

### Humphrey Decision

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On February 13, 2001, the Ninth Circuit Court of Appeals (which encompasses California) ruled that an employee, who was disciplined and eventually terminated for tardiness linked to her Obsessive-Compulsive Disorder ("OCD"), was denied a reasonable accommodation for her disability. In reaching this decision, the Ninth Circuit suggested, for the first time, that in the appropriate circumstances OCD qualifies as a protected "disability" which employers must accommodate. In addition, the Ninth Circuit emphasized that all employers have a "continuing" duty to participate in the "interactive process" with disabled employees.

#### The Facts of the Case

The employee, Carolyn Humphrey, worked at Modesto Memorial Hospital ("MMH") from 1986 through 1995. Throughout her tenure, Ms. Humphrey was judged to be an excellent performer who consistently exceeded her employer's standards for speed, accuracy and productivity. However, beginning in 1989 and continuing until her termination in 1995, Ms. Humphrey experienced problems getting to work on time, or at all.

Ms. Humphrey's inability to show up for work in a timely fashion was linked to a series of rituals she engaged in on an almost daily basis. More specifically, before leaving for work she would rinse her hair for up to an hour, and if after brushing her hair it did not "feel right" she would return to the shower to wash it again and again. The process of washing and preparing her hair often took up to three hours. Ms. Humphrey would then feel compelled to both dress very slowly and check (and recheck) for any papers she might need to take with her to work. She also often pulled out strands of her hair (and closely examined them), because she felt something was crawling on her scalp. Once she inevitably realized that her rituals had caused her to be late for work, Ms. Humphrey would often panic and become embarrassed, making it even more difficult for her to leave home and get to work.

As a result of Ms. Humphrey's difficulties with tardiness and absenteeism, MMH eventually gave her a letter of warning in June 1994. The warning did not work, however, and in December 1994 Ms. Humphrey received a sterner warning. She was also directed to the hospital's Employee Assistance Program ("EAP"). In May 1995, she asked the hospital's EAP nurse if she could see a psychiatrist for her problems.

In May 1995, the psychiatrist who MMH directed Ms. Humphrey to see determined that she had OCD and that her condition directly contributed to her problems with being on time. Ms. Humphrey then saw a psychologist who confirmed that her OCD was the probable cause of her absenteeism and tardiness.

After these consultations, MMH met with Ms. Humphrey and agreed to accommodate her condition by providing her with a flexible "start time arrangement." Unfortunately, this accommodation was unsuccessful and Ms. Humphrey continued to be late for and miss work. Ms. Humphrey suggested that she be allowed to work from home (which the hospital permitted other medical transcriptionists to do) as an alternative

accommodation. MMH denied this request, on the grounds her disciplinary record for tardiness did not warrant such a change. Because Ms. Humphrey's inability to get to work continued to be a problem, MMH terminated her employment on October 10, 1995. Approximately one year later, Ms. Humphrey filed a lawsuit alleging disability discrimination under both the federal Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA).

## **The Ninth Circuit's Ruling**

The Ninth Circuit first ruled that Ms. Humphrey had proffered sufficient evidence to establish that her OCD made it significantly more difficult for her to accomplish the basic tasks of washing and dressing when compared to the average person in the population. The Court specifically held that, "an individual [such as Ms. Humphrey] who has a physical or mental impairment that causes him [or her] to take inordinately more time than others to complete a major life activity is substantially limited as to that activity under the ADA." Hence, because Ms. Humphrey's OCD required her to spend an "inordinate" amount of time caring for herself, it constituted a disability.

MMH argued that even if Ms. Humphrey was disabled, it had met its obligations under the law by providing her with a reasonable accommodation; the flex-time schedule. The Ninth Circuit disagreed. It held that if the initial attempt at accommodation fails, an employer is obligated "to explore further methods of accommodation before terminating" the employee. One attempt at an accommodation is often not enough. The duty to accommodate, said the Court, "is a 'continuing' duty that is 'not exhausted by one effort.'"

The Court found it noteworthy that MMH fired Ms. Humphrey without considering the other accommodations she had requested: working from home and a leave of absence. According to the court, working from home is a "reasonable accommodation" where the work can be performed at home and granting the request would not create an undue hardship on the employer. The Court found MMH's argument that Ms. Humphrey was not eligible under its internal policies to work at home because she had been disciplined for tardiness to be particularly unpersuasive. It held that it would be incongruous for an employer to deny a reasonable accommodation for disciplinary reasons where the effects of the employee's disability were the sole reason for the discipline in the first place. The Court further concluded that the granting of a leave of absence is a reasonable accommodation, if granting the leave does not create undue burdens on the employer. In this case, the employer failed to consider either of these options.

## **What's This Mean For Employers?**

The *Humphrey* decision emphasizes a very important, but often overlooked point, about disability law: that is, the employer continuing duty to engage in the "interactive process" with a disabled employee to find a "reasonable accommodation." If an initial accommodation agreed upon by the employer and the disabled employee is not successful, the employer must re-engage in the interactive process to "explore further methods of accommodation." A single, unsuccessful attempt at accommodation – followed by a quick termination if attendance or performance problems continue – simply does not satisfy an employer's legal obligations. If you believe that one of your employees may have a serious medical condition, or if you are already dealing with a legitimately "disabled" employee, we recommend that you contact your employment counsel for concrete advice on how to proceed.

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