REASONABLY ACCOMMODATING EMPLOYEES WITH MENTAL HEALTH CONDITIONS BY PUTTING THEM BACK TO WORK

I. INTRODUCTION

Pat was a model employee.[1] He always received outstanding marks on his annual evaluations, and he was promoted three times during his fifteen years on the job. In early January, Pat called in sick for the first time in years. This was the first of many missed days of work for Pat in January, followed by more in February, and more in March.

Pat had no excuse. So, he falsified doctors' notes that claimed his absences from work were related to his physical health, leading his employer to believe he had a heart condition, a rare blood disease, and chronic arthritis. Each time Pat missed consecutive days of work, he would conjure up a new note from another fictitious doctor.

The reality was that Pat was not physically ill at all; he was mentally ill. In April, Pat's doctor diagnosed him with bipolar disorder and anxiety disorder. Pat had frequently missed work because on some days, he had been awake for seventy-two hours straight during a manic episode; and on others days, he simply could not find the energy or the courage to leave his bedroom. Pat falsified doctors' notes because he was afraid his employer would not understand if he told the truth. As a result, Pat received sick pay that he otherwise was not entitled to receive.

After his diagnosis, Pat decided to take a temporary leave of absence from work until he could obtain control over his conditions through therapy and medications. When he informed his supervisors of his mental health condition, he admitted to falsifying the previous doctors' notes. In addition, Pat voluntarily paid back all of the sick pay he received without even being asked to by his employer. Pat began his leave of absence under the impression that his prior misconduct was rectified and forgiven.

1. My thanks to Vice Dean Christopher David Ruiz Cameron of Southwestern Law School, whose practice as labor relations neutral inspired the facts of this hypothetical case.

However, that was not the case. During Pat's leave of absence, he was terminated for falsifying doctors' notes and lying to his employer. Was Pat wrongfully terminated? Was his behavior a result of his disability, and therefore, was he entitled to reasonable accommodations, including restoring his employment?

During Pat's hearing, he presented evidence of his prior employment record, including his excellent reviews by his supervisors; he examined witnesses, who testified to his work ethic and good character; and he admitted to his wrongdoing, but claimed his behavior was directly caused by his disability. Despite Pat's efforts, the court found that his discharge was appropriate. The court concluded that Pat's discharge was not caused by his disability; his discharge was caused by his falsification of doctors' notes and his lying. In essence, Pat's employer could not be held liable for terminating Pat *because* of his disability because the employer would have imposed the same discipline on an employee without a disability. Even if Pat had been fired for conduct that was deemed to be caused by his disability, the court's conclusion would not have changed based on guidelines set by the Equal Employment Opportunity Commission ("EEOC").[2]

According to the EEOC, an employer is not obligated, under the Americans With Disabilities Act ("ADA"), to accommodate an employee with a psychiatric disability by putting the employee back to work when the employee's disability is the cause of dischargeable workplace misconduct because the requirements under the ADA are only forward looking.[3] In other words, an employer cannot be liable for not accommodating a disability prior to knowledge of that disability.[4] So, if an employer discharged an employee for past conduct related to a disability, the employee is not entitled to his or her job back.[5] An employer is only obligated to make reasonable accommodations moving forward.[6]

2.

> The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

About EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc (last visited Mar. 20, 2016) [hereinafter *About EEOC*].

3. *EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/psych.html (last visited Apr. 3, 2017).

4. *Id.*

5. *Id.*

6. *Id.*

Although most federal circuit courts of appeals follow the EEOC's guidelines, the Ninth Circuit Court of Appeals disagrees with the EEOC in a series of cases.[7] The Ninth Circuit's reasoning can be summarized as requiring employers to restore employment for past misconduct that resulted from a disability, with a few exceptions.[8] This note focuses on this split of authority and proposes a need for an alternative approach: a multi-factor test.[9]

Rather than determining that the ADA only requires employers to make future accommodations once aware of the disability, this note proposes that courts should balance three factors and determine whether an individual's employment should be restored on a case-by-case basis.[10] The factors include: (1) whether the misconduct was egregious or constituted an offense of moral turpitude; (2) whether the disability was the direct cause of the misconduct or were there other intervening causes; and (3) whether the employer was placed on notice of the disability within a reasonable amount of time of when the employee realized the disability was causing the misconduct.[11]

Reported mental health conditions appear to be on the rise,[12] remain some of the hardest disabilities to understand,[13] and retain much of their centuries-old stigma.[14] This note will attempt to bring much needed clarity to the application of the ADA to workplace misconduct that is caused by disability.[15] To this end, Part II gives background information on the ADA,[16] mental health conditions and their effect on the workplace,[17] and the application of the ADA in the workplace with regards to mental health conditions.[18] Part III provides a detailed account of the legal landscape,

7. *See infra* Part III.B.

8. *See infra* Part III.B.

9. *See infra* Part IV.

10. *See infra* Part IV.

11. *See infra* Part IV.

12. Marcia Angell, *The Epidemic of Mental Illness: Why?*, THE NEW YORK REVIEW OF BOOKS (June 23, 2011), http://www.nybooks.com/articles/archives/2011/jun/23/epidemic-mental-illness-why/?page=1.

13. *See* Brian Krans, *Diagnosis For Bipolar Disease*, HEALTH LINE (June 19, 2013), http://www.healthline.com/health-blogs/bipolar-bites/helping-others-understand-invisible-illnesses.

14. "Throughout history people with mental health problems have been treated differently, excluded and even brutalized." Graham C.L. Davey, *Mental Health & Stigma*, PSYCHOLOGY TODAY (Aug. 20, 2013), https://www.psychologytoday.com/blog/why-we-worry/201308/mental-health-stigma.

15. *See infra* Part IV.

16. *See infra* Part II.A.

17. *See infra* Part II.B.

18. *See infra* Part II.C.

which includes the EEOC's approach and the circuit courts that follow, and the Ninth Circuit's approach and the lower courts that follow.[19] Part IV suggests the adoption of a multi-factor approach when facing the issue of whether an employee's misconduct should be excused if resulting from a disability that the employer is unaware of.[20] Part IV also suggests how the factors should be applied in a given set of factual scenarios.[21] Part V applies the multi-factor test to the hypothetical presented in the introduction and ultimately concludes that under this approach, Pat may have a good case against his employer for wrongful termination.[22]

II. BACKGROUND

A. Navigating Through the Americans with Disabilities Act[23]

Adopted in 1990, the Americans with Disabilities Act ("ADA") "is a civil rights law that prohibits discrimination against individuals with disabilities."[24] The ADA is applicable "in all areas of public life, including jobs, schools, transportation, and all public and private places" to ensure "that people with disabilities have the same rights and opportunities as everyone else."[25] The ADA is divided into five titles, each one relating to different areas of public life.[26]

Title I of the ADA includes the employment provisions, which apply to private employers, state and local governments, employment agencies, and labor unions.[27] However, the ADA does not apply to private employers with less than fifteen employees.[28] The ADA's employment nondiscrimination requirements include: "job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment."[29] In addition, "[i]t applies to recruitment,

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part IV.

22. *See infra* Part V.

23. *See EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3.

24. *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada (last visited Mar. 20, 2016).

25. *Id.*

26. *Id.*

27. *The ADA: Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc (last visited Mar. 20, 2016) [hereinafter *The ADA: Q&A*].

28. *See id.*

29. *Id.*

advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities."[30]

Under Title I, employers are required to provide "reasonable accommodations" of employees' disabilities.[31] It is considered discrimination if the employer fails to make reasonable accommodations to the "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[32] An employee has a disability if the person has "a physical or mental impairment that substantially limits one or more major life activities,[33] has a record of such an impairment, or is regarded as having such an impairment."[34] An employee with a disability is "qualified" if he or she "meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and he or she can perform the 'essential functions' of the position with or without reasonable accommodation."[35]

When a disabled person believes an employer has discriminated against them on the basis of their disability, he or she must file discrimination charges with the EEOC within 180 days of the alleged discrimination.[36] Some states allow up to 300 days to file a charge.[37] However, to ensure the most adequate protection of an individual's rights, the United States Department of Justice Civil Rights Division recommends an individual contact the EEOC promptly if discrimination is suspected.[38]

30. *Id.*

31. *See* 42 U.S.C. § 12112(b)(5)(A) (2012).

32. *Id.*

33. "[T]he U.S. Supreme Court redefined a major life activity in *Toyota Motor Manufacturing v. Williams* to include an inability to perform a variety of tasks *central to most people's daily life* and not whether an employee was unable to perform tasks associated with a specific job." William A. Lang, *Use of Progressive Discipline and Other Considerations in ADA Cases*, 17 LERC MONOGRAPH SER. 43, 45 (2003) (citing Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002)).

34. *EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3; 42 U.S.C. § 12102(1) (2012).

35. *The ADA: Q&A*, *supra* note 27.

36. *Information and Technical Assistance on the Americans with Disabilities Act*, U.S. DEP'T OF JUST. C.R. DIVISION, http://www.ada.gov/ada_title_I.htm (last visited Mar. 20, 2016).

37. *Id.*

38. *Id.*

B. The Increase of Mental Health Conditions and Their Effect on the Workplace

i. Mental Health Conditions

Mental health conditions are more common than most people think. Eighteen percent of adults experience a mental health condition every year,[39] and five percent of adults are living with a serious mental illness, such as bipolar disorder or schizophrenia.[40] To put this in perspective, a person is just as likely to be diagnosed with a mental health condition as he or she is to contract the seasonal flu.[41] In addition, young people are among the most frequent to be diagnosed, with fifty percent "of mental health conditions begin[ning] by age fourteen, and seventy-five percent of mental health conditions develop[ing] by age twenty-four."[42]

Mental illness impacts an individual's thinking, feeling, or mood.[43] Mental illness also impacts an individual's ability to relate to others and function on a daily basis.[44] One interesting thing about mental illness is that it doesn't affect everyone in the same way; people with the same diagnosis will often have completely different experiences.[45]

Mental health conditions are not the result of any one event; but instead, there are multiple, interlinking causes.[46] Likely causes of mental illness include: genetics, environment, and lifestyle; however, a stressful job, stressful home life, or a traumatic life event makes people more susceptible.[47] Research suggests that biochemical processes and circuits, as well as basic brain structure, may also play a role.[48] These conditions not only affect the person experiencing a mental illness directly, but they also affect family, friends, and the communities that the individuals are a part of.[49] When a

39. Dori Meinert, *Accommodating Mental Illness*, SOC'Y FOR HUM. RESOURCE MGMT (Sept. 15, 2014), http://www.shrm.org/publications/hrmagazine/editorialcontent/2014/1014/pages/1014-mental-health.aspx.

40. *Mental Health Conditions*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Mental-Health-Conditions (last visited Mar. 20, 2016) [hereinafter *Mental Health Conditions*].

41. "It is estimated that [each] year in the United States 5% to 20% of the population gets the flu." *Information for Schools Q&A*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/flu/school/qa.htm (last updated Aug. 18, 2016).

42. *Mental Health Conditions*, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

mental health condition significantly interferes with a major life activity, such as: learning, working, or communicating with others, the condition becomes known as a "psychiatric disability."[50]

ii. The Rise of Mental Health Conditions

Mental health conditions are affecting more Americans today than they were in earlier eras.[51] As a result, more people are relying on Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI").[52] The number of Americans identifying as disabled by a mental health condition increased nearly two and a half times between 1987 and 2007.[53] For children, the rise is even more startling, increasing thirty-five times over the same period.[54]

What is the cause of this drastic increase from one generation to the next? According to a June 2013 Gallup poll,[55] seventy percent of Americans hate their jobs or have "checked out" of them.[56] As Bruce Levine, PhD, stated, "Life may or may not suck any more than it did a generation ago, but our belief in 'progress' has increased expectations that life should be more satisfying, resulting in mass disappointment."[57]

iii. Mental Health Conditions in the Workplace

The rise in mental health conditions has caused many human resource professionals to create new policies and procedures to ensure employees are protected and employers are equipped to handle any issues that may arise.[58] According to the National Business Group on Health, "the indirect cost of untreated mental illness to employers is estimated to be as high as $100

50. *What is Psychiatric Disability and Mental Illness?*, B.U. CTR. FOR PSYCHIATRIC REHABILITATION, https://cpr.bu.edu/resources/reasonable-accommodations/what-is-psychiatric-disability-and-mental-illness (last visited Mar. 19, 2016).

51. *See* Jean M. Twenge, *Are Mental Health Issues on the Rise?*, PSYCHOL. TODAY (Oct. 12, 2015), https://www.psychologytoday.com/blog/our-changing-culture/201510/are-mental-health-issues-the-rise.

52. Angell, *supra* note 12.

53. *Id.*

54. *Id.*

55. Ricardo Lopez, *Most Workers Hate Their Jobs or Have "Checked out," Gallup Says*, L.A. TIMES (June 17, 2013), http://www.latimes.com/business/la-fi-mo-employee-engagement-gallup-poll-20130617-story.html.

56. Bruce Levine, *Why the Rise of Mental Illness? Pathologizing Normal, Adverse Drug Effects, and a Peculiar Rebellion*, MAD IN AM. (July 31, 2013), http://www.madinamerica.com/2013/07/why-the-dramatic-rise-of-mental-illness-diseasing-normal-behaviors-drug-adverse-effects-and-a-peculiar-rebellion.

57. *Id.*

58. *Mental Health Conditions*, *supra* note 40.

billion a year in the U.S. alone."[59] The Society of Human Resource Management recently stated, "More days of work have been lost or disrupted by mental illness than by many chronic conditions, including arthritis, diabetes and heart disease . . . improperly managed mental conditions also can affect employees' safety."[60]

Early detection and treatment of mental illness can not only prevent a crisis, but it may also reduce employers' future health care costs.[61] As a result, employers are being urged to learn more about psychiatric disabilities and psychotropic drugs.[62] Employers are also expected to provide more support for their employees with psychiatric disorders—similar to the help provided to those with physical injuries or ailments.[63]

Despite the increase in support and services provided by employers, people with mental health conditions have inordinately high rates of unemployment.[64] As many as sixty to eighty percent of working age adults with mental health disorders are unemployed, despite the fact that most of those people are willing and able to work.[65] These high unemployment rates not only cost the nation an estimated $25 billion in disability payments annually, but it also results in a "loss of productivity, earnings, and human potential."[66]

C. The Application of the Americans with Disabilities Act to Mental Health Conditions in the Workplace

On March 25,1997, the EEOC issued its "Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities" in response to the growing number of ADA charges filed with the EEOC based on emotional or psychiatric impairment.[67] The EEOC's guidelines set forth a

59. *Id.*

60. *Id.*

61. *Id.*

62. BRUCE SANDERS, SOC'Y FOR HUMAN RESOURCE MGMT., UNDERSTANDING PSYCHIATRIC DISABILITIES (2005), https://cpr.bu.edu/wp-content/uploads/2013/05/SHRM-On-Psychiatric-Disabilities.pdf.

63. *Id.*

64. NAT'L ALLIANCE ON MENTAL ILLNESS, THE HIGH COSTS OF CUTTING MENTAL HEALTH (2010), http://static1.1.sqspcdn.com/static/f/1267826/18732875/1339608141220/Unemployment.pdf?.

65. *Id.*

66. *Id.*

67. Michael Delikat & Aimee Meltzer, *What Should Employers Do About Psychiatric Disability Claims?*, 44 No. 1 PRAC. LAW. 69, 69-70 (1998); *EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3.

series of questions and answers outlining the EEOC's position on the application of Title I of the ADA to individuals with psychiatric disabilities.[68]

The EEOC identifies mental conditions that may be covered, which include: major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders, while drug abuse and distress over personal problems are not covered.[69] In addition, the EEOC emphasizes that traits or behaviors, such as: stress, irritability, chronic lateness, or poor judgment, may be symptoms of mental impairment but are not alone sufficient mental impairments.[70]

For an individual to qualify as an individual with a psychiatric disability protected under the ADA, a major life activity must be substantially limited by the mental impairment.[71] The guidelines state that employers must consider the length of time of the limitation and the severity of the limitation.[72] The EEOC also explicitly states that the impairment must be assessed in the absence of mitigating factors, including medications, that control the symptoms of the condition.[73]

At the pre-employment stage, employers may not ask disability-related questions or ask for a medical examination.[74] Once an employer makes a conditional job offer, "an employer may ask disability-related questions and request medical examinations as long as this is done for all entering employees in that job category."[75] However, "if the employer rejects the applicant after [finding out the employee has a disability], investigators will closely scrutinize whether the rejection was based on the results of [that disability-related] question or medical examination."[76]

68. Delikat & Meltzer, *supra* note 66, at 70.

69. *Id.* at 70-71; *see Mental Health Conditions*, *supra* note 40 (defining many common mental health conditions).

70. Delikat & Meltzer, *supra* note 66, at 71.

71. *Id.*; *see* Lang, *supra* note 33 (defining "major life activity").

72. Delikat & Meltzer, *supra* note 66, at 71.

73. *Id.*

74. *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/medfin5.pdf. An exception exists where the applicant requests reasonable accommodations for the hiring process, such as a request to reformat an examination. *Id.* The employer is entitled to know about the covered disability and the need for accommodation, and the applicant may be required to provide documentation from an appropriate professional. *Id.*

75. *Id.*

76. *Id.*

During the employment stage, employees may request reasonable accommodations at any time.[77] An employee does not need to explicitly state that an accommodation is needed.[78] The employer has a duty to accommodate if the employee has conveyed information sufficient to put the employer on notice of the need for accommodation.[79] Accommodations must be decided by employers on a case-by-case basis; therefore, there is no exhaustive list of possible reasonable accommodations.[80] However, accommodations are not reasonable if they compromise the standards of performance of the job or eliminate essential functions of the job.[81]

The EEOC "clearly states that disabilities are not an excuse for misconduct."[82] "Thus, an employer may discipline a mentally disabled individual for violating a workplace conduct standard, e*ven if the misconduct was a result of the disability*, as long as the standard is job related and consistent with business necessity."[83] In addition, the EEOC states that because accommodations are prospective, employers are not required to excuse past misconduct resulting from a disability when the employer was unaware of the need for accommodations.[84] As a result, if an employee is terminated for violating a company policy and claims the violation was the result of a disability that needs an accommodation, the employer is not required to rescind the discharge because the individual is no longer a "qualified individual with a disability."[85]

Because the United States Supreme Court has not decided a case that lays the framework for lower courts to follow in cases where mentally disabled employees claim to have been wrongfully terminated for past misconduct caused by their disability, most courts and litigants look to the EEOC's guidelines for guidance.[86] "Although the EEOC's opinions are not binding on courts, the EEOC is considered to have 'a body of experience and

77. Delikat & Meltzer, *supra* note 66, at 73.

78. *Id.*

79. *Id.*

80. The EEOC lists several common mental disability accommodations, including: time off, either as a leave of absence, partial absences, or part-time scheduling; adjusting an employee's regular work hours; physical changes in the workplace, such as soundproofing or visual barriers; modification of workplace policies; adjusting supervisory methods, such as the level of supervision or structure; providing a job coach or allowing a job coach to accompany the employee to work; or employee reassignment. *Id.* at 73-75.

81. *Id.* at 75.

82. *Id.*

83. *Id.*

84. *Id.* at 75-76.

85. *Id.*

86. *See infra* Part III.A.

informed judgment to which courts and litigants may properly resort for guidance.'"[87]

However, the Ninth Circuit Court of Appeals and several lower courts have a different approach when it comes to mentally disabled employees who violated a workplace conduct standard.[88]

III. LEGAL LANDSCAPE – A SPLIT IN AUTHORITY

A. The U.S. Equal Employment Opportunity Commission[89] Approach to the Enforcement of Title I of the Americans with Disabilities Act[90] and the Circuit Courts that Follow

The EEOC guidelines state that an employer may discipline an individual with a disability for violating a workplace conduct standard when the misconduct results from the disability, as long as it would impose the same discipline on an individual without a disability.[91] Several federal circuit courts of appeals have applied this rule to both physical and mental disabilities, holding that an employer that discharges an employee for workplace misconduct is not in violation of the ADA because the discharge is *because* of the conduct, not *because* of the disability.[92]

Additionally, the EEOC guidelines state that an employer must make reasonable accommodation to enable a qualified individual with a disability to meet conduct standards in the future, as long as it does not impose an undue hardship on the employer; however, "reasonable accommodations [are] always prospective . . . [and] an employer is not required to excuse past misconduct."[93]

87. Delikat & Meltzer, *supra* note 66, at 70 (quoting Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 65 (1986)).

88. *See infra* Part III.B.

89. *See About EEOC*, *supra* note 2.

90. *See* 42 U.S.C. § 12112 (2012).

91. *EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3.

92. "Recognizing that the ADA prohibits discrimination 'because of' a disability, 42 U.S.C. § 12112(a), [circuit] courts have explained that where an employer takes disciplinary action against an employee for workplace misconduct that may be related to a disability, the decision is still 'because of' the conduct, not the disability, and therefore does not violate the ADA." *Brief Amici Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the United States in Support of Petitioners and in Support of Reversal*, Raytheon Co. v. Hernandez, No. 02-749, 2003 WL 21092537, at *8 (May 9, 2003).

93. *EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3.

As part of the guidelines, the EEOC provides examples of employee misconduct and provides guidance for the application of the ADA to these examples.[94] One example provided by the EEOC involves an employee who threatens his supervisor with physical harm after an altercation.[95] After his employment was terminated, the employee asked for his termination to be put on hold and for his employer to allow him to take a month off for treatment for his mental health condition.[96] The EEOC guideline states that because the employer was unaware of the disability prior to this incident, the employer is not required to offer reasonable accommodations in the future or rescind the termination.[97] The EEOC's reasoning is that the employee is no longer a qualified individual with a disability, and his termination was the result of a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.[98]

Since many of the federal circuit courts of appeals found that an employee's termination is *because* of the misconduct and not *because* of the disability, the question of whether an employer is required to excuse past misconduct when the employer was unaware of the disability is not frequently addressed.[99] Yet, the Seventh Circuit held that reasonable accommodation does not include a second chance to control a controllable disability.[100] Using the Seventh Circuit's reasoning, the California Court of Appeal held that reasonable accommodation did not include giving an

94. *Id.*

95. *Id.* at Conduct, 31, Example C.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See* Palmer v. Cir. Ct. of Cook Cty., Ill., 117 F.3d 351 (7th Cir. 1997) (holding that an employer did not violate the ADA when it fired an employee with anxiety and depression for threatening a co-worker with statements like "Your ass is mine, bitch" and "I want her dead," even though the behavior was a result of the employee's disability); Brohm v. JH Props. Inc., 149 F.3d 517, 522 (6th Cir. 1998) (holding that a hospital did not violate the ADA when it fired an anesthesiologist with sleep apnea for repeatedly dosing off on the job because there was no evidence that the hospital had treated him any differently than it would have "a physician who slept on the job for another reason, such as staying up late every night to watch television"); Jones v. Am. Postal Workers Union, 192 F.3d 417 (4th Cir. 1999) (holding that an employer did not violate the ADA when it fired a schizophrenic employee that threatened the life of his supervisor); Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047 (5th Cir. 1998) (holding that an employer did not violate the ADA when it fired an employee with extreme mental disturbance for having an on-the-job confrontation with a co-worker because the termination was the result of his violation of the anti-violence policy, not discrimination based on his disability).

100. *See* Siefken v. Vill. of Arlington Heights, 65 F.3d 664, 666-67 (7th Cir. 1995) (holding that a probationary police officer with diabetes was not entitled to a second chance to monitor his diabetes when he had a diabetic reaction resulting in disorientation and memory loss, causing him to drive at high speeds through a residential area, because the employee was not entitled to reasonable accommodations for a controllable disability).

employee a second chance when the employer did not have prior knowledge of the disability.[101] In sum, without knowledge of the employee's disability, an employer does not owe the employee a duty to reasonably accommodate; and without knowledge of the employee's disability, the employer cannot be held liable for terminating an employee *because* of the disability.[102]

B. The Ninth Circuit Court of Appeals' Approach and the Courts That Follow

Despite the EEOC's guidelines and the holdings of the other circuit courts, the Ninth Circuit has held "[f]or purposes of the ADA, with a few exceptions,[103] conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."[104]

In *Humphrey v. Memorial Hospitals Association*, an employee with obsessive-compulsive disorder was terminated due to her frequent tardiness and absences from work, many of which occurred before she asked for accommodations.[105] After the employee asked for accommodations, the employer allowed her to have a flexible start time, but she was still frequently absent.[106] So the employee asked for the ability to work from home, which was denied based on her prior disciplinary actions (although other employees were allowed to work from home).[107] The Ninth Circuit held that the employer had an affirmative duty to explore further arrangements and offer reasonable accommodations.[108]

101. *See* Brundage v. Hahn, 66 Cal. Rptr. 2d 830, 838 (Ct. App. 1997) (holding that an employee with bipolar disorder was not entitled to a second chance when she had an unexplained six-week absence from work because the employer did not have knowledge of the employee's disability).

102. *See EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3.

103.

> The text of the ADA authorizes discharges for misconduct or inadequate performance that may be caused by a 'disability' in only one category of cases—alcoholism and illegal drug use . . . In line with this provision, we have applied a distinction between disability-caused conduct and disability itself as a cause for termination only in cases involving illegal drug use or alcoholism. See Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1996) (holding that an employer may fire an employee who went on a 'drunken rampage' and attempted to fire an assault rifle at individuals in a bar). . . . In *Newland*, however, we suggested that an additional exception might apply in the case of "egregious and criminal conduct" regardless of whether the disability is alcohol- or drug-related.

Humphrey v. Mem'l. Hosp. Ass'n, 239 F.3d 1128, 1139 n.18 (9th Cir. 2001).

104. *Id.* at 1139-40.

105. *Id.* at 1130-34.

106. *Id.* at 1131-32.

107. *Id.*

108. *Id.* at 1137.

In *Gambini v. Total Renal Care, Inc.*, an employee with bipolar disorder was terminated because of a violent outburst during a meeting with her supervisors.[109] Gambini's supervisors and her co-workers were aware of her disorder and that she was struggling with her medication.[110] Despite their knowledge of her condition, Gambini's supervisors called her into a meeting to discuss her poor attitude and job performance.[111] Gambini responded by throwing the performance improvement plan across the desk, using profanity towards her supervisors, and slamming the door.[112] The Ninth Circuit held that the jury should have been instructed that disruptive workplace conduct resulting from a disability is part of the disability and not a separate basis for termination.[113]

Lower courts have followed the Ninth Circuit approach, holding that workplace misconduct is part of a disability, rather than a separate basis for termination.[114] In *EEOC v. Walgreen Co.*, the district court denied an employer's motion for summary judgment when a diabetic employee was terminated for taking a bag of potato chips in violation of store's anti-grazing policy. [115] The court held that whether or not her misconduct was caused by her disability and whether or not Walgreens was required to accommodate her was a question of fact for the jury.[116] Similarly, in *Riehl v. Foodmaker, Inc.*, the Washington Supreme Court held that a jury could reasonably find an employee's mental condition was a substantial factor in his termination when an employer terminated and refused to rehire an employee that suffered from depression and post-traumatic stress disorder, noting that there was evidence to suggest his supervisors were displeased with his change in personality due to his condition.[117]

As demonstrated by the holdings in these cases, the Ninth Circuit's approach does not strictly apply the EEOC's guideline.[118] Instead, the Ninth Circuit's approach allows the trier of fact to determine if the misconduct was caused by a disability that could have been reasonably accommodated.[119] And since the Ninth Circuit has interpreted the ADA as *only* allowing

109. Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007).

110. *Id.* at 1092.

111. *Id.* at 1091.

112. *Id.* at 1091-92.

113. *Id.* at 1095.

114. EEOC v. Walgreen Co., 34 F. Supp. 3d 1049 (N.D. Cal. 2014).

115. *Id.* at 1056-57.

116. *Id.*

117. Riehl v. Foodmaker, Inc., 94 P.3d 930, 938-39 (Wash. 2004).

118. *See infra* Part III.A.

119. *See* Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007); *see also* EEOC v. Walgreen Co., 34 F.Supp. 3d 1049; Riehl, 94 P.3d 930.

discharge for misconduct resulting from alcoholism, illegal drug use, or egregious or criminal conduct, this approach may allow an individual's employment to be restored for past misconduct, even when the employer was unaware of the need for accommodation.[120]

As a society, America needs to become more understanding of mental illness. Adopting a new approach to past misconduct that is less rigid than suggested by the EEOC, but more structured than the Ninth Circuit approach, is the first step to ensuring that the rising number of Americans diagnosed with mental conditions[121] are reasonably accommodated for behavior caused by their condition.[122]

IV. ADOPTING A MULTI-FACTOR TEST

The EEOC's guidelines are too inflexible[123] and fail to take into account that mental health conditions affect people in many different ways, and no two situations are identical.[124]

Courts should adopt a multi-factor test to ensure that each situation is examined on a case-by-case basis. The factors should include: (1) whether the misconduct was egregious or constituted an offense of moral turpitude; (2) whether the disability was the direct cause of the misconduct or were there other intervening causes; and (3) whether the employer was placed on notice of the disability within a reasonable amount of time of when the employee realized the disability was causing the misconduct. In addition, all three factors should be weighed in the light most favorable to the employee.

120. Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1996).

121. Angell, *supra* note 12.

122. *See infra* Part IV.

123. *See infra* Part III.A.

124. *See Mental Health Conditions*, *supra* note 39.

A. Egregiousness of the Conduct

Whether the conduct resulting in the termination is egregious[125] or amounts to a crime of moral turpitude[126] is the first and most important factor to consider.[127]

By taking egregiousness of conduct into account, this factor mirrors the well-established practice of progressive discipline.[128] In general, when employees fail to perform their job in a satisfactory manner, the employer uses some form of progressive discipline to correct the employee's deficiencies.[129] Progressive discipline is a disciplinary system that provides a range of responses to employee performance or conduct problems.[130] The response ranges from mild to severe, depending on the nature and frequency of the problem.[131] For lesser offenses, a verbal counseling or written warning would be used; whereas, a more serious offense may result in suspension or immediate termination.[132]

When the misconduct merely amounts to a routine indiscretion, such as: excessive absenteeism, tardiness, insubordination, or poor performance, this factor will weigh in favor of the employee. However, when the misconduct is egregious or falls into the category of offenses of moral turpitude, such as: violence or threats of violence, sexual harassment, stealing from the employer, or lying to supervisors, this factor will weigh in favor of the employer. Similarly, when the conduct is so egregious that there is a substantial likelihood the employee's conduct would have caused harm to themselves or others, this factor will weigh heavily in favor of the employer.

125. Egregious is defined as "very bad and easily noticed." *Egregious*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/egregious (last visited Oct. 2, 2016).

126.

> [M]oral turpitude escapes precise definition . . . Moral turpitude has been described as an "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

Chadwick v. State Bar, 776 P.2d 240, 244-45 (Cal. 1989) (quoting In re Craig, 82 P.2d 442, 444 (Cal. 1938)).

127. This factor also takes into account the EEOC's approach. *See EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 3 (indicating that "[a]n 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").

128. Lang, *supra* note 33, at 46.

129. *Id.*

130. Lisa Guerin, *What is Progressive Discipline for Employees?*, NOLO, http://www.nolo.com/legal-encyclopedia/employee-progressive-discipline-basics-30242.html (last visited Mar. 19, 2016).

131. *Id.*

132. *Id.*

If an anesthesiologist with anxiety disorder had insomnia[133] and was frequently falling asleep on the job, the employee's conduct would be placing patients in harm's way. In addition, the employer would bare an undue burden in any situation where an employee is unable to perform their work without the assistance of someone else, ensuring they would not fall asleep on the job or be too tired to complete tasks accurately. However, evaluating this factor would become increasingly difficult in situations where a delivery driver falls asleep at the wheel for the first time, or a crane operator falls asleep for the first time while moving an 8,000-pound container. Although these actions understandably place people in harm's way, the court may consider them excusable if the employee is unaware of the disability, and the conduct is occurring for the first time.

Under a different scenario, if an employee makes violent threats against a co-worker, this conduct is considered so egregious that this factor alone will be enough to find in favor of the employer. Whereas, if an employee violates an anti-grazing policy[134] or an employee is frequently tardy for work,[135] this factor would weigh heavily in favor of the employee because this conduct does not rise to the level of egregious misconduct, nor would it place an undue burden on the employer to accommodate the employee.

As a practical matter, no court, agency, or arbitrator will be expected to put back to work an employee, who shoots his or her supervisor or threatens to, whether his or her mental health disorder is the cause or not. But, an employee who lies to his or her supervisor may be treated on a case-by-case basis. The trier of fact will be expected to examine the employee's job responsibilities and determine if honesty is a critical part of the job. For example, if a case involves a police officer, whose job is to ensure people are obeying the law and to uncover the truth through investigation, lying would likely amount to egregious misconduct. However, if a case involves a custodian or a factory worker, lying may not amount to egregious misconduct.

133. *Insomnia*, NATIONAL SLEEP FOUNDATION, https://sleepfoundation.org/insomnia/content/what-is-insomnia (last visited Feb. 18, 2016) (defining insomnia as "difficulty falling asleep or staying asleep, even when a person has the chance to do so").

134. *See* EEOC v. Walgreen Co., 34 F. Supp. 3d 1049, 1056 (N.D. Cal. 2014).

135. *See* Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1130 (9th Cir. 2001).

B. Direct Causation

To determine if workplace misconduct was directly caused by a disability, the courts should examine all causes of the misconduct, including intervening causes.[136]

This factor takes into account a well-established rule that the ADA authorizes termination of employment for use of illegal drugs and alcohol.[137] In *Pernice v. City of Chicago*, Pernice, a City employee of twenty years, was arrested and charged with disorderly conduct and possession of cocaine while off-duty.[138] After his arrest, Pernice requested medical leave from the City, but instead of allowing Pernice to take medical leave, the City fired Pernice for the violation of personnel rules stemming from his arrest and conviction.[139] Pernice then sued the City under the ADA, claiming that he was discharged due to his disability of drug addiction, since drug possession was "an integral part" of his disability.[140] The court held that Pernice was not wrongfully terminated.[141] If this case had been examined under the multi-factor approach, the possession of cocaine would have been considered an intervening cause because if treated properly for his drug addiction, Pernice should not have possessed or used drugs at all, especially if it was a violation of a personnel rule.

On the other hand, if an employee with depression was expected to be bubbly and friendly while working with customers and had a sudden change in personality, which did not align with what was expected on the job, like in *Riehl v. Foodmaker, Inc.*, the misconduct would be considered directly caused by the disability.[142]

Similarly, in a case where an employee has a disability that is affecting the employee's ability to sleep, and the employee is falling asleep on the job, this factor would weigh in favor of the employee. For example, in *Brohm v. J.H. Properties, Inc.*, the court found that an anesthesiologist with sleep apnea, who repeatedly fell asleep on the job, was rightfully terminated because the hospital would have terminated any doctor for falling asleep on the job.[143] Although not a mental health condition, sleep apnea is a serious

136. An intervening cause is a superseding act that breaks the chain of causation. H.J.C., *Negligence – Proximate Cause – Concurring and Intervening Causes Distinguished*, 12 TEX. L. REV. 518, 518-19 (1934).

137. Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1996).

138. *See* Pernice v. City of Chicago, 237 F.3d 783, 784 (7th Cir. 2001).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Riehl v. Foodmaker, Inc., 94 P.3d 930 (Wash. 2004).

143. *See* Brohm v. JH Properties, Inc., 149 F.3d 517, 522 (6th Cir. 1998).

condition that causes a person to stop breathing during sleep, and if left untreated, sleep apnea can affect one's ability to perform everyday activities in work or school.[144] Under the multi-factor approach – and if Brohm's sleep deprivation would have been caused by anxiety disorder, rather than sleep apnea – the court would have found that the employee's anxiety disorder was the direct cause of him falling asleep on the job. However, this does not mean that an anesthesiologist, who frequently fell asleep on the job, would have his misconduct excused. Direct causation is only one factor, and when misconduct places other people's lives at risk, the court would weigh those facts when determining the egregiousness of the conduct under the first prong of the multi-factor test.

C. Timeliness of Notice

To determine the timeliness of notice, the courts should examine when the employee became aware of the disability in comparison to when the employee notified the employer. An employee should be allowed a reasonable amount of time to seek a medical diagnosis, including multiple opinions; process the information given by the medical professionals, which gives them time to accept the diagnosis and begin treatment; and inform the employer of the condition and what accommodations may be needed. What constitutes a "reasonable amount of time" would be determined by the trier of fact on a case-by-case basis because no one situation will ever be identical.

Using Pat, from the hypothetical posed earlier,[145] as an example, Pat noticed his symptoms affecting his work in January, he was diagnosed in April, and terminated in June after informing his employer of his mental health condition. The court would need to determine if the six months from January to June was a reasonable amount of time, considering he was diagnosed in April.

Further, when determining the timeliness of notice, the court should not only look subjectively at what the employee knew at the time of the misconduct, but the court should also examine medical records to determine when the employee was placed on notice that the condition existed and would need further treatment. Where an employee was made aware of a mental health condition, but chose not to seek any treatment, second opinions, or to inform their employer, this factor would weigh against the employee.

144. *Sleep Apnea*, WEBMD, http://www.webmd.com/sleep-disorders/sleep-apnea/sleep-apnea (last visited Feb. 18, 2016).

145. *See infra* Part I.

V. CONCLUSION

Pat, an otherwise model employee, could have been given a second chance. Pat's case may have survived this multi-factor test.[146] Looking closer at the facts of Pat's case, let's examine the factors.[147]

Was the conduct egregious or amount to a crime of moral turpitude? Pat could have argued that his misconduct was not egregious. He could have also argued that although the falsification of doctors' notes and lying to his supervisors may have amounted to a crime of moral turpitude, this factor should take into account his ability to perform his job responsibilities. Pat could have suggested that although honesty is important, his truthfulness has no bearing on his ability to perform his job.

On the other hand, the employer could have argued that Pat's falsification of doctors' notes and lying was both egregious and a crime a moral turpitude. The employer could have also argued that although this factor may depend on the type of job that Pat held and what his responsibilities were, an employer should not have to give a second chance to someone who committed a crime, regardless of his job responsibilities.

Was the disability the direct cause of the misconduct or were there other intervening causes? Pat's misconduct was lying about physical ailments and falsifying doctors' notes. Pat could have argued that he was afraid that he would have lost his job if he did not have a valid excuse for his absences, and the lying and falsification was a direct result of his manic behavior caused by his bipolar disorder. Bipolar disorder could have affected his ability to think clearly, and the lack of sleep would have caused him to act irrationally.

However, the employer could have argued that the lying and falsification of doctors' notes was an intervening event that caused his termination because he was not terminated for missing work, which was directly caused by his disability, he was terminated for his failure to tell the truth to his employer.

Was the employer placed on notice of the disability within a reasonable amount of time of the employee realizing the disability was causing the misconduct? Pat could have argued that he was unaware of the full extent of his condition until his diagnosis in April, and he notified his employer in a timely manner.

Nonetheless, the employer could have argued that his delay of three months to seek medical attention was unreasonable, and Pat should have known sooner that he had a condition that needed to be brought to his

146. *See infra* Part IV.

147. *See infra* Part IV.

employer's attention. Additionally, Pat waited two months after his diagnosis to inform his employer, which was not timely.

When balancing these three factors, Pat could possibly win his case against his employer for wrongful termination. If the trier of fact determines his conduct was not egregious, Pat's employer will be liable for any damages resulting from the violation of the ADA, and Pat's employer will need to restore Pat's employment with reasonable accommodations.

Pat's story is just one story. There are potentially hundreds of thousands, if not millions, of Pats out there that are struggling with mental health conditions and need the protection of the law to ensure they can continue to work and support themselves and their families. These people include: state government employees in civil service hearings, federal government employees asserting claims before the EEOC, private sector employees in state or federal court, and unionized employees in arbitration, all of whom are covered by the ADA or state or local versions of it. If we no longer want a psychiatric diagnosis to ruin a person's life, we need to adopt policies that assist those in need of assistance.

*Lauren Fierro**

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In 2016, Ms. Fierro joined Prindle, Goetz, Barnes & Reinholtz where her practice consists mostly of personal injury defense, including premises liability, products liability, and medical malpractice. In her free time, Ms. Fierro enjoys spending time with her husband and children. She also spends her free time volunteering at her local YMCA, where she mentors high school students and organizes service projects.