

GOOD PLANS GONE BAD: TOP 10 ACCESSIBILITY ISSUES AND MISTAKES WILL BEGIN AT 2 PM ET

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- TransCen, Inc.
 - ▣ Improving lives of people with disabilities through meaningful work and community inclusion

- Mid-Atlantic ADA Center, a project of TransCen, Inc.
 - ▣ Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services



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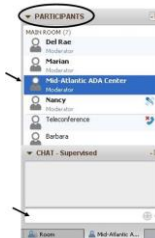
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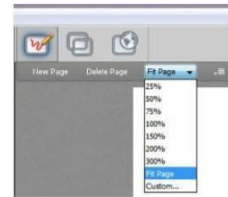
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Customize Your View continued

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- Requests for continuing education credits must be received by 12:00 PM EDT **March 24, 2017**

MENTAL HEALTH CONDITIONS IN THE WORKPLACE

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Office of Legal Counsel, EEOC

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ADA Amendments Act (ADAAA)

ADA Definition of “Disability”

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- Three definitions—
 - Current disability: A mental or physical impairment that substantially limits one or more major life activities
 - Past disability: A record of having such an impairment
 - Perceived disability: Being “regarded as” having such an impairment

- ADAAA (2008) kept the words of the definition but changed their meanings

Effect on “Current Disability”

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- Now the definition is very broad
 - ▣ Many people with ordinary mental health conditions have “current disabilities”
 - ▣ Do not need to be severe or permanent
 - ▣ Condition can be a disability even if it is controlled with medication, or in remission
 - ▣ Some conditions will easily be determined to be disabilities:
 - Major Depressive Disorder, Bipolar Disorder, OCD, PTSD, Schizophrenia

Effect on “Regarded As”

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- I am “regarded as” having a disability =
 - Employer took adverse **action** against me (terminated me, failed to hire me, etc.) because of a perceived **medical condition**
 - ▣ Condition does not need to be a disability
 - ▣ Only exceptions: “transitory **and** minor” conditions
 - ▣ I do not need to actually have the condition
 - ▣ How the employer thinks about the condition is irrelevant

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Mental Health Conditions

Avoiding Stereotypes

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- Almost nothing follows from the fact that someone has a “mental illness”
- Even specific diagnoses can be poor indicators of symptoms
- Most mental health conditions have nothing at all to do with violence

Common Mental Health Conditions

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- The most common mental health conditions, in order, are:
 - Specific Phobia
 - Depression (including dysthymic disorder)
 - Social phobia
 - PTSD
 - Generalized anxiety disorder
 - Panic disorder
 - Bipolar disorder

Social Phobia

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- Feeling highly anxious about being with other people and having a hard time talking to them
- Feeling very self-conscious in front of other people and worried about feeling humiliated, embarrassed, or rejected, or fearful of offending others
- Being very afraid that other people will judge them
- Worrying for days or weeks before an event where other people will be
- Staying away from places where there are other people
- Having a hard time making friends and keeping friends
- Blushing, sweating, or trembling around other people
- Feeling nauseous or sick to your stomach when other people are around

Panic Disorder

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- Sudden and repeated panic attacks of overwhelming anxiety and fear
- A feeling of being out of control, or a fear of death or impending doom during a panic attack
- Physical symptoms during a panic attack, such as a pounding or racing heart, sweating, chills, trembling, breathing problems, weakness or dizziness, tingly or numb hands, chest pain, stomach pain, and nausea
- An intense worry about when the next panic attack will happen
- A fear or avoidance of places where panic attacks have occurred in the past

PTSD

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- Flashbacks or bad dreams
- Staying away from certain places or certain objects or certain thoughts
- Being easily startled or difficulty sleeping or anger outbursts
- Feeling guilty or loss of enjoyment

Major Depression

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- Low mood or “empty” mood
- Difficulty sleeping or oversleeping
- Restlessness or decreased energy
- Eating too little or eating too much

- Possibly pains/headaches/cramps/digestive problems...

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Reasonable Accommodation

What Are They?

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- A change in the way things are normally done that enables the individual to:
 - Apply for a job
 - Do a job
 - Enjoy benefits and privileges of employment

Examples

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- Altered break or work schedules
- Additional leave
- Changes in supervisory methods
- Telework
- Reassignment to a vacant position (“accommodation of last resort”)

- Be creative!

Who Can Get an Accommodation?

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- Someone who needs one because of a “current disability”
 - ▣ But recall: the definition of “current disability” is now very broad
- Or because of a past disability
 - ▣ Example: someone who needs special scheduling for maintenance or monitoring appointments

Limitations

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- Things that employer does not have to provide as a reasonable accommodation:
 - ▣ Changes that would cause “undue hardship” (significant difficulty or expense)
 - ▣ Permission to do less work
 - Eliminating an “essential” job function
 - Lowering production or quality standards
 - Caveat: temporary leave and reassignment may be reasonable accommodations

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Getting Reasonable Accommodations

The “Interactive Process”

Triggering the Interactive Process

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- Easy to do
- Employee somehow makes employer aware that he/she is experiencing difficulty at work because of a medical condition
 - ▣ No need to mention “ADA” or “disability”
 - ▣ No need to have an accommodation in mind
 - ▣ Requester might use colloquial terms like “stress”

Order of Operations

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0. Disability?
1. Need for accommodation?
2. Accommodation available?
 1. Remain on the job?
 2. Temporary Transfer?
 3. Unpaid leave?
 - a) Voluntary alternative: Transitional work assignment
 4. Reassignment?

Step Zero: Disability?

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- If disability is not obvious, employer may require reasonable medical documentation
- Worthwhile to spend time on this question?
 - ▣ The less serious the medical condition is, the easier it is to accommodate
 - ▣ The more serious the condition, the more likely it is to be disability

1. Need for Accommodation

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- Does the condition affect the job?
 - ▣ No need to determine whether better treatment or treatment compliance would eliminate the need for accommodation
 - ▣ No need to determine whether there are other contributing factors

- Again, employer may require reasonable documentation

2. Accommodation Available?

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- Employer and employee should work together to develop an effective accommodation that does not impose undue hardship

- Order of preference
 - ▣ Accommodation that allows the person to remain on the job
 - ▣ Temporary transfer
 - ▣ Unpaid leave
 - Non-mandatory alternative: paid leave or transitional work assignment
 - ▣ Permanent reassignment

Providing an Accommodation

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- Employer can choose which accommodation to provide, if more than one would meet the individual's needs
- Employer can't require the individual to accept an accommodation
 - ▣ However, if an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job

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Communicating with Providers

The Provider's Role

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- Provides documentation that can be used to determine whether the employee has a disability (when not obvious), and needs an accommodation
 - ▣ Purely medical documentation is sufficient
 - ▣ Providers generally have no expertise in determining whether an individual has a “disability”
- May suggest reasonable accommodations, and provide opinions on whether proposed accommodations would be effective

Information Relevant to Disability

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- What the functional limitations would be in the absence of treatment (during an active episode, if applicable)
- Examples of functions (“major life activities”)
 - ▣ Communicating, concentrating, eating, sleeping, caring for oneself, interacting with others, learning, thinking, brain functions

Information Relevant to Accommodation

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- How the client's (actual, not hypothetical) symptoms affect the job
- Only the symptoms that are causing work issues are relevant
- The provider may suggest accommodations

Unnecessary Information

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- Generally, should not include:
 - ▣ The tests that were used during the assessment, or their specific results
 - ▣ The history of the condition
 - ▣ Current treatment, or lack of treatment
 - ▣ Whether the individual could work with different treatment
 - ▣ What caused the onset of the condition
 - ▣ Family medical history

Example

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- “[Patient] is diagnosed with PTSD. In the absence of ongoing treatment, [Patient] would have significant difficulty thinking and concentrating in the presence of loud noises.”
- “As a result of hyper-vigilance, [Patient] becomes distracted in environments that are noisy or contain a lot of visual stimulation. He is therefore having some difficulty completing assignments in his current office, which is located next to the factory floor and which has an open doorway.”

Vocabulary Issues

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- Professionals may use medical terminology
 - ▣ AMA definition of “impairment” – “significant deviation, loss, or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease”
 - More like ADA’s “limitation” or “substantial limitation”
 - ▣ More likely to use “diagnosis”

Other Miscommunication

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- Some providers are reluctant to diagnose, or will diagnose conservatively
- Some providers may minimize symptoms
- Some may be unfamiliar with ignoring mitigating measures
 - ▣ In DSM, assessments of severity (discussed later) **and even diagnoses themselves** tied to current symptoms

Other Miscommunication, Cont'd

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- May skip to a proposed accommodation
- But provider may not be in a position to make the legal determination that a particular accommodation is required
 - ▣ May be unaware of employer's resources
 - ▣ May be unfamiliar with range of options
- Possible that providers will overstate the need for a particular accommodation, thinking that it will make getting it more likely (think: insurance)

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Discrimination

Discrimination

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- ADA prohibits discrimination against someone who is “regarded as” having a disability

No adverse action based on a real or perceived mental health condition

- Perceived condition doesn’t need to be a “disability”
- Applicant/employee doesn’t need to have the condition
- Only exceptions: “transitory **and** minor” conditions
- Employer doesn’t need to think that the condition substantially limits a major life activity

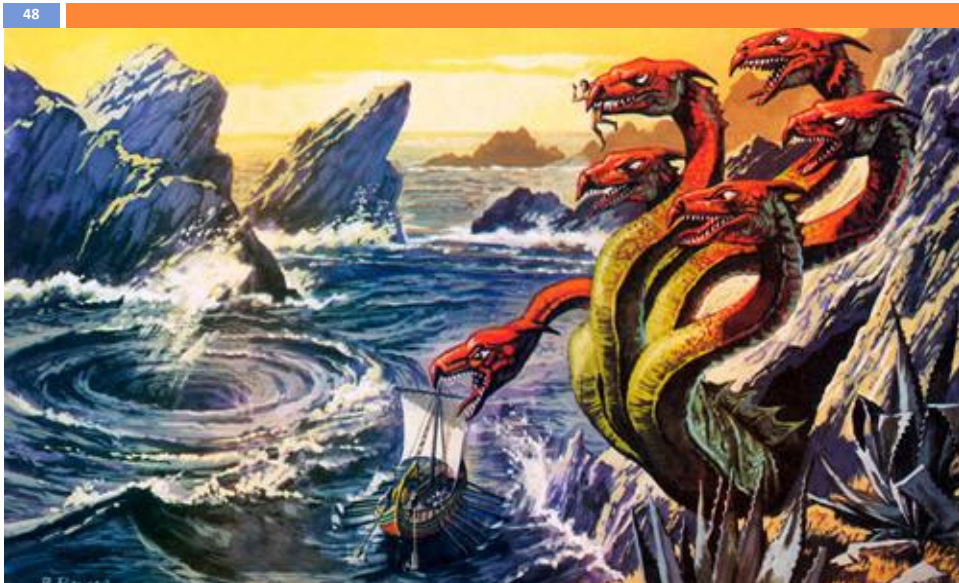
Performance and Conduct

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- **BUT** Employers are not required to keep someone on the job who—
 - ▣ Is unable to perform the essential functions (even with a reasonable accommodation if one is required)
 - ▣ Would pose a direct threat to safety
- Even if the problem was caused by a disability**

Between Scylla and Charybdis

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Performance Management

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- It is always OK to impose discipline for poor performance or misconduct, regardless whether a mental health condition is contributing to the problem

- If the employer learns that a mental health condition is contributing to the problem, it should consider whether a reasonable accommodation would help

Inquiries and Examinations

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- Employer should **NOT** require a psychiatric fitness-for-duty evaluation unless—
 - ▣ It is part of a routine post-offer, pre-employment medical exam; or
 - ▣ There is a objective evidence that the individual in question has a mental health condition and, as a result—
 - Is unable, or will become unable, to perform the essential functions of the job; or
 - Creates a significant risk of substantial harm

Adverse Action

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- An employer should **NOT** take adverse action based on a mental health condition unless someone with reasonable medical judgment, relying on current medical knowledge, would agree that the particular individual in question—
 - ▣ Is unable to perform the essential functions of the job, even with a reasonable accommodation ; or
 - ▣ Creates a significant risk of substantial harm, even with a reasonable accommodation

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Deciding Whether to Disclose

A Balancing of Risks

Risks Associated With Asking

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- Employer might illegally discriminate
 - ▣ Termination, even though the client could do the job with a reasonable accommodation
 - ▣ Harassment
 - ▣ Retaliation
- Employer might illegally deny accommodations

The employer would be violating the law, but winning a case could be time consuming and difficult

Another Risk Associated With Asking?

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- Could the client be fired legally if the requested accommodation is not possible?
- Generally NO
 - ▣ Employer required to look for alternatives
 - ▣ Termination only legal if no possible accommodation would enable client to perform essential job functions
 - ▣ If client can't possibly perform essential functions, termination is likely regardless whether a request is made

Requesting a reasonable accommodation generally does not increase risk of legal termination

A Risk Associated With Not Asking

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- Without reasonable accommodations, the client may perform poorly at work
- Employer can take normal disciplinary action (including termination) for poor performance or misconduct, even if caused by a disability

Not requesting a reasonable accommodation may significantly increase risk of legal termination

A Hypothetical

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- C does not inform her employer that she has panic disorder
- C leaves building without notice when she has an attack, because break room is crowded and noisy
- C subjected to progressive discipline for unscheduled breaks, consistent with attendance policy, and eventually terminated

Hypothetical #2

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- C tells employer that she has panic attacks, and that she needs a way to deal with them at work
- Employer must now work with employee to identify an appropriate reasonable accommodation
- On therapists' advice, employer provides C with a flexible break schedule and access to a quiet room when necessary
- C is not subjected to discipline or termination

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Concluding Remarks

EEOC Online Resources

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- <http://www.eeoc.gov/laws/types/disability.cfm>
 - Fact sheet for mental health providers
 - Information for veterans, covering disability
 - Telework as a reasonable accommodation*
 - Performance and conduct*
- http://www.eeoc.gov/laws/types/disability_guidance.cfm
 - Reasonable accommodation*
 - Disability related inquiries and medical exams (2)*
 - Guidance on psychiatric disabilities*
- <http://www.eeoc.gov/employees/charge.cfm>
 - Information on filing charges of discrimination

*not updated to reflect the amendments

Other Online Resources

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- Job Accommodation Network (JAN)
 - A free consulting service providing individualized accommodation solutions and information on the ADA and services related to employment for people with disabilities
 - www.askjan.org
- Center for Psychiatric Rehabilitation
 - A research, training, and service organization with information on reasonable accommodation and other topics related to recovery
 - <http://cpr.bu.edu/>

Contact

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