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Court Provides Roadmap For Managing 'Intolerable' Behavior From Employee With Disabilities

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What is an employer to do when a long-standing employee with a known anxiety disorder engages in a public display of suicidal gestures and disruptive behavior? Don't act in haste, but if careful consideration of the situation leads to a termination, the decision-making process may withstand scrutiny in court. That's the outcome in a recent ruling from the Seventh Circuit Court of Appeals in *Felix v. Wisconsin Dept. of Transportation*, which provides a thorough and detailed analysis of a challenging situation involving an employee with mental health issues. In the process of upholding summary judgment in favor of the public employer in a case under the Rehabilitation Act, the court laid out lessons for addressing current behavior while evaluating the threat of future harm under the Rehabilitation Act and the Americans with Disabilities Act (ADA). Because the case involved a public employer, the action arose under the Rehabilitation Act, but the court noted that the Rehabilitation Act incorporates ADA standards concerning employment. The case involved a Division of Motor Vehicles employee whose duties included administering road tests to new drivers, processing paperwork for vehicle and drivers' licenses, and collecting fees associated with such transactions. For some time the employer had accommodated the employee's anxiety disorder and associated conditions by allowing her to take breaks in the restroom when she experienced the onset of a panic attack. While such incidents usually led the employee to calm herself down outside of the public work areas, the incident that led to her termination was different. Following an interaction with a co-worker, the employee notified her supervisor that she felt a panic attack coming on and would need to take a break and her supervisor told her to take all the time she needed. But a short time later the supervisor heard "muffled screaming" and upon investigation found the employee on the floor in a public lobby area with cut marks on her right wrist, kicking and rolling on the floor. An ambulance was called and the employee was transported to a hospital. Following the incident, the employee was placed on leave under the Family and Medical Leave Act and the employer required the employee to undergo an independent medical examination to determine whether she was fit to resume her duties. Ultimately, the employer determined that the behavior, coupled with the results of the independent medical exam, warranted termination. Thereafter, the employee filed a lawsuit in which she claimed the employer unlawfully terminated her employment solely due to her disabilities. The district court granted summary judgment to the employer. On appeal, the employer's careful consideration of the full facts and circumstances weighed in its favor. "It should go without saying that when a disruptive incident like the [employee's public workplace] episode has occurred, an employer may seek a professional assessment of the likelihood of an employee's unacceptable behavior recurring before it decides … whether the employee is qualified for continued employment," the appellate court noted, adding: "Hasty and reactive employment decisions are the last thing that the Rehabilitation Act or the ADA were meant to encourage." The court determined that an employer is not required to turn a blind eye to intolerable behavior – even if such

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behavior is associated with a disability – that would otherwise warrant termination of employment. In reaching its conclusion, the Court also analyzed the distinction between whether an employee is “otherwise qualified” for the position (where the burden of proof is on the employee-plaintiff) or whether the employee poses “a direct threat” to her own health and safety or that of others in the workplace (a defense that the employer has the burden to prove). The court explained that when an employee’s disability has actually resulted in conduct that is intolerable in the workplace, the direct threat defense does not apply because the case is no longer about a potential threat, but rather is focused on the actual dangers that the employee poses to herself and others. In its ruling, the court applied prior precedent that “when an employee engages in behavior that is unacceptable in the workplace … the fact that the behavior is precipitated by her mental illness does not present an issue under the ADA; the behavior itself disqualifies her from continued employment and justifies her discharge.” This case illustrates the difficulties placed on employers to accommodate known disabilities while also managing behavioral expectations, and provides a valuable lesson on the steps an employer should take when determining how to address intolerable behavior.