Psychiatric Disabilities in the Workplace

Don't Just “Go Through the Motions”


- “the interactive process of the ADA demands active participation by both parties in creating a reasonable accommodation, not just occasional employer reactions as a mentally ill employee works his way through the resources structure”

- a jury could find that the employer “was merely attempting to placate [plaintiff] rather than making good faith reasonable efforts to accommodate him”

Finding Effective Accommodations

- In some instances, the precise nature of an effective accommodation for an individual may not be immediately apparent. Mental health professionals, including psychiatric rehabilitation counselors, may be able to make suggestions about particular accommodations and, of equal importance, help employers and employees communicate effectively about reasonable accommodation.


Workplace Environment

• Simple physical changes to the workplace may be effective accommodations for some individuals with psychiatric disabilities. For example:
  • room dividers, partitions, noise-cancelling headphones, or other soundproofing or visual barriers between workspaces may accommodate individuals who have disability-related limitations in concentration
  • moving an individual away from noisy machinery or reducing other workplace noise that can be adjusted (e.g., lowering the volume or pitch of telephones) are similar reasonable accommodations
  • permitting an individual to wear headphones to block out noisy distractions also may be effective
  • rearranging the desk placement of an individual with PTSD so they do not have to sit with their back to the door

Modifying a Policy

• Example: A retail employer does not allow individuals working as cashiers to drink beverages at checkout stations. The retailer also limits cashiers to two 15-minute breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in order to combat dry mouth, a side-effect of his psychiatric medication. This individual requests reasonable accommodation. In this example, the employer should consider either modifying its policy against drinking beverages at checkout stations or modifying its policy limiting cashiers to two 15-minute breaks each day plus a meal break, barring undue hardship. The employer is permitted to make an exception as a disability accommodation while still holding all other cashiers to the usual rule.

Modifying Supervisory Methods

• In some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation without undue hardship by, for example:
  • communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by e-mail)
  • providing or arrange additional training or modified training materials. more detailed day-to-day guidance, feedback, or structure in order to perform his job
  • periodic meetings to review the status of large projects and identify which steps need to be taken next
  • more detailed day-to-day guidance, feedback, or structure (adjusting the level of supervision)
Leave or Schedule Change for Symptoms or Treatment

- Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a disability is a reasonable accommodation, unless (or until) the employee’s absence imposes an undue hardship on the operation of the employer’s business. This includes leaves of absence, occasional leave (e.g., a few hours at a time), and part-time scheduling.

- A related reasonable accommodation is to allow an individual with a disability to change his/her regularly scheduled working hours, for example, to work 10 AM to 6 PM rather than 9 AM to 5 PM, barring undue hardship. Some medications taken for psychiatric disabilities cause extreme grogginess and lack of concentration in the morning. Depending on the job, a later schedule can enable the employee to perform essential job functions.

Providing or Allowing a Job Coach

- An employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship.

- An employer also may be required absent undue hardship to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.

Swapping Marginal Tasks

- Jacobs v. N.C. Administrative Office of the Courts, __ F.3d ___ (4th Cir. Mar. 12, 2015). Plaintiff, an office assistant who was promoted to deputy clerk, had duties that included microfilming and filing. Four or five of the 30 deputy clerks were assigned to provide back-up customer assistance at the front counter. When plaintiff began training on the front counter, she experienced extreme stress, nervousness, and panic attacks. She explained to management that she had social anxiety disorder with a past history of medical treatment including medication. She requested as an accommodation to handle a different task or only work at the counter once per week, and was subsequently terminated.

- Held: Where deputy clerk’s duties were mainly filing, and only 4 or 5 out of 30 deputy clerks were assigned to perform back-up front counter duty, a jury could conclude plaintiff could not perform counter duty due to disability could be accommodated by assigning counter duty to other employees and assigning plaintiff to another task instead.
More Case Examples

- **McMillan v. City of New York**, 711 F.3d 120 (2d Cir. 2013). An employee with side effects from psychiatric medication requested flexible arrival and departure times; this could be a reasonable accommodation that did not pose an undue hardship in light of the nature of the job and his work history.

- **Skerski v. Time Warner Cable Co.**, 257 F.3d 273 (3d Cir. 2001). An installer technician with panic and anxiety disorder who could not work at heights may be qualified where the record shows that he performed satisfactorily for three years without performing climbing tasks.

- **Conneen v. MBNA Am. Bank**, 334 F.3d 318 (3d Cir. 2003). A manager with clinical depression was often tardy for his scheduled 8:00 am arrival due to the side effects of his medication could be qualified with the accommodation of a schedule change.

- **Humphrey v. Memorial Hosp.**, 299 F.3d 1128 (8th Cir. 2002). A medical transcriptionist unable to maintain regular and predictable attendance may be qualified when potential accommodations such as a leave of absence or telework are available.

- **Battle v. UPS, Inc.**, 438 F.3d 856 (8th Cir. 2006). A distribution manager with depression that temporarily affected his ability to memorize large amounts of data should have been allowed to return to work with a requested accommodation of notice prior to supervisor meetings of the specific data categories targeted for discussion.

How does the ADA apply where an employee is not taking his or her medication?

- Can the employer deny accommodation on the ground that adherence would eliminate or reduce the need for accommodation?
  - No.

- Does an employer have to make sure an employee takes his medication as prescribed?
  - No. Employers have no obligation to monitor medication because doing so does not remove a barrier that is unique to the workplace. When people do not take medication as prescribed, it affects them on and off the job.

- How should an employer deal with an employee with a disability who is engaging in misconduct because s/he is not taking his/her medication?
  - The employer should focus on the employee’s conduct and explain to the employee the consequences of continued misconduct in terms of uniform disciplinary procedures, as discussed on the following slides. It is the employee’s responsibility to decide about medication and to consider the consequences of not taking medication.

Conduct Issues

- Maintaining satisfactory conduct and performance typically is not a problem for individuals with psychiatric disabilities. Nonetheless, circumstances may arise when employers need to discipline individuals with such disabilities for misconduct, as other employees.

- General Rule: Even if an employee’s misconduct was caused by disability, the employer may impose discipline for violating a workplace conduct standard that is job-related for the position in question and is consistent with business necessity (examples: rules regarding violence, threats of violence, harassment, stealing, or destruction of property).

- But disparate treatment based on disability violates the ADA: make sure any discipline imposed is the same as would be imposed on any employee for engaging in the same conduct.
Example – Disparate Treatment

- An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard — a rule prohibiting intentional damage to equipment — that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

Example – Rule Not Job-Related and Consistent with Business Necessity

- An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer’s company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

- The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.

Accommodation Related to Misconduct

- General Rule: Because reasonable accommodation is always prospective, an employer is not required as an accommodation to excuse misconduct or rescind discipline for violation of a uniformly applied conduct rule that is job-related and consistent with business necessity.

- If an employee will remain employed notwithstanding the discipline (e.g., counseling, warning, letter of reprimand, or temporary suspension), the employer who knows the violation was related to the disability must make reasonable accommodation to enable an the individual to meet such a conduct standard in the future, barring undue hardship.
Example – Accommodation to Meet Conduct Standard After Warning – Schedule Change

• Employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning, arriving at 9:30, 10:00 or even 10:30 even though his scheduled arrival time is 9:00.
• Per uniformly applied progressive discipline system, the employer gives him a disciplinary warning for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule.
• The employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can fulfill his duties by regularly working a schedule of 10:00 AM to 6:30 PM, a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 AM. If not (e.g., duties are time-sensitive such as working a customer-facing shift, etc.), he may be qualified for a vacant position with a different schedule to which he could be reassigned.

Example – Accommodation to Meet Conduct Standard after Suspension – Leave for Treatment

• A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. After receiving a suspension as the second step in uniform, progressive discipline, she discloses her disability, states that it causes her behavior, and requests a leave of absence for treatment. The employer may discipline her because she violated a conduct standard — a rule prohibiting disruptive behavior towards patrons and coworkers — that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future.

Example – Accommodation to Meet Conduct Standard – Reminders about Interaction with Customers

• Taylor v. Food World, Inc., 133 F.3d 1419, 1424 (11th Cir. 1998).
• Grocery clerk position inherently requires an ability to do the job without offending customers, but summary judgment inappropriate because factual issue existed as to whether employee with autism could meet this requirement with reasonable accommodation, such as reminders not to say certain things.
Direct Threat to Health or Safety of Self or Others

- Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a "direct threat."

- "Direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

- A "significant" risk is a high, and not just a slightly increased, risk. The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence.

Direct Threat (cont’d)

- With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat. An individual does not pose a "direct threat" simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability.

- Employers must apply the "direct threat" standard uniformly and may not use safety concerns to justify exclusion of persons with disabilities when persons without disabilities would not be excluded in similar circumstances.

Example

- An individual applies for a position with Employer X. When Employer X checks his employment background, she learns that he was terminated two weeks ago by Employer Y, after he told a coworker that he would get a gun and "get his supervisor if he tries anything again." Employer X also learns that these statements followed three months of escalating incidents in which he had to be restrained from fighting with a coworker. He then revealed his disability to Employer Y. After being given time off for medical treatment, he continued to have trouble controlling his temper and was seen punching the wall outside his supervisor's office. Finally, he made the threat against the supervisor and was terminated. Employer X learns that, since then, he has not received any further medical treatment. Employer X does not hire him, stating that this history indicates that he poses a direct threat.

- This individual poses a direct threat as a result of his disability because his recent overt acts and statements (including an attempted fight with a coworker, punching the wall, and making a threatening statement about the supervisor) support the conclusion that he poses a "significant risk of substantial harm."

- What different facts might counsel a different conclusion? What if Employer Y simply learned that an applicant had prior mental health treatment or hospitalization? What if the facts were the same but a longer length of time had elapsed?
Example

- Hoback v. City of Chattanooga, 2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012). Police officer who returned with PTSD from his National Guard duty deployment in Iraq was found by a jury to be terminated in violation of the ADA.
- The “direct threat to safety” defense was not met because the employer’s determination that officer was not fit for duty was not based on the best available objective medical evidence. For example, it did not consider two other psychological evaluations that had found the plaintiff fit for duty.

Effects of Medication

- An individual does not pose a direct threat solely because s/he takes a medication that may diminish coordination or concentration for some people as a side effect. Whether such an individual poses a direct threat must be determined on a case-by-case basis, based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence.
- Therefore, an employer must determine the nature and severity of this individual’s side effects, how those side effects influence his/her ability to safely operate the machinery, and whether s/he has had safety problems in the past when operating the same or similar machinery while taking the medication. If a significant risk of substantial harm exists, then an employer must determine if there is a reasonable accommodation that will reduce or eliminate the risk.

Example

- An individual receives an offer for a job in which she will operate an electric saw, conditioned on a post-offer medical examination. In response to questions at this medical examination, the individual discloses her psychiatric disability and states that she takes a medication to control it. This medication is known to sometimes affect coordination and concentration. The company doctor determines that the individual experiences negligible side effects from the medication because she takes a relatively low dosage. She also had an excellent safety record at a previous job, where she operated similar machinery while taking the same medication. This individual does not pose a direct threat.
Does an individual who has attempted suicide pose a direct threat when s/he seeks to return to work?

- No, in most circumstances. As with other questions of direct threat, an employer must base its determination on an individualized assessment of the person’s ability to safely perform job functions when s/he returns to work. Attempting suicide does not mean that an individual poses an imminent risk of harm to him/herself when s/he returns to work. In analyzing direct threat (including the likelihood and imminence of any potential harm), the employer must seek reasonable medical judgments relying on the most current medical knowledge and/or the best available factual evidence concerning the employee.

Example

- An employee with a known psychiatric disability was hospitalized for two suicide attempts, which occurred within several weeks of each other. When the employee asked to return to work, the employer allowed him to return pending an evaluation of medical reports to determine his ability to safely perform his job.
- The individual’s therapist and psychiatrist both submitted documentation stating that he could safely perform all of his job functions. Moreover, the employee performed his job safely after his return, without reasonable accommodation.
- The employer, however, terminated the individual’s employment after evaluating the doctor’s and therapist’s reports, without citing any contradictory medical or factual evidence concerning the employee’s recovery. Without more evidence, this employer cannot support its determination that this individual poses a direct threat.

Disability-Related Inquiries and Medical Exams

- Generally, an employer only may seek information about an employee’s medical condition when it is job related and consistent with business necessity.
- This means that the employer must have a reasonable belief based on objective evidence that: an employee will be unable to perform the essential functions of his or her job because of a medical condition; or, the employee will pose a direct threat because of a medical condition.
- Employers also may obtain medical information about an employee when the employee has requested a reasonable accommodation and his or her disability or need for accommodation is not obvious. In addition, employers can obtain medical information about employees when they: are required to do so by another federal law or regulation (e.g., DOT medical certification requirements for interstate truck drivers), when they offer voluntary wellness programs, or per an affirmative action program.
Example

- A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. There is no indication, however, that his failure to learn his route is related in any way to a medical condition.
- Because the employer does not have a reasonable belief, based on objective evidence, that this individual's ability to perform his essential job function is impaired by a medical condition, a medical examination (including a psychiatric examination) or disability-related inquiries would not be job-related and consistent with business necessity.

Example

- A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin around-the-clock labor negotiations during the next several weeks.
- The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk of substantial harm to himself and others. There is no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings.
- The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

Example

- As the result of problems he was having with his medication, an employee with a known psychiatric disability threatened several of his co-workers and was disciplined.
- Shortly thereafter, he was hospitalized for six weeks for treatment related to the condition.
- Two days after his release, the employee returns to work with a note from his doctor indicating only that he is “cleared to return to work.” Because the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition, it may ask the employee for additional documentation regarding his medication(s) or treatment or request that he submit to a medical examination.
Resources

- Enforcement Guidance: Disability-Related Inquiries and Medical Exams Under the ADA, www.eeoc.gov/policy/docs/guidance-inquiries.html

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