2003) (affirming summary judgment against employee who, despite repeated warnings about tardiness and the threat of termination, failed to request a modified schedule until after she was terminated); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (finding accommodation request untimely when employee made request only after committing two rule violations that "she knew would mandate her discharge"); *Soileau v. Guilford of Me., Inc.,* 105 F.3d 12, 17 n. 4 (1st Cir. 1997) (noting, in context of ADA retaliation claim, the "danger" of "permit[ting] an employee already on notice of performance problems to seek shelter in a belated claim of disability"); *cf. Halpern v. Wake Forest Univ. Health Scis*., 669 F.3d 454, 465 (4th Cir. 2012) (rejecting medical student's claim that school failed to reasonably accommodate his mental illness, in part because student did not allege that his behavioral problems were "manifestations of a disability" until after disciplinary board had recommended his dismissal); *Dewitt v. Southwestern Bell Telephone Co.*, NO. 12-2605-SAC, 2014 WL 3955356 (D. Kan. Aug 13, 2014) ("Although the Tenth Circuit has no published decision on this issue, this court is persuaded by *Davila* and by other Circuit courts which have consistently explained that a 'second chance' or overlooking misconduct that otherwise warrants termination is not a "reasonable accommodation.'"); *Green v. Medco Health Solutions of Texas, LLC*, 947 F. Supp. 2d 712, 729 (N.D. Tex. 2013), *aff'd*, 560 Fed. Appx. 398 (5th Cir. 2014) (granting summary judgment against plaintiff who requested reasonable accommodation after her termination was in progress, and stating, "[i]n situations where an employee's termination based on a legitimate, nondiscriminatory reason has been made effective but has not yet been processed, courts must not permit the employee to use the ADA as a shield from being fired by suddenly requesting an accommodation before the ink on her valid termination papers is dry.") (citing *Brookins v. Indianapolis Power & Light Co*., 90 F. Supp. 2d 993, 1006–08 (S.D. Ind. 2000) (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666–67 (7th Cir. 1995)).

The EEOC agrees with these court decisions. In 2008, it issued guidance with this relevant language from a question and answer:

> 10. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?
>
> If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would

> not require further discussion about the employee's disability or request for reasonable accommodation.

EEOC Enforcement Guidance on The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities, at question 10 (Sept. 3, 2008), available at http://www.eeoc.gov/facts/performance-conduct.html (endnotes omitted).

The EEOC also explained in earlier guidance:

> Must an employer make reasonable accommodation for an individual with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?
>
> An employer must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future, barring undue hardship. Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 31, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html.

The EEOC also gives examples, such as:

> Example A: A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. After receiving a suspension as the second step in uniform, progressive discipline, she discloses her disability, states that it causes her behavior, and requests a leave of absence for treatment. The employer may discipline her because she violated a conduct standard – a rule prohibiting disruptive behavior towards patrons and coworkers – that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future.
>
> Example B: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 AM to 5:30 PM, but he arrives at 9:00, 9:30, 10:00 or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must

consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 AM to 6:30 PM, a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 AM.

Example C: An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. When he learns that his employment has been terminated, the employee asks the employer to put the termination on hold and to give him a month off for treatment instead. This is the employee's first request for accommodation and also the first time the employer learns about the employee's disability. The employer is not required to rescind the discharge under these circumstances because the employee violated a conduct standard – a rule prohibiting threats of physical harm against supervisors – that is job-related for the position in question and consistent with business necessity. The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 31, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html (endnotes omitted).

Because of this rule, the EEOC advises employees that, "it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur." *Id*. at fn. 70.

II. CONCLUSION

Case law continues to develop in relation to employer's conduct rules. Employers must stay abreast of the latest developments to avoid engaging in conduct – no matter how well meaning – that leads to liability.