

# 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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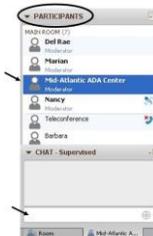


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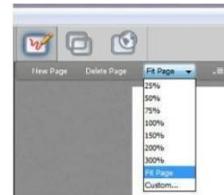
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## MENTAL HEALTH CONDITIONS IN THE WORKPLACE

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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](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](http://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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