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## *MAYO V. PCC STRUCTURALS*: THE NINTH CIRCUIT CLARIFIES BOUNDARIES FOR ACCOMMODATING EMPLOYEES WHOSE MISCONDUCT MAY RELATE TO A MENTAL DISABILITY

By Anna Ferrari

The extent of an employer's duty to provide reasonable accommodations to employees with mental impairments can be difficult to discern, especially in where an adverse action is taken in connection with conduct that is caused by or related to an employee's cognitive or mental health condition. In a recent

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decision, *Mayo v. PCC Structurals, Inc.*, the Ninth Circuit has recognized an exception to a well-settled precedent holding that an employee who is terminated for threatening conduct arising from a psychiatric disability may state a claim for disability discrimination because the conduct is, in fact, part of the employee's disability.[1]

### The ADA Standard for Workplace Conduct Violations

The Americans with Disabilities Act ("ADA") defines disability discrimination to include the use of qualification standards or selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, while recognizing an exception where the standard or other selection criteria is used in a way that is both "job-related for the position in question" and "consistent with business necessity."[2] The EEOC has issued guidance interpreting this exception to mean that an employer may "discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability," provided that the conduct standard is job-related and consistent with business necessity.[3] If the employer is aware of the potential need for a reasonable accommodation, and that accommodation would enable an otherwise-qualified individual with a disability to meet the conduct standard in the future, there is a concomitant obligation on the employer's part to provide such an accommodation, unless doing so would cause undue hardship.[4]

### *Mayo v. PCC Structurals, Inc.*

Plaintiff Timothy Mayo worked as a welder at an industrial facility ("PCC") for over two decades. Although diagnosed with major depressive disorder, with the help of treatment and medication, he was able to work without major incident for almost all of his employment. In 2010, several employees – including the plaintiff – complained that a supervisor had been bullying them and "making work life miserable." After a meeting with a co-worker and a representative from human resources to discuss the supervisor's bullying, Mayo began to make threatening comments indicating that he felt like "blowing off" the heads of the supervisor and another manager with a shotgun, that he wanted to "take out"

## Recent ECJ ruling expands concept of associative discrimination

By Dr. Lawrence Rajczak, MoFo Berlin

The European Court of Justice ("ECJ") recently handed down a ruling that could turn out to have a considerable impact on European anti-discrimination law. In the ruling, the ECJ decided that an individual can successfully bring an indirect discrimination claim even if it does not itself share the protected characteristic of the group that is being discriminated against by the indirectly discriminating practice (Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*). The decision may profoundly influence the outcome of discrimination cases brought before the courts in the future. It will likely also necessitate changes in the existing anti-discrimination legislation of some EU member states. Although the case's subject matter is not employment-related, the ruling can still be expected to impact the EU member states' labor and employment laws, as this field of law is traditionally heavily influenced by the EU anti-discrimination directives and their corresponding case law.

### The Ruling

The ruling arose from a business practice of a Bulgarian electricity supply company. In neighborhoods where the population was predominantly of Roma origin, the electricity supplier had installed the electricity meters at a height of 6 meters (i.e., 20 feet). Usually, in other neighborhoods, the electricity supplier placed the meters at the more convenient height of 1.7 meters (i.e., 6 feet). The electricity supplier justified this installation policy by


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management, and that he wanted to "start shooting people."

Mayo's threats were reported to company management, and PCC's Senior Human Resources Manager called the plaintiff to discuss the threats. After Mayo acknowledged that he "couldn't guarantee" that he would refrain from acting out his threats, his employment was suspended. Mayo was interviewed by police and consented to be admitted to a hospital. He was released after six days and then took a medical leave of absence from work. After two months, his treating psychiatrist cleared Mayo to return to work, recommending that he be placed under a different supervisor as an accommodation. Instead, PCC terminated his employment.

Mayo filed a lawsuit contesting his termination on the grounds that his threats were caused by his diagnosed major depressive disorder and that PCC failed to accommodate his disability by not returning him to work under a different supervisor.[5] The district court granted summary judgment in favor of PCC, finding that Mayo failed to prove a *prima facie* case of disability discrimination because, once he made "violent threats," Mayo was no longer a "qualified individual" entitled to protection against disability-based discrimination.

The Ninth Circuit affirmed on the same basis, finding that Mayo was not a "qualified individual" under the ADA because he could not perform the essential job functions of "handl[ing] stress and interact[ing] with others," regardless of whether he received any reasonable accommodation. While showing sensitivity to the rights of employees affected by mental illness, the Court ultimately concluded that "[a]n employee whose stress leads to serious and credible threats to kill his coworkers is not qualified to work for the employer, regardless of why he makes those threats." Because the Court found that Mayo's conduct effectively removed him from protection under the ADA, it was not necessary for the Court to consider whether PCC terminated him for a legitimate, non-discriminatory reason, or whether PCC should have provided his requested accommodation. Citing similar precedent from the Seventh Circuit, the Court explained:

citing the unusual amount of tampering that allegedly occurred in neighborhoods with a high degree of Roma population. The claimant – a Bulgarian national of non-Roma origin – owned and operated a grocery store in a neighborhood where the meters were installed at a height of 6 meters. Despite not being of Roma origin herself, the claimant brought a claim before the Bulgarian Anti-Discrimination Commission and argued that the meter installation practice, which denied her the ability to keep track of her electricity consumption, constituted unfair racial discrimination against members of the Roma ethnic group.

The ECJ decided that even though the claimant was herself not a member of the Roma ethnicity, she could still successfully bring her anti-discrimination case based on ethnic discrimination because she suffered less favorable treatment alongside the discriminated-against individuals who actually possessed the relevant characteristic.

While the ECJ has already ruled in favor of associative discrimination claims with regard to cases of direct discrimination (Case C-303/06 *Coleman v Attridge Law*), the current ruling now clarifies that the principle of associative discrimination also applies to indirect discrimination cases – i.e., cases in which a certain practice, policy or procedure, albeit not directly treating individuals with a protected characteristic less favorably because of the characteristic, nevertheless has the effect of putting such individuals at a disadvantage.


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*The [ADA] does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge—in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone. The [ADA] protects only "qualified" employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one.*[6]

## Lessons From Mayo

Around one in five adults has a mental, behavioral, or emotional disorder that either currently meets diagnostic standards or did so within the past year, according to research published by the National Institute of Mental Health.[8] Thus, it is rather likely that an employer will encounter an employee whose work obligations may interfere with his or her mental health condition. Of course, the overwhelming majority of such cases do not present safety concerns that approach the facts of *Mayo*.[7] Thus, although *Mayo* introduces some clarity into Ninth Circuit precedent by recognizing that employers may discipline potentially or actually disabled employees for workplace conduct that presents a serious risk of violence, the scope of its application is rather narrow.

Although a number of disabilities might bear on one's ability to perform the essential job functions of "handl[ing] stress and interact[ing] with others," it is clear that *Mayo* does not provide a broad license to discipline employees whose mental health conditions negatively impact their job performance. The opinion acknowledged that its holding is premised upon the "extreme" and particular facts of the case.

The notion that an employee who has been a "qualified individual" and who has demonstrated that he could perform the essential functions of the employment position for over 20 years could lose that status based on a single incident may be difficult for employers to apply, particularly where an employee's conduct involves threats that are less direct than Mayo's. The EEOC's enforcement guidance on accommodating psychiatric disabilities contemplates that a disabled

### Implications

It is likely that the ECJ's decision will lead to an increase in discrimination-based claims being brought before the courts of the EU member states. The question of whether claimants could bring a case based on the concept of associative indirect discrimination was the subject of legal debates in some of the member states, in Germany for example. Current German anti-discrimination legislation is open to being construed both as to allow the concept or to prohibit it. Now that the issue has been conclusively settled by the ECJ's ruling with binding effect for the EU member states, German courts are likely to see more claims based on alleged indirect discrimination.

In other EU member states, the ECJ's ruling may even necessitate changes to existing legislation. For example, in the UK, the UK Equality Act explicitly requires a claimant in an indirect discrimination case to itself possess a protected characteristic – a requirement which is now in direct conflict with the ECJ's interpretation of the EU's anti-discrimination directives. Challenges to the respective provisions of the UK Equality Act, based on an alleged improper implementation of EU law, can therefore be expected in the future.


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employee could lose his or her "qualified" status by having an altercation or making a threat. In the example illustrating this principle, however, the employer lacked any prior knowledge of the employee's disability.[9] *Mayo*'s holding, which affirmed the employer's adverse action although the employer had long been aware of the employee's major depressive disorder, expands upon the EEOC's position as stated in its enforcement guidance.

In light of its fact-driven holding, *Mayo* offers limited guidance to employers about the extent of their legal responsibilities when attempting to respond to employee conduct that is caused by or related to an employee's mental health condition but does not involve actual violence or violent ideations. Where an employee's violation of a workplace conduct standard stems from a disability, and a risk of violence is not present, the obligation to attempt accommodation to mitigate future misconduct persists. Thus, as before, disciplining employees for conduct that is related to a disability requires a measured and cautious approach.

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1 *Mayo v. PCC Structurals, Inc.*, No. 13-35643, 2015 U.S. App. LEXIS 13065 (9th Cir. Jul. 28, 2015) ("*Mayo*").

2 42 U.S.C. §12112(b)(6); *see also* 29 C.F.R. §§ 1630.10(a), 1630.15(c).

3 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 (Mar. 25, 1997), at Question 30, available at http://www.eeoc.gov/policy/docs/psych.html (last visited Aug. 25, 2015). The ADA was substantially amended in 2008 by the ADA Amendments Act ("ADAAA"). The EEOC's "Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities" predates these amendments and has not been updated in the post-ADAAA context. Because the ADAAA did not amend the statutes and regulations addressing the use of qualification standards or selection criteria (except in the limited context of uncorrected vision tests), the cited portions of the Enforcement Guidance have not been superseded by the ADAAA or its updated regulations.

4 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, *supra*, at Question 31.

5 Mayo's claim of disability discrimination proceeded under section 659A.112 of the Oregon Revised Statutes, Oregon's state-law counterpart to the ADA, which "shall be construed to the extent possible in a manner that is consistent with any similar provisions of the [ADA]." *See* Or. Rev. Stat. § 659A.139(1).

6 *Mayo, supra*, at *8 (quoting *Palmer v. Circuit Court*, 117 F.3d 351, 352 (7th Cir. 1997)).

7 Some authors have opined that rare, extreme fact patterns regarding workplace violence, such as the ones in *Mayo*, may actually increase the stigma faced by employees with cognitive disabilities by drawing public attention in a manner that perpetuates the idea that persons with cognitive disabilities behave irrationally and dangerously. *See, e.g.*, Sheree Wright, *Protecting Your Employees From Harm While Accommodating Mental Illness: Are Employers In a Bind?*, American Bar Association, Labor and Employment Law Section, Annual Meeting (Aug. 7, 2014), at p. 4.

8 National Institute of Mental Health, *Statistics: Any Mental Illness (AMI) Among Adults* (2013), *available at* http://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among-adults.shtml (last visited Aug. 25, 2015).

9 *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, *supra*, at Question 31, Example C (suggesting employer need not rescind termination for violating workplace policy against threatening supervisors, where the employee discloses his disability and requests an accommodation after the adverse action and where "this is the employee's first request for accommodation and also the first time the employer learns about the employee's disability").

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