

## When Disability Meets Discipline

**THE SCHOOL DISTRICT'S** superintendent can hardly believe her ears: The high school principal reports that a female custodian slapped a male student's rear end as she passed him at his locker. The principal interviewed the custodian, who admits the behavior but claims she has sleep apnea and was in a "stupor."

Believing there to be clear evidence of significant misconduct, the superintendent recommends termination of the employee. However, the custodian hires an attorney who claims it would be illegal to terminate because the alleged misbehavior was a symptom of her disability. What is the superintendent to make of such a situation?

Although it may seem counterintuitive, federal courts have established that school employees in some parts of the country may be protected from discipline or discharge due to certain misbehavior that stems from a medical condition qualifying as a disability under the federal Americans with Disabilities Act. State nondiscrimination laws may also provide similar protections.

### Broad Protection

To avoid potential liability for disability discrimination and ensure that disciplinary actions are upheld, school administrators should be alert for situations where employee misconduct may be legally shielded from discipline as part and parcel of an underlying disability.

The employment provisions of the federal ADA statute apply to all public school districts and to private schools with 15 or more employees. The ADA mandates that covered employers not discriminate against a "qualified individual" with a disability — one who can perform the essential job functions either with or without "reasonable accommodation" — with regard to discharge and other terms or conditions of employment.

In the early 2000s, the U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over federal cases in nine Western states, decided key cases in favor of disabled employees who faced discipline on the rationale that conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination.

In one instance, the Ninth Circuit reversed

an initial ruling in favor of an employer that discharged a medical transcriptionist with obsessive-compulsive disorder for tardiness and absenteeism related to a "series of obsessive rituals." The court reasoned that the jury should decide whether the attendance problems were caused by the medical condition, in which case the termination would be impermissible "because of" the disability.

Some federal appeals courts have shared the Ninth Circuit's interpretation, such as the Tenth Circuit (covering Colorado, New Mexico and four other states). However, not all federal courts agree. The view of at least the Fifth, Sixth and Seventh circuits is that violation of a uniformly enforced conduct standard by an employee with a disability may be the basis for discipline.

School administrators should seek legal advice about what interpretation governs in their jurisdiction.

Where the Ninth Circuit's approach applies, employers should be on the lookout for indications that the employee may have an ADA-protected disability that contributed, even in a small way, to misconduct. Such information may be revealed during the investigation process or a pre-discipline meeting. Other times, it may be gleaned by reviewing employment files or interviewing the supervisor.

### Behavioral Assessment

A critical issue may be whether misbehavior is actually caused in part by a given disability. That assessment may require using the ADA's pre-discipline interactive process to obtain medical information directly from the employee. In complex cases, it also may require directing an employee to undergo a medical examination by an outside provider at the employer's expense.

Even where conduct does stem from the disability, it may be possible to discharge an employee who can no longer perform the essential functions of the job even with accommodation (such as an employee who has made death threats to coworkers) or who poses a "direct threat" to the safety of students or staff. Legal counsel should be consulted early in the discipline process to ensure compliance with state and federal nondiscrimination laws.

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**PARKER HOWELL** is an education attorney with Porter Foster Rorick in Seattle, Wash. E-mail: parker@pfrwa.com