In a decision that should cause significant concern among employers, the Ninth Circuit Court of Appeals ruled earlier this month that an employer may not terminate an employee when the employee engages in misconduct which is caused by a disability. In *Gambini v. Total Renal Care, Inc., d/b/a Davita, Inc.*, No. 05-35209, 2007 U.S. App. LEXIS 5444 (March 8, 2007), the plaintiff suffered from a bipolar disorder which caused her to experience mood swings and to engage in otherwise inappropriate conduct in the workplace including outbursts directed toward her co-workers. In addition to the inappropriate workplace conduct, Gambini found that she was unable to concentrate or assign priorities to tasks and was admittedly having significant difficulty performing her job. Gambini freely discussed with her coworkers and her managers the fact that she was bipolar, that she was having difficulty performing her job and that she was struggling to find the right combination of medicines to control her symptoms.

As a result of Gambini’s workplace conduct, she was called to a meeting where she was to be placed on a performance improvement plan. Gambini arrived at the meeting in an agitated state because she was unaware of the nature or purpose of the meeting. During the meeting, she was rude and rattled off a series of profanities to her supervisors. She was later seen kicking and throwing objects. After the meeting, Gambini allegedly developed suicidal thoughts which she reported to her nurse practitioner who recommended that she seek immediate hospitalization. As a result of this recommendation, Gambini sought and received confirmation of an FMLA leave, subject to medical certification. However, after approving the medical leave, the company decided to terminate Gambini’s employment because investigation revealed that her co-workers were concerned about her outbursts and because of her conduct in the meeting. When notified of the termination, Gambini specifically requested that the company reconsider because the conduct was a consequence of her medical condition. The company refused. Gambini sued.

A jury decided that Davita had not engaged in discriminatory conduct because Gambini had been terminated as a result of inappropriate work place conduct. Gambini petitioned the District Court for a new trial which motion was denied. On appeal, the Ninth Circuit Court of Appeals ruled that Washington State’s disability laws are consistent with the American’s With Disabilities Act (ADA). Therefore, if a plaintiff can establish that misconduct is causally connected to a disability, an employer may not use such misconduct as a basis for termination.

What does this mean for employers? This ruling by the Ninth Circuit is not new but is a reiteration of that court’s interpretation of the disability laws. The court came to a similar conclusion in 2001 when an employee was terminated as result of Obsessive Compulsive Disorder (OCD) which prevented her from arriving to work on time. In that case, the employer had tried to accommodate the employee by providing a flexible work schedule but failed to provide any additional or different accommodations. In rendering its decision in *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (2001) the Ninth Circuit ruled that the employer had violated the ADA and the California Anti-discrimination laws by terminating the employee instead of providing the accommodation of permitting the employee to work at home, since working at home would not constitute an undue hardship.
What should employers do? When faced with a situation where an employee has engaged in misconduct in the workplace or is otherwise breaking work rules, it is incumbent on employers to determine whether there is a disability giving rise to the misconduct. The best manner for the employer to protect itself and perform such an investigation is to ask the employee at issue whether there is some condition giving rise to the misconduct which the employer could alleviate by providing assistance. If the employee answers in the affirmative, the employer must explore reasonable accommodations that would permit the employee to perform the essential functions of the job. If the employee responds that there is no medical condition at the root of her behavior, the employer has likely satisfied its legal obligations and may proceed with the termination. After all, an employer still has no requirement to provide an accommodation if it is unaware of any disability.

In any event, the employer must document the entire procedure. In particular, the employer should document in writing: (1) Whether the employer is aware of or the employee identified a cause for her behavior; (2) What accommodations were considered; and (3) Why each such accommodation presented an undue hardship. The problem for the employer in Gambini and Humphrey is that they did not follow such procedures, and simply terminated the employee without considering the root of the employee’s conduct and the accommodations that would improve the employee’s conduct. In Gambini, the accommodation which was requested and granted was FMLA leave only to be rescinded. In Humphrey, the accommodation which was requested and denied was a leave of absence and/or working from home. If the employers had engaged in the interactive process described above, the Ninth Circuit may have had no need to even reach the issue of whether termination based on behavior attributable to a disability is unlawful.

Although this decision may appear to make no logical sense, unless and until the United States Supreme Court weighs in on this issue, it is the law of this Circuit and must be followed. This decision makes it even more critical that businesses contact their employment attorneys before acting on terminations if there is any suspicion that the misconduct might in any way be related to a disability.