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DEPRESSION AND OTHER "INVISIBLE" DISABILITIES

Sarah, your receptionist of five years, has been missing work lately, and when she's in the office, she seems lethargic and out of sorts—not her bubbly, social self. Yesterday, she snapped at a customer, "You want help or are you just standing around for your health?" You took her aside and asked her what was wrong, and she broke down. She's "had a lot going on in her life lately," she said, and she's seeing a counselor for depression. He's got her on anti-depressants, which haven't really kicked in yet. "Be patient," she tells you. "I can beat this thing."

Shari L. Lane

Sarah has been a loyal and valued employee, so you try to "be patient." But a month goes by, with little improvement. She brings you a doctor's note, with a diagnosis. The prescribed treatment? "Patient may need to stay home from time to time, if she feels overwhelmed."

You need a receptionist who will be the "face" of your company—pleasant, prompt, responsive, and most of all, *in the office*.

So you give her an ultimatum: shape up or ship out. Her behavior gets worse, not better. She's sullen, often late (when she bothers to come in at all), doesn't get her work done, and tells you nastily that the "written warning" you gave her sure didn't help her depression. At your wits' end, you fire her.

And end up with a lawsuit claiming you've discriminated against her because of her disability.

Employers everywhere are facing this scenario in one form or another. Most employers are pretty comfortable with their obligations under the Americans with Disabilities Act and the state law counterparts, when dealing with a visible problem: a missing leg, blindness, etc. There are unforeseen and complex issues, however, when dealing with the "invisible" disabilities, such as depression, post traumatic stress disorder, obsessive-compulsive disorder, panic disorder, and bi-polar disorder. A recent Ninth Circuit case illustrates some of the many pitfalls and potential problems. *Gambini v. Total Renal Care, Inc.*, (No Westlaw or Reporter citation yet) (9th Cir. 2007)

Gambini notified her employer that she had been diagnosed with bi-polar disorder, resulting in severe mood swings. As a result, she asked her co-workers not to take it personally when she was irritable. The problem was not immediately corrected with medication, and her co-workers complained. Her supervisors prepared a written performance improvement plan, based on her poor "attitude and general disposition." During and after the meeting to deliver the performance improvement plan, Gambini became combative, swore, threw objects, and slammed the door. She was subsequently hospitalized with suicidal thoughts. After her co-workers expressed fear of Gambini's "violent outbursts," her employer fired her.

The court reversed the jury verdict for the employer, because the jury instructions failed to notify the jury that "conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination." Therefore, a properly instructed jury could have found that terminating Gambini for the moodiness and violent outbursts that were the direct result of her medical condition was impermissible termination "because of" her disability.

So what should you do with "Sarah" so you don't end up facing the problems in Gambini?

First things first, keep in mind that a temporary dip into depression may not qualify as a disability. Medical conditions must be evaluated according to the criteria set out in the statute, and one of the considerations is the duration of the condition. 29 U.S.C. §1630.1(j)(2); OAR 839-006-0212.

These are dangerous waters, however (when an employer tries to practice medicine without a license, that is). When an employee notifies you that she is suffering from a medical condition that is affecting her work, your best bet is to ask for more information, and assume in the interim that your employee is disabled as that term is defined by law.

If the condition does qualify as a disability, the employer has an obligation to engage in the interactive process—in other

words, talk to her. Ask her to enlist the help of her doctor to come up with proposed accommodations. In Sarah's case, one solution might be an agreement that, on the days Sarah does not believe she'll be able to function properly in her role, she will call in sick, and you will locate a temporary employment agency to provide you with qualified and reliable back up. The corollary to that is that you must refrain from disciplining Sarah for "excessive absenteeism" or "poor attitude" resulting from her disability.

Ideally, the interactive process and resulting accommodations will resolve the workplace problems until Sarah and her doctor can come up with effective treatment for her depression.

If not, you may ultimately determine that a) pleasant interaction with the public is an essential function of the job; b) replacing Sarah with temporary help on a regular basis after Sarah has exhausted her medical leave entitlement is an "undue hardship" on the business; and c) there are no other positions within the company that Sarah could fill or other potential reasonable accommodations to her disability. In that case, you will have fulfilled your obligations under the law to provide medical leave up to and perhaps beyond what is required, to interact with the employee to discuss potential accommodations, and to attempt proposed accommodations. There are no guarantees, of course, but following those steps should help you avoid the legal problems Gambini's employer faced.

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