Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 29, ISSUE 12 / JANUARY 6, 2015

EXPERT ANALYSIS

Accommodation of Mental Disabilities Under The ADA

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According to the National Alliance on Mental Illness, one in four adults — nearly 60 million people — will have a mental health disorder this year. Accommodating employees with mental health impairments is a growing challenge for employers. Not only are requests for accommodations increasing, but employees are taking action to enforce their legal rights more and more frequently.

The Equal Employment Opportunity Commission also has begun to file suits against employers on the basis of mental disabilities. To make matters more confusing, there is a great deal of uncertainty about employers' obligations, because case law on mental health disabilities under the federal Americans with Disabilities Act is still developing. This commentary addresses only the ADA, 42 U.S.C. § 12101, and cases decided under the ADA. Many states, and even some localities, have statutes protecting employees with disabilities. Some track the ADA relatively closely, but others provide for different or additional obligations. State and local statutes are beyond the scope of this article.

DEFINING A MENTAL DISABILITY

Mental disabilities are covered by the ADA to the same extent as physical disabilities. A physical or mental impairment constitutes a disability under the ADA if it "substantially impairs one or more major life activities," which are broadly defined to include activities such as learning, reading, concentrating, thinking and communicating. ADA regulations define "mental impairment" to include "[a]ny mental or psychological disorder, such as ... emotional or mental illness."

The EEOC has issued guidance providing examples of mental illnesses such as major depression, bipolar disorder, anxiety disorders, schizophrenia and personality disorders. It therefore appears that a broad range of mental impairments may qualify as disabilities.

Of particular importance is the fact that, under the law, a mental impairment that is episodic or even in remission is still considered to be a disability if it would substantially limit a major life activity when active.

Many mental health conditions such as anxiety, depression and bipolar disorder are episodic in nature and only affect an employee's ability to work during a serious episode. For example, in *Kinney v. Century Services Corp.*, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011), the court held that a plaintiff could be disabled when she had isolated bouts of depression that were debilitating when active but did not impair her work performance at other times.

Disabilities are evaluated without regard to mitigating measures such as medication. Thus, even if an employee takes medication that allows him or her to function normally, in most cases, the employee is nevertheless disabled under the law if he or she would have a substantial impairment without the assistance of the medication.

In 2008 Congress enacted the Americans with Disabilities Act Amendments Act specifically for the purpose of overturning case law that made it difficult for a plaintiff to establish a disability. The stated objective of the ADAAA is to "reinstate" the original "broad scope of protection" under the ADA for individuals with disabilities. The ADAAA decreed that the definition of a disability is to be construed "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this act." The effect of this amendment has been to set a very low standard for employees to prove that they are disabled.

Nevertheless, whether an employee has a significant enough impairment to qualify as being disabled under the ADA has been and is likely to continue to be the subject of litigation, particularly with respect to mental impairments. The EEOC recognizes in its enforcement guidance that traits or behaviors such as irritability, chronic lateness and poor judgment do not themselves constitute disabilities, but it notes that they are often linked to mental health impairments.

Determining when an impairment is significant enough to constitute a disability may be difficult. For example, in *Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014), the plaintiff, a police officer, had received a diagnosis of attention deficit hyperactivity disorder, which caused him to experience interpersonal problems throughout his life. His job was terminated because of complaints from co-workers about their interactions with him, in which he was described as "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive," according to court documents.

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The plaintiff argued that his ADHD was the cause of these problems and that the police department had an obligation to accommodate him. In finding for the employer, the 9th U.S. Circuit Court of Appeals (which frequently issues opinions that are regarded as being pro-employee) noted that the plaintiff's ADHD "may well have limited his ability to get along with others," but nevertheless held that the plaintiff was not disabled, because "that is not the same as a substantial limitation on the ability to interact with others." The court recognized that any other holding risked exposing employers to liability for taking action against ill-tempered employees.

In contrast, in *Estate of Murray v. UHS of Fairmount Inc.*, 2011 WL 5449364 (E.D. Pa. Nov. 10, 2011), the court denied summary judgment to an employer, finding that the plaintiff's testimony that she had trouble sleeping and experienced racing thoughts and feelings of hopelessness and helplessness was sufficient to allege a *prima facie* case of "disability" under the ADA. The court specifically cited the command in the ADAAA to construe "disability" broadly.

DUTY TO ACCOMMODATE

As with other protected categories (such as race and gender), an employer cannot discriminate against an employee with a disability in the terms and conditions of employment. However, the ADA imposes an additional, affirmative obligation on employers to provide a "reasonable accommodation" to employees with a known disability if the accommodation would not impose an undue hardship on the employer. There are several components to this obligation, each of which can have its own pitfalls.

"Known" disability

Before an employer has a duty to accommodate, it must know that the employee has a disability. Unlike physical disabilities, which may be obvious, it can be very difficult for an employer to recognize the existence of a mental disability. The initial burden is on the employee to disclose the disability and request an accommodation.

However, the employee does not need to use any "magic" words such as "disability" or "accommodation." Rather, the employee's duty is to notify the employer that he or she requires an adjustment to the workplace because of a physical or mental limitation. In practice, the question of notice can be a difficult one.

The EEOC takes the position that the notice requirement is fairly minimal, and it has issued guidance stating that an employee provides sufficient notice to an employer by, for example, stating that he or she is "stressed and depressed." Courts have, however, rejected the EEOC guidance on this issue and held employees to a higher standard.

By way of example, in *Reed v. LePage Bakeries Inc.*, 244 F.3d 254, 261 (1st Cir. 2001), the court held that an employee's request must be "sufficiently direct and specific" to give notice that she needs an accommodation. The court held that the request must at least "explain how the accommodation requested is linked to some disability."

An employer has the right to obtain medical documentation of the existence of the disability if it is not obvious. Often, the employer will make a written request for information from the employee's doctor. This inquiry can include a request for a description of the employee's condition and an explanation of why it constitutes a disability.

Employers may also request information on the accommodation recommended by the doctor, how it will allow the employee to perform the essential functions of his or her job, a timeframe on the necessity for the accommodation and whether any other accommodation might be effective. Employers should provide a job description and any other information that would be helpful to the doctor in answering those questions.

Reasonable accommodation

An employee request for an accommodation begins the "interactive process," which is a dialogue with the employee about the request, the need for the accommodation and any alternatives the employer may offer. Since the focus is on the "essential functions" of the employee's job, this process requires the employer to:

- Analyze the employee's job functions to separate out essential from nonessential functions.
- Identify the barriers to performance by learning the employee's limitations.
- Explore the accommodations that would be most effective.

The purpose of this exchange of information and ideas is to determine what the employee needs and what the employer can offer that will allow the employee to perform his or her job without significant disruption to the employer's operations. If the employee does not provide information in response to the employer's request, the employer does not need to provide the accommodation.

The employee's request for an accommodation must be reasonable. In some cases, the request is unreasonable on its face and need not be provided. For example, in *Theilig v. United Tech Corp.*, 415 F. Appx. 331 (2d Cir. 2011), the court found that an employee's request to have no contact with his co-workers or supervisor was unreasonable as a matter of law.

Similarly, in *Shin v. University of Maryland Medical System Corp.*, 369 F. Appx. 472 (4th Cir. 2010), a medical intern with attention deficit disorder needed so much supervision and such a decreased workload that the request was found, on its face, to be unreasonable. There is no bright-line test for reasonableness, however, and an employer who simply denies a request as being unreasonable on its face does so at its own peril.

Indeed, although the failure to engage in the interactive process is not an independent claim under the ADA, courts have viewed this as evidence of bad faith on the part of the employer. *See, e.g., Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011 (8th Cir. 2000).

Once one or more reasonable accommodations have been identified, an employer must provide them unless that would create an "undue hardship." An undue hardship includes any action that is unduly costly or disruptive or that fundamentally alters the nature and operation of the business. This can be difficult to judge, because the accommodations necessary for individuals

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with mental disabilities may require changes to scheduling, attendance or the manner in which work assignments are provided.

Employee requests to work at home or to take leave are also common. These accommodations may seem incompatible with today's workplaces that are often fast-paced and high-stress environments, but courts have made clear that they must be considered. An accommodation that requires other employees to work harder or longer is generally not reasonable, and an employer is not required to reduce production standards or excuse compliance with legitimate, business-related conduct rules.

An employer is not required to change an employee's supervisor or create an entirely new position to accommodate an employee. *See Larson v. Commonwealth of Virginia, Dep't of Transp.*, 2011 WL 1296510 (W.D. Va. Apr. 5, 2011) (no need to change the employee's supervisor); *Otto v. City of Victoria*, 685 F.3d 755 (8th Cir. 2012) (no need to create a new position).

Even if a requested accommodation is reasonable and does not create an undue hardship, the employer does not have an obligation to provide the exact accommodation required by the employee, so long as the company can provide an alternative that is reasonably expected to allow the employee to perform essential functions. For example, an employee may request a private office to minimize distractions from nearby co-workers. If noise-canceling headphones could effectively reduce these distractions, the employer may provide those instead.

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STEPS EMPLOYERS CAN TAKE

In light of the uncertainty involving requests for accommodations of mental disabilities, employers can take some steps to protect themselves.

Every employer should have a policy that specifically addresses disability discrimination and informs employees of the process for requesting an accommodation. Although a formal, written accommodation process is not an absolute requirement, employers should have a uniform process for addressing requests in order to ensure consistency and proper documentation. Training on disability discrimination, and particularly mental disabilities, can help reduce the risk that comments in the workplace can be used to support a disability discrimination claim.

For example, although most employees understand that race- and gender-based epithets and derogatory terms are not permitted, fewer seem to understand that terms relating to mental health are similarly problematic. Many employees seem to lack an understanding that describing other employees as being "crazy," "a basket case," "depressed" or "off her meds" can be seen as harassing a person because of his or her mental disability.

Training managers to identify a request for an accommodation is also critical. Employers who fail to engage in and document the interactive process face very high hurdles in court and before the EEOC and other agencies.

Once a request has been made, either human resources or an individual outside of an employee's supervisory chain should manage the process, if possible. Any medical information requested by the employer must be kept confidential and in a locked cabinet separate from any personnel files.

Employers should document the steps taken to evaluate the request and be prepared to explain the reason for any denial and the hardship that would be caused. If a requested accommodation is denied, employers should be prepared to offer alternatives, or at a minimum invite the employee to continue the dialogue by making further requests for accommodation.

Employers should review and revise job descriptions, which are critical for determining an employee's essential functions. Job descriptions should clearly address essential functions relating to attendance, work location and teamwork. Employers also should consider revising policies that could result in disability discrimination, such as inflexible maximum-leave policies or no-fault attendance policies.

Courts and the EEOC have made clear that exceptions to these policies may be required as an accommodation.

Although these steps cannot guarantee a successful defense against a claim for disability discrimination, they should significantly improve compliance and help employers create a record of compliance that will aid them should litigation ensue.

(*Disclaimer*: This commentary is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the commentary are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or Westlaw.)

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