

Mental Health Disabilities in the Workplace: the ADA and the Provider's Role



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Outline

- I. Overview of Mental Health Issues in the Workplace
- II. EEOC Resource Document
- III. EEOC Enforcement
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Mental Health Concerns in the Workplace

Mental Health: 1 in 4 Adults

- The Job Accommodation Network (JAN) reports that approximately 61.5 million Americans, one in four adults, experience mental health impairment in a given year (JAN citing National Alliance on Mental Illness, 2013).
- One in seventeen individuals lives with serious mental health impairment, such as schizophrenia, major depression, or bipolar disorder (JAN citing National Institute of Mental Health, 2013).

Mental Health in the Workplace: Direct and Indirect Costs

- Depression and other mental health conditions have a significant association with impaired work performance, and can have a significant economic impact on the workplace.
- The economic impact on the workplace includes both direct and indirect costs such as lost work days, decreased productivity, impact on co-worker performance, increased insurance costs, increased workplace injuries, paid disability benefits including paid sick time, and costs of hiring and training replacement workers (Goldberg 1642).

Fitness for Duty: Mental Health Exam

- An employer may require an employee to undergo medical exams that are “shown to be job-related and consistent with business necessity.”
- Thus, an employer may require an employee to submit to a fitness-for-duty examination after receiving reports that an employee yelled at co-workers, talked to herself, had mood swings
- Co-workers may also report concerns that the employee might become physically violent.
- The Employer may request the employee to see a psychologist for assessment that she can safely perform essential job duties.

Recent Decision: *Painter*

- In *Painter v. Illinois Department of Transportation*, the Seventh Circuit affirmed summary judgment and dismissed the plaintiff's ADA claim following multiple mental health evaluation referrals.
- The Seventh Circuit found that “[p]reventing employees from endangering their coworkers is a business necessity.”
- The court noted, however, “annoying or inefficient” behavior is not sufficient to warrant a required medical examination. Rather, an employer must meet a high burden of demonstrating “a genuine reason to doubt whether that employee can perform job-related functions.”
- In *Painter*, the court held that the employer met that burden because it established through multiple, documented statements and complaints, and other documentation, that the plaintiff posed a potential safety risk.

ADA Disability Defined

- The ADAAA defines a disability using a three-pronged approach.
- Specifically, the ADAAA provides that a "disability" includes (A) a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"); (B) a record of a physical or mental impairment that substantially limited a major life activity ("record of"); or (C) when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as").
- Examples of major life activities that may be particularly relevant to individuals with mental health conditions include, but are not limited to, caring for ones' self, concentrating, thinking, sleeping, interacting with others, and the operation of major bodily functions including brain and neurological functions.

Mental Health: A Hidden Disability

- An employee's mental health condition is often not apparent to the employer even if it satisfies the definition of "disability."
- A mental impairment is defined by statute as "[a]ny mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities."
- Employers are generally not liable for employment discrimination if they are unaware of an employee's disability.
- Thus, the invisibility of mental health conditions can often make it more difficult for employees in the workplace who can feel pressure to self-disclose at an early stage.
- For example, in *Shealey v. Equal Employment Opportunity Commission*, Complainant sent multiple requests to her District Director asking to be voluntarily reassigned. It was not until one month after these requests were denied that Complainant informed the Director that she was experiencing cumulative stress and was unable to maintain concentration, pace, and persistence sufficient for her challenging 40-plus-hour position thereby raising Rehabilitation Act concerns.

Duty to Provide Reasonable Accommodation

- The ADA requires an employer to provide reasonable accommodation to qualified employees with disabilities, mental or physical, unless doing so would cause an undue hardship.
- A reasonable accommodation is a change in the way things are typically done at work that enables an individual with a disability to apply for a job, perform the essential functions of a job, or have equal access to the benefits and privileges of employment.
- Reasonable accommodations can include modifications or adjustments to the work environment or to the manner or circumstances under which the individual's position is performed which enable the individual with a disability to perform the essential functions of the position the individual holds or desires.
- Reasonable accommodation can also include modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as access to training opportunities and employer-sponsored social events.
- A modification or adjustment must also be effective in meeting the needs of the individual.
- Some examples of reasonable accommodations include modifications to an employee's workstation or equipment; altered break or work schedules; telework, and reassignment to a vacant position

EEOC Guidance

Depression, PTSD, & Other Mental Health Conditions in
the Workplace: Your Legal Rights

EEOC Guidance

- In December 2016, the EEOC released guidance on mental health issues in the workplace.
- The guidance explains that job applicants and employees with mental health conditions are protected from employment discrimination and harassment based on their conditions.
- The guidance also answers questions about how to request an accommodation, describes some types of accommodations, and addresses restrictions on employer access to medical information, confidentiality, and the role of the EEOC in enforcing the rights of people with disabilities.

Guidance for Mental Health Providers

- The recent EEOC publications for the employee and his/her treating health care professional(s) are because
 - they clearly support the right of the employer to obtain necessary information about the condition,
 - guide healthcare providers in focusing on performance of essential job functions, and
 - support the employee's obligation to engage in an interactive dialogue about reasonable accommodations that would allow the employee to perform his/her essential job duties safely without direct threat to the employee or others in the workplace.

Reasonable Accommodations

- The guidance is in a question and answer format and suggests some reasonable accommodations which may allow a person with a mental health condition to perform their essential job duties.
- Examples include altered break and work schedules (e.g., scheduling work around therapy appointments), quiet office space or devices that create a quiet work environment, changes in supervisory methods (e.g., written instructions from a supervisor who usually does not provide them), specific shift assignments, and permission to work from home.
- The document includes a link to another EEOC Fact Sheet, *The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work*, and recommends that an employee provide a copy to their treating physician when requesting medical support for a reasonable accommodation.

Major Life Activities

- A reasonable accommodation may be obtained for any condition that would, if left untreated, "substantially limit" one or more major life activities.
- Major Life Activities include brain/neurological functions and activities such as communicating, concentrating, eating, sleeping, regulating thoughts or emotions, caring for oneself, and interacting with others.
- The client does not actually have to stop treatment. The client's symptoms in the absence of treatment are merely considered in order to determine whether the person has a "disability" under the ADA.

Intermittent Symptoms:

- If the client's symptoms come and go, what matters is how limiting they would be when present.
- Federal regulations say that some disorders should easily be found to be disabilities, including major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.
- Other conditions may also qualify depending on the individual's symptoms.
- Additionally, an individual may qualify for a reasonable accommodation if he or she has had a substantially limiting impairment in the past.

Drugs and Alcohol

- The ADA, however, does not protect individuals currently engaging in the **illegal use of drugs**, where an employer takes an action based on such use.
- Someone with alcoholism or who was addicted to drugs in the past may be entitled to a reasonable accommodation, such as time off for treatment.
- However, the ADA specifically says that employers are not required to tolerate employees using or being under the influence of alcohol or illegal drugs on the job, or unsatisfactory performance or conduct relating to the use of alcohol or illegal drugs.

How Can I Help My Client Get a Reasonable Accommodation?

- Your client may ask you to document his or her condition and its associated functional limitations, and to explain how a requested accommodation would help.
- The employer, perhaps in consultation with a health care professional, will use this information to evaluate whether to provide a reasonable accommodation, and if so which one.
- The person evaluating the accommodation request also may contact you to ask for clarification of what you have written, or to provide you with additional information to consider. For example, you may be told about a particular job function and asked whether the requested accommodation would help your client to perform it, or you may be asked whether a different accommodation would be effective where, for example, the requested accommodation would be too difficult or costly for the employer to provide.
- Employers are required to keep all information related to reasonable accommodation requests confidential.

Discrimination Prohibited; But Employee Must be able to Perform Essential Job Duties

- The ADA prohibits employers from harassing your client because of a mental health condition, and from terminating or taking other adverse actions **because of** a mental health condition.
- However, the patient must be able to perform the essential duties of the job with or without a reasonable accommodation.
- Generally, the employee must meet performance and conduct standards.

What Kind of Documentation Would Be Helpful?

- Employers may require documentation that establishes how your client's condition limits job performance, and how an accommodation would help to overcome the limitations.
- However, you should not simply provide your client's medical records, because they will likely contain unnecessary information.
- Documentation is most likely to help your client obtain a reasonable accommodation if it explains, using plain language, the following:
- Your professional qualifications and the nature and length of your relationship with the client. A brief statement is sufficient.
- The nature of the client's condition. Based on your professional judgment, state the nature of the client's mental health condition, even if the client is currently not experiencing symptoms (e.g., because of the use of medication or because the condition is in remission). If your client asks you not to disclose the specific diagnosis, it may be sufficient to state the general type of disorder (e.g., "an anxiety disorder"), or to describe how the condition substantially limits a brain/neurological function or some other major life activity.

Functional Limitations

- The client's functional limitations in the absence of treatment. Describe the extent to which the condition would limit a brain or neurological function, or another major life activity (e.g., concentrating, interacting with others, eating, sleeping, learning, reading, communicating, or thinking), in the absence of therapy, medication, and any other treatment.
- If the symptoms of the condition come and go or are in remission, describe the limitations during an active episode. It is sufficient to establish substantial limitation of one major life activity.

Need for Reasonable Accommodation

- Explain how the client's condition makes changes at work necessary.
- For example, if your client needs an accommodation to perform a particular job function, you should explain how the client's symptoms - as they actually are, with treatment - make performing the function more difficult.
- If necessary, ask your client for a description of his or her job duties. Limit your discussion to the specific problems that may be helped by a reasonable accommodation.
- Also explain to the employer why your client may need an accommodation such as a schedule change (e.g., to attend a therapy appointment during the workday) or time off (e.g., to adjust to a new medication, receive treatment, or recover).

Proposed Accommodations

- If you are aware of an effective accommodation, you may suggest it.
- Do not overstate the need for a particular accommodation, in case an alternative is necessary.
- Employer does not have to provide the requested accommodation if another accommodation would allow the employee to perform the essential job duties.
- Be careful about “leave” as an accommodation.

Providers Cautioned to Maintain Confidentiality

- The ADA does not alter a health provider's ethical or legal obligations about confidential health information.
- The Guidance advises the provider to obtain authorization to release such information to the employer.
- The Guidance outlines the information which would be helpful in preparing a letter in support of a patient's reasonable accommodation request including the nature of the patient's condition, functional limitations in the absence of treatment, the need for reasonable accommodation, and suggested accommodations.

EEOC Enforcement

EEOC: Discrimination Based on Mental Health on the Rise

- The Guidance states that charges of discrimination based on mental health conditions are on the rise.
- During fiscal year 2016, the EEOC resolved almost 5,000 charges of discrimination based on mental health conditions, obtaining approximately \$20 million for individuals with mental health conditions who were unlawfully denied employment and reasonable accommodations.

Duty to Accommodate: Limits

- The employer may be required to provide a reasonable accommodation to the employee.
- The employer – and employee -- must engage in the interactive dialogue.
- Employers do not have to hire or employ an individual who cannot perform the job with a reasonable accommodation or whose mental illness poses a direct threat or safety risk.
- Accommodation cannot impose an “undue hardship.”

Wrap Up

Review the EEOC Guidance

- EEOC guidance clearly supports the right of the employer to obtain necessary information about the condition;
- Guides healthcare providers in focusing on performance of essential job functions; and
- Supports the employee's obligation to engage in an interactive dialogue about reasonable accommodations that would allow the employee to perform his/her essential job duties safely without direct threat to the employee or others in the workplace.

What Can Employers Do?

- Good workplace policies and good management can mitigate or eliminate common stressors linked to and/or triggering depression, including improving job satisfaction, eliminating bullying, and improving co-worker collegiality to reduce both direct and indirect costs of mental health stressors in the workplace.
- Employers should be pro-active in creating a workplace culture which mitigates the likelihood of depression and other anxiety disorders for all employees, including employees who otherwise would have no anxiety related disorder.
- Many employers today are implementing “Wellness Programs” for the workplace.

Questions?

NAJJAR EMPLOYMENT LAW GROUP, P.C.

- **Debra Dyleski-Najjar** founded the Najjar Employment Law Group, P.C. in April, 2008 as a labor, employment and benefits boutique law firm providing top quality legal advice, as well as litigation expertise, for employers to keep employers ahead of the curve. Ms. Najjar is a graduate of Boston University School of Law, third in her class, and a magna cum laude graduate of Wellesley College. She is admitted to practice in the state and federal courts of Massachusetts, Maine and New Hampshire as well as the United States Supreme Court. Ms. Najjar is a fellow of the College of Labor and Employment Attorneys, a certified member of the American Society of Pension Professionals and Actuaries, AV rated by Martindale Hubbell, and recognized as a New England Super Lawyer over ten consecutive years. Over her 30 plus year career, Ms. Najjar has advised many employers regarding HIPAA and privacy law compliance, as well as implementation of medical examinations, well programs, medical surveillance programs and providing reasonable accommodation.



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