

Workplace Accommodations and Employees with Psychiatric Disabilities

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Sample Case I

- My name is Otilly and I have been afflicted with undiagnosed mental problems for 6-8 years. I am now receiving treatment for major depressive disorder and social anxiety. I also suspect I have an attention deficit disorder, but my psychiatrist says it's caused by depression and anxiety.
- I work front desk in a small workspace with two other people in close proximity. There are offices opening out from my area where 9 other people can hear anything we say. My EAP counselor recommended I speak with HR to talk about accommodations for mental disability. This is not something I've done before., and pretty much everyone I work with views mental illnesses as a charlatan/hokey illness. I am getting worried, because this is starting to affect my work.

Sample Case II

- There is no one to talk to. HR says they can't help me and told me to talk to my boss – who argued with me and said I had no disability protected by ADA.
- The EEO compliance Office wants me to just submit my accommodation request but they won't talk to me about it. The EEO person warned me I would be given a low performance rating if my work starts to suffer.
- Geez, I am scared to lose my job if I push any of this where I work. I'm sorry for this long winded email.

The ADA Covers Physical and Psychiatric Disabilities

- The principles prohibiting discrimination in the workplace under Title I of the ADA cover physical and psychiatric disabilities;
- 1 in 25 U.S. adults experience serious mental illness each year;
- Suicide is the 2nd leading cause of death among people aged 10-34. NAMI 2/2019

Rough Discussion Agenda

1. ADA Basics - Who is protected, definition of disability, affected major life activities;
2. Reasonable Accommodations - Interactive Process - Job Requirements;
3. Unlawful Medical Inquiries and Unconscious Bias - Rejecting the Stigma ;
4. Defenses for Declining Accommodations;
5. Recommended Accommodation Process - Practical Reminders - Useful Resources

Remember the Basics

- The job applicant or employee must have a “disability” as defined under the ADA;
- Can perform the essential functions of the job with or without reasonable accommodation;
- May or may have not disclosed a disability.

Definition of Disability

- (a) A physical or *mental* impairment that substantially limits one or more major life activities;
 - (b) having a record of such an impairment; or
 - (c) being regarded as having such an impairment.
- Notice that all three prongs of this definition can be involved in a psychiatric disability issue.

Sample Psychiatric and Emotional Disorders

- Major depression; Bipolar disorder;
- Anxiety disorders; e.g., panic, obsessive compulsive, and post-traumatic stress disorders;
- Schizophrenia, and personality disorders.
- Mental health professionals and courts use the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) to identify disorders.

Mental Health Disorders Can Adversely Affect Major Life Activities

- Learning, thinking, concentrating, interacting with others;
- Caring for oneself, speaking, performing manual tasks, or working;
- Sleeping, eating, digestion, other physical manifestations.

Disability Can be Permanent, Indefinite, or Temporary and of Short Duration

- *The 2008 ADAAA removed the “six month” duration rule.
- *A disability can be of short duration – e.g., leave to recuperate from a severe panic attack compromising the ability to interact with others.
- *An accommodation may therefore be needed for a limited time.

Reasonable Accommodation

- A reasonable accommodation is any change or adjustment to a job or work environment that permits an applicant or employee with a disability to participate in the application process, to perform the essential functions of a job, and to enjoy benefits and privileges of employment equal to those enjoyed by all employees;
- Job applicants and employees must request a reasonable accommodation;

The Required Interactive Process

- Employers are required to engage in an *Interactive Process* with employees who disclose a disability and request reasonable accommodations.
- The ***Interactive Process*** is a collaborative effort to identify appropriate accommodations that employer facilitates so employee may perform essential job functions.
- Note that courts are required to first determine whether employer engaged in “good faith” interactive process – even before medical documentation was provided. [Nine Rules of Construction at 29 C.F.R. 1630.2(j)(1)(iii)]

Questions?



Consistently Applied Performance Standards

- The ADA does not infringe on the right of employers to define jobs and to evaluate employees according to consistently applied performance and conduct standards.
- Employees with disabilities must meet qualification standards that are job-related and consistent with business necessity.
- Sometimes a psychiatric disability may contribute to performance or conduct problems. If so, a reasonable accommodation may eliminate the problem – if the employee asks for help.

Job-Related Requirements or Qualification Standards

- Possessing specific training.
- Possessing specific licenses or certificates.
- Possessing certain physical or mental abilities; e.g., meeting vision, hearing, or lifting requirements; showing ability to run or climb; exercising good judgment.
- Meeting health or safety requirements.
- Demonstrating certain attributes; e.g., the ability to work with other people or to work under pressure.

Unlawful Medical Inquiries and Unconscious Bias

- Have you ever been treated for drug addiction or alcoholism?
- Have you ever had or been treated for any of the following conditions or diseases? See checklist);
- Have you ever been treated by a psychologist or psychiatrist? If so, for what reason?
- Do you suffer from any health-related condition that might prevent you from performing this job?
- How many days were you absent from work because of illness last year?

Reject the Stigma

- In view of recent mass shootings a movie goer could watch the film “Joker” 2019 and walk away with the politically popular conclusion that “Mental illness and hatred pull the trigger, not the gun.”
- Problem: this perpetuates the sinister myth that people with mental illness are more likely to be violent than others, which scientific research has shown to be demonstrably false;
- A 2008 study found that “most patients with stable mental illness do not present an increased risk of violence.” (Marie E. Rueve and Randon S. Welton);
- While “mental illness may increase the likelihood of committing violence in some individuals... only a small part of the violence in society can be ascribed to mental health patients.” Id.

Defense – Business Necessity

- A work duty expectation, a standard or policy that must be met by an employee with a disability must be job-related and consistent with a business necessity;
- This requirement ensures that the qualification standard is a legitimate measure of an individual's ability to perform an essential function of the specific position. 42 U.S.C. § 12113; 29 C.F.R. § 1630.10;
- Many problems in this area regarding job postings and recruitment.

Disability Bias in Job Posting

- General Assignment Reporter role with major newspaper. Must have ability to break news and meet tight deadlines. Must have the ability to reach, bend, lift, push, pull and carry a minimum of 25 lbs. Must be able to type 40 wpm and read computer screens and hand written notes. The role is a sedentary desk job that requires ability to sit for extended periods -- up to 8-hour shifts.

Defense - Direct Threat

- Direct threat is a significant risk of substantial harm ... that cannot be eliminated or reduced by reasonable accommodation;
- Direct threat' must be based on an individualized assessment of the person's present ability to safely perform essential job functions that relies on current medical knowledge and/or on the best available objective evidence;
- Four factors:
 - (1) duration of the risk;
 - (2) nature and severity of the potential harm;
 - (3) likelihood that the potential harm will occur; and
 - (4) imminence of the potential harm.
- Reasonable accommodation that can eliminate the risk of harm or reduce it to an acceptable level must be considered.

Mitigating Measures

- Should the corrective effects of medications be considered when deciding if an impairment substantially limits a major life activity?
- Answer: No! The ADAAA unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications;
- An individual taking medication for a mental impairment has a disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.

Example A:

- An employee was diagnosed with major Depression for almost a month. He has been intensely sad and socially withdrawn (except for going to work). He developed serious insomnia, and has had severe problems concentrating and interacting with others;
- When asked by a supervisor why his work has been of poor quality along with his poor communication with coworkers, he snapped that nothing was wrong and asked to be left alone.
- What should the supervisor do?

Example B:

- An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, she experienced increasingly severe and frequent cycles of depression and mania; at times, she became extremely withdrawn socially or had difficulty caring for herself. Her symptoms have abated with medication, but her doctor says that the duration and course of her bipolar disorder is indefinite, although it is potentially long-term.
- The employee requests leave for 4 weeks but she is not qualified for FMLA. Should she get ADA Leave?

Example C:

- An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was distressed for about two months during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. He asks to work only 40 hours per week even though his employer asks that everyone in his division work at least 50 hours weekly.

Recommended Process:

1. Analyze the job and determine essential vs. marginal job functions. Marginal functions are tangential and can be removed as needed.;
2. Consult with employee to ascertain precise job-related functional limitations imposed by the disability and how to overcome them with reasonable accommodations or auxiliary aids.
3. Identify potential accommodations and assess the effectiveness each accommodation may have in enabling the employee to perform essential job functions without causing “undue hardship” on business operations.

Practical Reminders Part 1:

- 1) Individuals with psychiatric disabilities may require occasional leave to address emotional, stress or medication-related issues.
- 2) Individuals with diagnosed mental impairments will be hesitant to disclose a psychiatric disability due to negative stereotypes, stigma, and misleading news headlines.
- 3) Keep medical disclosures confidential.

Practical Reminders Part 2:

1. Get Past the Definition of Disability – any substantially limiting condition will likely be covered – regardless of duration;
2. Make well-documented Decisions That Are Job-Related and Consistent with a legitimate Business Necessity;
 - . Embrace Diversity and Inclusion - Everyone from the C Suite to HR to front-line supervisors and employees should participate in awareness and sensitivity training;
4. Stop being afraid to work with people who have a psychiatric disability – the disability population is the only minority group that anyone can join at any time.

Questions?



Still have Questions? Contact Us!

- TOLL FREE Line – (800) 949-4232
- All Calls Confidential
- Email: swdbtac@ilru.org

Useful Resources

- [Violence and Mental Illness – by Marie E. Rueve, MD and Randon S. Welton, MD, LT COL, USAF](#)
- [EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities](#)
- [Job Accommodations Network - Ask Jan](#)