



# Accommodating Employees with Mental Health Challenges – the Federal Framework and Practical Considerations

Andrew Manna and Amy Matthews, Church Church Hittle & Antrim, Noblesville, IN

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# ***Accommodating Employees with Mental Health Challenges – the Federal Framework and Practical Considerations***

**By: Andrew Manna, Amy Matthews, and Carolyn Haney  
Church Church Hittle + Antrim**

## I. INTRODUCTION

For the past several years, public schools have been focused on student mental health services. Increasingly, attention must be paid to school employees and training school districts to recognize employee mental health concerns and the resulting needs for accommodations and leaves.

## II. LAWS APPLICABLE TO EMPLOYEES WITH MENTAL ILLNESS

Employers must be careful not to discriminate against employees with a mental illness in violation of the Americans with Disabilities Act (ADA), and to provide reasonable accommodations for employees with mental health disorders. School employers also must be aware of their obligations to provide FMLA and contractually-obligated leave for employees who have mental health problems. The nature and background of both the illness and the applicable law can be complex.

### a. The ADA and Reasonable Accommodations

Employers are prohibited from discriminating against anyone in employment decisions based on disability. Further, employers must provide reasonable accommodations to employees with disabilities. The ADA can be harsh, punishing employers that so much as mention a worker's mental or emotional problems to fellow employees, or fail to engage in the interactive process of determining whether a worker's mental illness can be accommodated.<sup>1</sup>

#### i. Mental Illness as a Disability Under the ADA

The ADA Amendments Act of 2008 (ADAAA) broadened the definition of "disability" under the ADA. An individual now has a "disability" under the ADA if he or she has a *physical or mental impairment that substantially limits one or more major life activities*, has a record of such impairment, or is regarded as having such an impairment.<sup>2</sup> *Mental impairment* is broadly defined to include any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *Major life activity* is also broadly defined and includes, but is not limited to, "Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breath, learning, reading, concentrating, thinking,

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<sup>1</sup> See 29 C.F.R. § 1630.2(o)(3): *Dower v. Noblesville Schs.*, 2012 U.S. Dist. LEXIS 145055, 11-12 (S.D. Ind. Oct. 9, 2012) (describing how an employer can be liable for a breakdown in the interactive process, and ultimately finding that the employee, not the school, was responsible for the breakdown).

<sup>2</sup> 29 C.F.R. 1630.2(g).

communicating, interacting with others, and working; and the operation of a major bodily function.”<sup>3</sup>

The term *substantially limits* (a major life function) is to be construed broadly in favor of expansive coverage of what constitutes a “disability.”<sup>4</sup> A condition does not have to result in a high degree of functional limitation to be “substantially limiting.” It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. If the employee’s symptoms come and go, what matters is how limiting they would be when present.

Federal regulations say that some mental disorders should easily be found to be “disabilities,” including major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Other conditions may also qualify depending on the individual’s symptoms. Thus, any mental illness from mild depression to serious schizophrenia can potentially be a disability that is covered by the ADA if it affects a person’s daily functioning.

The ADA further states that the determination of whether an impairment substantially limits a major life activity should be made without regard to the effects of *mitigating measures* such as medication or medical equipment.<sup>5</sup> Thus, even if a teacher’s mental illness is fully controlled with medication, that teacher could still have a disability under the ADA if the mental impairment would substantially affect a major life activity of the teacher without the medication. However, mitigating measures may be considered when determining what, if any, reasonable accommodation is necessary for the disability. If an employee’s mental illness is fully controlled by medication that has no side effects, the employee would have a “disability,” but there would be no need for reasonable accommodation.<sup>6</sup> In addition, the ADA requires that episodic impairments be evaluated while the impairment is in its active state. Thus, a person who suffers from infrequent grand mal seizures that last only a few minutes could qualify as disabled under the ADA.

Because “disability” is so broadly defined by the ADA after the 2008 amendments, the primary issue for ADA compliance is now seldom whether or not an employee has a “disability.” Rather, the primary issue is what constitutes a “reasonable accommodation” for the employee.

## ii. Reasonable Accommodations for Employee Mental Health

An employer must only provide reasonable accommodations to an employee who is “qualified.”<sup>7</sup> The law does not require employers to lower the standards of performance or change the qualifications for a job. However, employers are expected to

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<sup>3</sup> 29 C.F.R. § 1630.2(i).

<sup>4</sup> 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.2(j)(1)(i).

<sup>5</sup> 29 C.F.R. § 1630.2.

<sup>6</sup> If a mitigating measure does have side effects, an employer may have to provide a reasonable accommodation for those side effects.

<sup>7</sup> See *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1284-85 (7th Cir. Ind. 1996) (discussing whether an employee with a mental disability was “otherwise qualified” for his position).

be flexible about the way work gets done.<sup>8</sup> Additionally, the ADA doesn't protect employees who exhibit or threaten violence on the job, because in most cases violent behavior will be disqualifying.<sup>9</sup> If an employee is otherwise qualified, an employer must provide reasonable accommodations to the employee.<sup>10</sup> The term *reasonable accommodation* means:

“(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”<sup>11</sup>

Two exceptions exist to the reasonable accommodation requirement. First, an employer is not required to provide accommodation if it will impose an *undue hardship* on the operation of its business; for example, if the accommodation would be excessively costly, disruptive, or would fundamentally alter the nature or operation of the business.<sup>12</sup> The idea is to provide *reasonable* accommodations, which requires considerations of the burdens, or “undue hardships,” that may be placed on an employer.

A reasonable accommodation may include: (1) changing facilities used by employees to make them accessible to individuals with disabilities, (2) part-time or modified work schedules, (3) reassignment to a vacant position, (4) acquisition or modifications of equipment or devices, (5) appropriate adjustment or modifications of examinations, training materials, or policies, or (6) any other reasonable accommodation the employer and employee can devise.<sup>13</sup>

Second, an employer may refuse to employ or to provide accommodations to someone who poses a “direct threat” to the health or safety of him/herself or others in the workplace.<sup>14</sup> The Equal Employment Opportunity Commission (EEOC) defines a threat as “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.”<sup>15</sup> The regulations further state that the “determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment of the individual's present ability

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<sup>8</sup> Center for Psychiatric Rehabilitation, “What Are Reasonable Accommodations?”, available at <http://cpr.bu.edu/resources/reasoanble-accommodations/jobschool/what-are-reasonable-accomodations>

<sup>9</sup> See Department of Labor Workplace Violence Program – Appendices, available at <http://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program-appendices.htm>.

<sup>10</sup> 29 CFR 1630.9. See *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281 (finding an issue of fact as to whether the school provided a reasonable accommodation).

<sup>11</sup> 29 CFR 1630.2(o).

<sup>12</sup> Daniel D Crean, *Local Government and the ADA with a Focus on Reasonable Accommodations for Emotional or Mental Disability* (2013).

<sup>13</sup> See 29 C.F.R. 1630.2(o).

<sup>14</sup> See 42 U.S.C. 12113(b); 29 C.F.R. 1630.2(r).

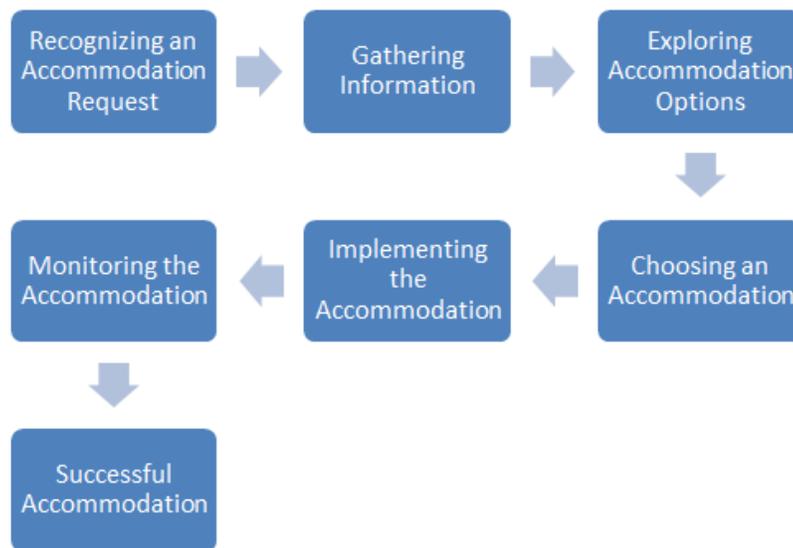
<sup>15</sup> *Id.*

to safely perform the essential functions of the job . . . that relies on the most current medical knowledge and/or on the best available objective evidence.”<sup>16</sup> An employer should consider four factors when deciding if a “direct threat” exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that an individual poses a direct threat to self or others should not be based on generalizations or stereotypes about mental illness.

### iii. Employee Requests for Accommodations for Mental Health Issues

Many employees with mental health problems do not request reasonable accommodations because of concerns about the potential negative consequences of disclosing a mental illness at work. Employees are more likely to disclose a mental health issue, which can help schools address mental health problems before they become more serious, if there is an open and supportive supervisor/employee relationship.<sup>17</sup> This flowchart outlines the basic process for an employee who requests a reasonable accommodation for a disability.

## Interactive Process



When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an

<sup>16</sup> *Id.*

<sup>17</sup> See Rebecca R. Hastings, *Are Your Employees Comfortable Disclosing Disability?*, available at <http://www.shrm.org/hrdisciplines/diversity/articles/pages/comfortabledisclosingdisability.aspx>.

individual may use “plain English” and need not mention the ADA or use the phrase “reasonable accommodation.”<sup>18</sup>

For example, an employee who asks for time off because he is “depressed and stressed” has communicated a request for a change at work (time off) for a reason related to a medical condition (being “depressed and stressed” may be “plain English” for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee’s need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee’s disability and functional limitations. Courts have even found that an employer must do so prior to taking any form of disciplinary action.

#### iv. Inquiries into Employee Mental Health

Because information about employee health conditions and disabilities has historically been used to exclude individuals with disabilities who could otherwise perform a job, disability-related inquiries and medical examinations of current employees must be “job-related and consistent with business necessity.”<sup>19</sup> There are different rules for inquiries and examinations during the employment application process. Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.<sup>20</sup> After an applicant is given a conditional job offer, but before starting work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.<sup>21</sup>

During employment, a disability-related inquiry<sup>22</sup> or medical examination<sup>23</sup> of an employee is permissible when it is “job-related and consistent with business necessity.”<sup>24</sup> If an employer has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical

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<sup>18</sup> *Schmidt v. Safeway*, 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (an employee’s request for reasonable accommodation need not use “magic words” and can be in plain English); *Bultemeyer v. Ft. Wayne Community Schs.*, 100 F.3d 1281 (an employee with known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting note from his psychiatrist).

<sup>19</sup> Exceptions to this rule include inquiries and examinations required by federal law and those that are part of voluntary wellness and health screening programs, as well as invitations to self-identify voluntarily as persons with disabilities for affirmative action purposes. See <http://eoc.gov/policy/docs/guidance-inquiries.html> for in-depth guidance on disability-related inquiries and medical exams of employees.

<sup>20</sup> 42 U.S.C. § 12112(d)(2)(A).

<sup>21</sup> 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). However, if an individual is screened out because of a disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10, 1630.14(b)(3).

<sup>22</sup> A “disability-related inquiry” is a question (or series of questions) that is likely to elicit information about a disability. See *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990*, 8 FEP Manual (BNA) 405:7191 (1995).

<sup>23</sup> A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health. For example, a vision test is considered a medical exam, but a personality test is not. See *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990*, 8 FEP Manual (BNA) 405:7191 (1995).

<sup>24</sup> 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).

condition; or (2) an employee will pose a direct threat due to a medical condition, then a disability-related inquiry or medical examination into the medical condition is “job-related and consistent with business necessity.”

Thus, inquiries or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position. In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat. This example from the EEOC illustrates:

**Example A:** A crane operator works at construction sites hoisting concrete panels weighing several tons. During a break, the crane operator appears to become lightheaded, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

The employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination.

However, an employer must have reliable information that would give rise to a reasonable belief that the employee's ability to perform essential job functions will be impaired or that s/he will pose a direct threat due to a medical condition before making a disability-related inquiry or requiring a medical examination. Factors that an employer might consider in assessing whether information learned from another person is sufficient to justify asking disability-related questions or requiring a medical examination of an employee include: (1) the relationship of the person providing the information to the employee about whom it is being provided; (2) the seriousness of the medical condition at issue; (3) the possible motivation of the person providing the information; and (4) how the person learned the information. Mere speculation or rumor is not enough. Again, an example from the EEOC illustrates:

**Example B:** Kim works for a small computer consulting firm. When her mother died suddenly, she asked her employer for three weeks off, in addition to the five days that the company customarily provides in the event of the death of a parent or spouse, to deal with family matters. During her extended absence, a rumor circulated among some employees that Kim had been given additional time off to be treated for depression. Shortly after Kim's return to work, Dave, who works on the same team with Kim, approached his manager to say that he had heard that

some workers were concerned about their safety. According to Dave, people in the office claimed that Kim was talking to herself and threatening to harm them. Dave said that he had not observed the strange behavior himself but was not surprised to hear about it given Kim's alleged recent treatment for depression. Dave's manager sees Kim every day and never has observed this kind of behavior. In addition, none of the co-workers to whom the manager spoke confirmed Dave's statements.

In this case, the employer does not have a reasonable belief, based on objective evidence, that Kim's ability to perform essential functions will be impaired or that s/he will pose a direct threat because of a medical condition. The employer, therefore, would not be justified in asking Kim disability-related questions or requiring her to submit to a medical examination because the information provided by Dave is not reliable.

An employer may require that an employee who it reasonably believes will pose a direct threat be examined by a health care provider of the employer's choice.<sup>25</sup> An employer may also require an examination by a provider of the employer's choice if an employee seeking an accommodation has not provided sufficient documentation to show an ADA disability and that a reasonable accommodation is necessary. In both cases, the employer must pay for the examination.

Additionally, the results of any medical examination or any disability-related inquiries, including information about psychiatric disability, must be kept confidential. Employers must collect and maintain such information on separate forms and in separate medical files, apart from the usual personnel files.<sup>26</sup> There are limited exceptions to the ADA confidentiality requirements, but an employer also may not tell other employees whether or why it is providing a reasonable accommodation for a particular individual.

#### b. Mental Health Leave and FMLA

In addition to any leave required as a reasonable accommodation under the ADA, employees with mental health problems may be entitled to leave under the Family and Medical Leave Act (FMLA) and under any contractual or bargaining agreements that may be in place.

Under the FMLA, an "eligible" employee may take up to 12 work weeks of leave during any 12-month period for certain qualifying reasons including when a "serious health condition" makes the employee unable to perform one or more of the essential functions of his or her job.<sup>27</sup>

Schools only need to provide job-protected FMLA leave if the employee meets the Act's eligibility requirements. To be eligible, an employee must: work at a worksite where at least 50 employees are employed within 75 miles; be employed for 12 months,

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<sup>25</sup> Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employers under the ADA.

<sup>26</sup> EEOC Notice Number 915.002 (Oct. 10, 2009).

<sup>27</sup> 29 U.S.C. §§ 2611 –2619.

which need not be consecutive (there can be as much as a 7-year gap); and have worked 1,250 hours in the 12 months preceding the start of the leave.<sup>28</sup>

When calculating the 1,250 hours requirement, do not count only the hours that an exempt employee (i.e., teacher or administrator) is scheduled to work. Because these categories of employees often work many hours both before and after normal school hours, ensure that those "extra" hours before/after work are counted when determining whether such person meets the 1,250 hours requirement.

A "serious health condition" under the FMLA is "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care . . . or continuing treatment by a health care provider."<sup>29</sup> But, a mental health problem, like a physical impairment, must require hospitalization or ongoing treatment that meets the FMLA definition, such as a period of incapacity of more than three consecutive calendar days involving (i) treatment two or more times by, or under the orders of, a health care provider, or (ii) treatment by a health care provider on at least one occasion that results in a supervised regimen of continuing treatment.<sup>30</sup> A "health care provider" can include clinical psychologists and clinical social workers, as well as physicians. Some FMLA "serious health conditions" may be ADA "disabilities." Others may not, as the two standards are different and only partly overlapping.

Employees who receive counseling or treatment for alcohol or substance abuse may be eligible for FMLA leave for a "chronic condition," meaning the condition causes at least occasional periods of incapacity and requires treatment by a health care provider at least twice a year. However, leave is allowed only for treatment and not because of the employee's use of the substance. Note, too, that since the FMLA also permits leave to care for a spouse, child, or parent who has a serious health condition, eligible employees also may be entitled to take leave to attend counseling sessions with a family member who is undergoing treatment for alcohol or substance abuse, mental illness, or other serious health condition.

Drug and alcohol treatment is increasingly relevant, due to the opioid abuse and addiction epidemic. The majority of drug overdose deaths now involve an opioid, and since 1999, the number of overdose deaths involving opioids has quadrupled. Ninety-one Americans die every day from an opioid overdose.<sup>31</sup> As more individuals are facing addiction, having a program in place to allow employees to seek help is critical to ensuring a healthy workplace.

The FMLA allows employers to ask for certification that an employee has a serious health condition. Employers will not violate the ADA's restrictions on disability-related inquiries and medical exams by asking for the information specified in a FMLA certification form. According to the EEOC, the FMLA form only requests information relating to the particular serious health condition, as defined in the FMLA, for which the employee is seeking leave. An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off under the FMLA. If the inquiries are

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<sup>28</sup> 29 U.S.C. § 2611(2), (4).

<sup>29</sup> 29 C.F.R. § 825.113(a).

<sup>30</sup> See 29 C.F.R. §§ 825.114, 825.115.

<sup>31</sup> <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

strictly limited in this fashion, they would be "job-related and consistent with business necessity" under the ADA.<sup>32</sup>

Employees who are entitled to take FMLA leave for a serious health condition may take leave on an intermittent or reduced schedule basis. Requests for intermittent or reduced schedule leave are more frequent for mental health problems than for other medical problems, since mental health problems more often involve sporadic episodes and/or frequent counseling sessions. Intermittent leave is taken in periodic blocks of time, such as a day or a few hours, whereas a reduced leave schedule decreases the employee's daily or weekly work hours. These types of leave may be taken only with the employer's permission, unless the arrangement is "medically necessary."

Once an individual with a disability has used all 12 weeks of FMLA leave, the employee may still be entitled to additional unpaid leave as an accommodation under the ADA, unless the additional leave would impose an undue hardship on the employer for purposes of the ADA.<sup>33</sup>

#### i. Special FMLA Rules for Schools

Congress recognized that there could be a substantial disruption to the educational process from teachers taking frequent leave or taking leave near the end of an academic period. As a result, there are special rules in the FMLA regulations regarding "instructional employees" of public and private elementary and secondary schools.<sup>34</sup> "Instructional employees" are those whose principal function is to teach and instruct students in a class, small group or individual setting. Thus, "instructional employees" includes not only teachers in the school, but also athletic coaches, driving instructors, and special education assistants, such as signers for the hearing impaired. For "instructional employees," the following rules apply:

- With regard to intermittent or reduced schedule leave (for an employee's own serious health condition, to care for a covered service member, or to care for a sick family member with a serious health condition), if the medical leave is foreseeable based on planned medical treatment and the employee is scheduled to be off work more than 20% of the working days during the period of medical leave, the school may require the employee to choose:
  - to take leave for a particular duration not to exceed the duration of the planned leave (the entire block of time for the treatment requiring intermittent or partial schedule leave is counted as FMLA leave); or
  - to transfer temporarily to another position, so long as such position has equivalent pay and benefits and is a position for which they are qualified that can better accommodate the employee's intermittent leave.
- If an instructional employee begins leave more than five weeks before the end of a term, the employer may require the employee to continue taking leave until the end of the term if the leave will last at least three weeks and the employee would

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<sup>32</sup> See 29 C.F.R. § 1630.14(c).

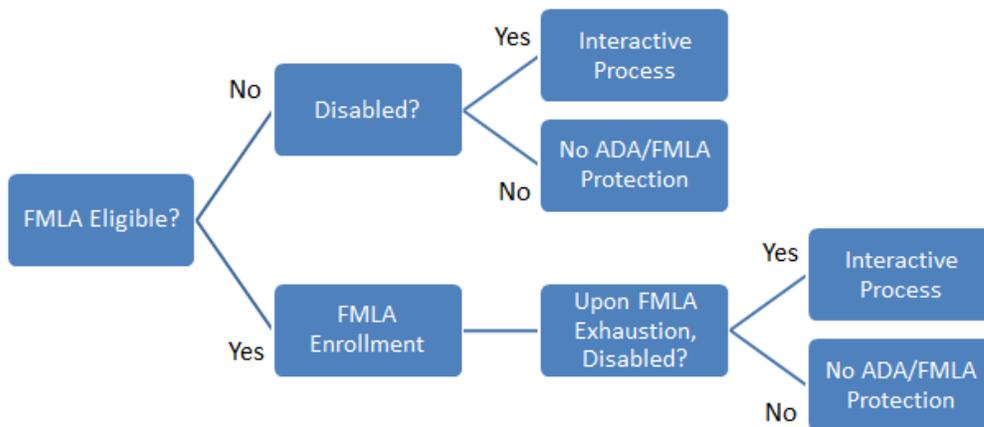
<sup>33</sup> See 29 C.F.R. § 1630.2(p).

<sup>34</sup> 29 § C.F.R. 825, Subpart F.

return during the three-week period before the end of the academic term, or if the leave will last at least two weeks and the return would be within the last two weeks before the end of the term. A similar requirement applies to leaves that begin within three weeks of the end of an academic term. However, the portion of such "forced" leaves during which the employee is ready and able to return to work cannot be counted toward FMLA leave.

Schools, like other employers, can only count leave time as FMLA leave when the employee would be otherwise working. For example, teachers typically are not required to work during the spring, summer, and winter breaks. Thus, if the employee took FMLA leave before one of these breaks, the period of the break does not count as FMLA leave weeks for that employee.

c. The Entire Process for ADA Accommodation/FMLA Leave



II. CASE LAW REGARDING EMPLOYEE MENTAL HEALTH

a. *Bultemeyer v. Fort Wayne County Schools*, 100 F.3d 1281 (7th Cir. 1996).

i. Summary:

Bultemeyer was a custodian at Fort Wayne Community Schools, and suffered from serious mental illnesses, including bipolar disorder, anxiety attacks, and paranoid schizophrenia. He refused to take a physical, and requested to work at a school less stressful than the one to which he was assigned. The school district decided to fire Bultemeyer, who subsequently filed a suit claiming that the school district failed to reasonably accommodate him as required by the ADA. Bultemeyer states that the school knew of his illness, and had a note from his doctor requesting a less stressful school

placement, yet did nothing to accommodate him. The trial court granted summary judgment for the school district, from which Bultemeyer appealed.

ii. Holding:

The Seventh Circuit held that the *McDonnell-Douglas* burden-shifting method of proof, while appropriate for disparate treatment claims, was unnecessary and inappropriate for ADA reasonable accommodation claims. The court also held that material issues of fact existed regarding the custodian's ability to perform essential functions of the job, and whether the school engaged in an interactive process to determine necessary reasonable accommodations. Therefore, summary judgment was precluded.

b. *E.E.O.C. v. Cottonwood Financial, Ltd.*, 2010 WL 3500555.

i. Summary:

Sean Reilley was hired by the "Cash Store," owned by defendants Cottonwood Financial. Reilley informed his supervisor and human resources that he suffered from bipolar disorder. Reilley did well at work, and was promoted, but then stopped taking his prescribed medications. Reilley then began experiencing manic behavior, and informed his supervisor that he was unable to work. His supervisor informed Reilley that he needed to come to work until she could get there. After this, Reilley was able to take some time off and get back onto medication. Later, after he had returned to the store and the cash deposit was short one night, Reilley responded with an obscenity ("pray that the computers don't f\*\*k up again.") After this, Reilley's employment was terminated. He filed suit claiming that he was discriminated against for his bipolar disorder, and was denied reasonable accommodation.

ii. Holding:

The defendants filed a motion for summary judgment on the grounds that Reilley was not disabled by his bipolar disorder, there was no evidence that decision-making managers had knowledge of Reilley's disorder, Reilley failed to initiate the interactive process, and that Reilley's employment was terminated for legitimate, non-discriminatory reasons. In order to be considered as having a disability, Reilley must show that he had a physical or mental impairment that substantially limits one or more of the major life activities. The court agreed that bipolar disorder is a mental impairment, but did not find it to be substantially limiting because Reilley voluntarily stopped taking his medication before his manic episode. However, the court found there to be a question of fact as to whether Reilley was "regarded as" having a disability, and whether he was terminated because of that perceived disability. The court also granted summary judgment for the defendants on the failure to accommodate claim, on the ground that the Ninth Circuit has ruled that an employer does not have a duty to reasonably accommodate an employee that it regards as disabled.

c. *Walton v. Spherion Staffing LLC*, 152 F.Supp.3d 403 (2015).

i. Summary:

Walton was employed with Defendant Spherion Staffing, and experienced suicidal ideations for the first time while travelling for work. His suicidal and homicidal ideations continued, and he reached out to his supervisor and parents for help. Walton was diagnosed with depression. Walton attempted to communicate this with his supervisor and other individuals at the company, and when he was finally able to reach his supervisor he was terminated. Walton claims that his employer terminated his employment because of his disability and failed to make reasonable accommodations for him. Defendant moved for summary judgment on the grounds that Walton's threat of violence took him outside the protection of the statutes.

ii. Holding:

An employer can lawfully discharge a disabled individual for disability-related misconduct, provided the employer's explanation is not a pretext for discrimination. In this case, the court found that Walton did not intend to harm anyone, and rather tried to mitigate an unprecedented mental health incident. Rather than commit violence, he sought assistance. From a policy standpoint, more harm than good could be done by terminating an employee who had sought assistance facing a mental health crisis. Additionally, because of the time that passed between the incident and Walton's termination, as well as his efforts to inform his employer of his diagnosis and need for treatment, there was a plausible reading of the facts that Walton was discharged because of his diagnosis as opposed his expression of violent intentions. Therefore, summary judgment was denied.

d. *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015)

i. Summary:

Jacobs worked as a deputy clerk at a courthouse, and was assigned to provide customer service at the courthouse front counter. Because of her social anxiety disorder, Jacobs requested an accommodation—to be assigned to a less social role. Jacobs' employer waited three weeks without acting, and then terminated her. Jacobs had no disciplinary reports in her file. Jacobs filed a suit under the ADA, and the trial court granted summary judgment for her employer on all counts.

ii. Holding:

The Fourth Circuit held that the trial court erred by concluding that Jacobs was not disabled within the meaning of the ADA, as there are conflicting reports between medical professionals regarding Jacobs diagnosis. The trial court also erred by finding that there was no evidence that Jacobs' supervisor was aware that Jacobs had requested an accommodation. This is contrary to the evidence as Jacobs emailed her supervisor

requesting an accommodation and had discussed it with other employees. The Fourth Circuit also found that a reasonable jury could have found that Jacobs had made out the elements of a prima facie case of discriminatory discharge. Additionally, the Fourth Circuit reversed summary judgment on the retaliatory discharge claim because a reasonable jury could have found that Jacobs was fired for requesting an accommodation, which is a protected activity. Finally, the Fourth Circuit found that there was a question of fact as to whether Jacobs employer had failed to accommodate her, because Jacobs on numerous occasions requested to have a conversation regarding her disability and was refused.

e. *Mundo v. Sanus Health Plan of Greater New York*, 966 F. Supp. 171 (1997).

i. Summary:

Mundo worked as a quality analyst at Sanus Health Plan. She had been promoted and doing well until she had to leave work due to stomach pains and was admitted to the hospital for an appendectomy and gall bladder surgery. She was terminated over the phone shortly after. Mundo asserted that she was fired because her employer perceived that she was unable to handle job-related stress. Her employer claimed that during Mundo's leave, a backlog of work was discovered in her office that had not been entered into the system. Mundo did not claim that she actually has a mental impairment that prevented her from performing her job, rather that she was perceived to have a mental impairment.

ii. Holding:

The court dismissed Mundo's claim for two reasons: (1) the ability to cope with stress is not a mental impairment for purposes of the ADA, and (2) even if the court concluded that an inability to cope with stress qualified as a mental impairment, Mundo's complaint failed to set forth adequately that she was substantially limited in the life activity of working.

f. *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.2d 847 (5th Cir. 1999).

i. Summary:

Zenor was hired to work as a pharmacist at a hospital. After agreeing that he was an at-will employee, and receiving a copy of Columbia's Drug-Free/Alcohol-Free Workplace Policy, Zenor became addicted to cocaine. He typically received positive employment feedback, but at one point he was rated below average and placed on a probationary period. After Zenor told his supervisor that he was unsure if he could perform his job, as he was under the influence of cocaine, Zenor was referred to the employee assistance program. Zenor was then told to see his own doctor, and spent time in a hospital and a detox center. He was concerned about his job, and filled out paperwork for a leave under the FLMA. Zenor was then told that he would stay on as an

employee until his leave was over, but then would be terminated. Zenor then sued, claiming he was terminated in violation of the ADA.

ii. Holding:

The Fifth Circuit held that: (1) Zenor was currently engaged in the illegal use of drugs at the time he was informed he would be terminated, and therefore was not a qualified individual under the ADA, and (2) the fact that the employee self-reported his cocaine addiction and voluntarily entered a rehabilitation program before he was terminated did not bring him within the ADA's "safe harbor" provision for drug users.

### III. BEST PRACTICES AND SAMPLE POLICIES

#### a. Wellness Programs and Encouraging Employee Health

There are well-recognized links between an individual's physical health and their mental wellbeing. A study conducted by the Wisconsin Department of Health Services highlighted the link between psychological distress and the increased prevalence of chronic diseases such as asthma, diabetes, and arthritis, as well as increased cardiovascular disease.<sup>35</sup> The American Psychological Association has noted the many benefits of sleep and exercise on one's mood, stress level, and mental wellbeing.<sup>36</sup> One way to improve employee's physical health, and in turn, their mental health, is to provide a wellness program in the workplace.

Many types of wellness programs can provide benefits both for employees and for employers. These include biometric screenings, health fairs, physical activity incentives, or smoking cessation programs. The program may be as large or as small as the employer sees fit. These programs may be easily managed by a committee, human resources, or by an outside company that specializes in wellness.<sup>37</sup> One way to implement a wellness program can include technology. Devices such as Fitbit or Apple Watch, or less sophisticated devices such as a simple pedometer, can provide methods of measurement that correlate with incentives.<sup>38</sup>

Wellness programs are becoming incredibly popular; in 2015, 80% of employers offered preventative wellness services and information. This popularity is for good reason, as these programs have been shown to pay off for both employees and employers. Wellness programs have been shown to increase employee's fruit and vegetable intake, decrease body weight, increase smoking cessation, and improve

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<sup>35</sup> <https://www.dhs.wisconsin.gov/publications/p0/p00066.pdf>.

<sup>36</sup> <http://www.apa.org/monitor/2011/12/exercise.aspx>.

<sup>37</sup> <https://www.forbes.com/sites/alankohll/2016/04/21/8-things-you-need-to-know-about-employee-wellness-programs/#1ad7d97a40a3>.

<sup>38</sup> *Id.*

mental health. Wellness programs have also been shown to correlate with decreased employee absenteeism, staff turnover, and employee stress.

Wellness programs should be constructed to be inclusive of all employees, regardless of current physical health, weight, or ability. The program should also strive to incorporate not only physical health, but also mental health and even financial health. A holistic approach to health may lead employees to improve on multiple levels, which is particularly important in light of the established connection between chronic diseases and depression.<sup>39</sup>

#### b. Workplace Culture and Destigmatizing Mental Illness

Employers have control over the kind of workplace culture that employees encounter day-to-day. If this workplace culture is positive, employees are less likely to be stressed, and therefore less likely to have physical and mental health problems exacerbated during their employment.<sup>40</sup> Additionally, a healthy workplace environment can have a positive impact on the quality of work an employee produces.<sup>41</sup>

Employers can take several steps to ensure a healthy work environment. The first step is to review available data and current policies. This includes employee satisfaction, turnover rates, and clear goals and policies enforced and upheld in the workplace.<sup>42</sup> The second step is to open a dialogue with current employees where employees can freely express their concerns. This can include anonymous surveys, live discussions, or both. Ensure that employees understand they will not be penalized for speaking up.<sup>43</sup> The third step is to take action based on the information gathered. Determine what policies need to be changed or enforced, and address toxic behaviors that are brought to light. Despite the difficulties this step may involve in the short-term, the long-term benefits include less turnover, higher productivity, and healthier employees.<sup>44</sup> The fourth and final step is to adjust and be flexible as new needs arise. Be open to ongoing feedback, and ensure that the district is adjusting to current needs.<sup>45</sup>

In addition to a healthy workplace culture, employers should also strive to destigmatize mental illness and those who seek treatment. Programs, such as Ernst and Young's "r u ok?" campaign, encourage employees to look out for one another, and to reach out and offer support and resources when a colleague is struggling.<sup>46</sup> Destigmatizing mental health can also include providing employees with resources, research, and forums for open discussion regarding their mental wellbeing, and should

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<sup>39</sup> *Id.*; <https://www.cdc.gov/workplacehealthpromotion/tools-resources/pdfs/issue-brief-no-2-mental-health-and-chronic-disease.pdf>

<sup>40</sup> <http://www.mentalhealthamerica.net/workplace-culture-bullying>

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> <http://www.mentalhealthamerica.net/workplace-culture-bullying>

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> <http://www.ey.com/us/en/about-us/our-people-and-culture/diversity-and-inclusiveness/unleashing-our-full-abilities--4--resources>

include health care programs that treat mental illness with the same urgency as physical illnesses.<sup>47</sup>

### c. Identifying Employees In Need

Understanding the warning signs of an employee struggling with mental illness may allow employers to catch problems before they occur. Warning signs of mental illness include: social withdrawal, a drop in functioning, problems concentrating, increased sensitivity, apathy, feeling disconnected, illogical thinking, nervousness, unusual behavior, sleep or appetite changes, and/or rapid or dramatic shifts in feelings.<sup>48</sup>

While one or two of these signs on their own do not necessarily mean that an employee is struggling with mental illness, it can be a good practice to check in on employees who are exhibiting unusual behavior. Additionally, employees who express suicidal thoughts or intent, or intent to harm others, should receive medical attention immediately.<sup>49</sup>

### d. Addressing and Preventing Workplace Violence

While no publicized incidents of school staff committing mass violence on school grounds have occurred, workplace violence remains a serious concern.<sup>50</sup> Nearly 2 million Americans report being victim to workplace violence per year, and many more likely go unreported.<sup>51</sup> Additionally, sexual misconduct by school employees is a more common problem that may be tied to employee mental health.<sup>52</sup> One study estimated that as many as 4.5 million students are subject to sexual misconduct by an employee of a school sometime between kindergarten and twelfth grade.<sup>53</sup>

As Niels Bohr, Danish Physicist and Nobel laureate said, “Prediction is very difficult-especially about the future.” In fact, the best predictor of future violence is past violence.

The vast majority of people who are violent do not have a psychiatric disorder, and the vast majority of people who have psychiatric disorders are not violent. Issues that raise the risk of violence in an individual who has a mental health disorder include the presence of a substance use disorder, a history of violence, juvenile detention, or physical abuse. Recent stressors, such as being a crime victim, getting a divorce, or losing one’s job, can also have an effect.

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<sup>47</sup> <https://www.cdc.gov/workplacehealthpromotion/tools-resources/pdfs/issue-brief-no-2-mental-health-and-chronic-disease.pdf>.

<sup>48</sup> <https://www.psychiatry.org/patients-families/warning-signs-of-mental-illness>.

<sup>49</sup> *Id.*

<sup>50</sup> Nearly one in five workplace deaths results from workplace violence.

<http://www.victimsofcrime.org/library/crime-information-and-statistics/workplace-violence>.

<sup>51</sup> <https://www.osha.gov/SLTC/workplaceviolence/>.

<sup>52</sup> Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* 18 (U.S. Dep’t of Educ. June 2004), available at <http://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>.

<sup>53</sup> *Id.*

While no actuarial methods to predict employee violence exist, acts of violence do not often happen out of the blue. Several behaviors serve as an indicator for employee violence, including: sadness, depression, threats, menacing or erratic behavior, aggressive outbursts, references to weaponry, verbal abuse, inability to handle criticism, hypersensitivity to perceived slights, offensive commentary or jokes referencing violence, or personal relationship problems.

To minimize employee violence, schools should adopt a zero-tolerance policy. Schools should also provide a well-written and implemented workplace violence program; this can be separate or incorporated into a health and safety program, employee handbook, or manual of standard operating procedures.<sup>54</sup>

#### e. Short-Term and Long-Term Disability

Generally, short-term and long-term disability are administered by a third-party insurer and determined by the policy language. The employee can receive, for example, 66% of their pay, and receive periodic check-ups. There are freestanding benefits, and a “bridge” to retirement and SSI disability. A description of short and long-term disability benefits should be part of the FMLA and interactive process discussion.

Most worker’s compensation events trigger FMLA leave, and FMLA leave can be consumed while an employee is on worker’s compensation leave. Be careful not to require use of paid leave, FMLA leave, and worker’s compensation leave at the same time.

Partial paid leave can be used with FMLA leave and while on worker’s compensation leave to bridge the gap between full paid leave and the worker’s compensation amount.

#### f. Returning to Work and Fitness for Duty After FMLA

Before an employee returns to work, the district should send approximately 1-2 weeks from their return-to-work date a letter reminding the employee of when their FMLA leave expires and when they are expected to return to work. Ask the employee to make contact if they believe they need an accommodation when they return to work.

A fitness for duty certification can be required, where a policy exists requiring all similarly-situated employees to provide such certification. This certification will be specific to the condition that caused the leave. Additionally, a second or third opinion may be requested.

Finally, under the ADA, it is necessary to assess whether the employee is able to perform job-related duties.

#### g. Sample Accommodation Form<sup>55</sup>

A good sample accommodation form is provided at [askjan.org](http://askjan.org), the Job Accommodation Network.

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<sup>54</sup> <https://www.osha.gov/SLTC/workplaceviolence/>.

<sup>55</sup> <https://askjan.org/media/raemployersform.htm>.

**A. Questions to clarify accommodation requested.**

What specific accommodation are you requesting?

If you are not sure what accommodation is needed, do you have any suggestions about what options we can explore?    Yes                   No

    If yes, please explain.

Is your accommodation request time sensitive?                  Yes                   No

    If yes, please explain.

**B. Questions to document the reason for accommodation request.**

What, if any, job function are you having difficulty performing?

What, if any, employment benefit are you having difficulty accessing?

What limitation is interfering with your ability to perform your job or access an employment benefit?

Have you had any accommodations in the past for this same limitation?    Yes                   No

    If yes, what were they and how effective were they?

If you are requesting a specific accommodation, how will that accommodation assist you?

**C. Other.**

Please provide any additional information that might be useful in processing your accommodation request:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Return this form to \_\_\_\_\_

#### h. FMLA Request Form

The United States Department of Labor has a number of resources and forms available for employees and employers relating to FMLA requests. These can be found on their website, at <https://www.dol.gov/whd/fmla/forms.htm>.

#### i. Handbook Excerpt, Employee Assistance Program

Following is a sample handbook provision template explaining and promoting an Employee Assistance Program:

## **EMPLOYEE ASSISTANCE PROGRAM (EAP)**

### **Website:**

**Telephone:** (800) xxx-xxxx, 24/7 immediate support

The EAP is a free and confidential service available for all employees and those in their household, and is a helpful, immediately and always available wellness resource.

The goal of the EAP is to help you cope with life's challenges – whether financial, mental/emotional (such as anxiety, depression, or addiction and recovery), or any life event. Employees are encouraged to, and in some cases may be required to, utilize this resource.

When you access the program online or by telephone, you are paired with a clinical social worker, professional counselor, psychologist, or marriage and family therapist who best fits your needs and concerns and who will connect you with appropriate services that may include, but not limited to, relationship, stress management, addiction, or grief counseling; crisis services; moving/relocation support; credit monitoring and post-identity theft services; smoking cessation; health and wellness support; legal and financial services; and child, elder, and pet care referrals.

Please contact [department or position] for further information about the EAP.

### **IV. Recommendations**

Addressing the mental health disorders of school staff is a complex issue that does not lend itself to a one-size-fits-all solution. Still, the following broad recommendations should be a good starting point for educators, school boards, and school attorneys to use when planning for mental health issues in their schools.

- Use careful hiring procedures that do not discriminate based upon a disability, but that also avoid hiring an employee who may be violent, commit sexual misconduct, or otherwise not be qualified to work in a school.
- Treat employees well. Employees in a supportive environment are less likely to develop stress-related mental health problems, or to act out against co-workers.

- Provide adequate employee assistance programs to which employees can safely and effectively bring mental health or substance abuse issues.
- Maintain awareness regarding mental health issues and attempt to reduce the stigma surrounding mental health disorders in the workplace.
- Train supervisors to be open to requests for reasonable accommodation for mental health disorders.
- When there is a risk (e.g., termination of a disgruntled employee), assure that the workplace has adequate security.
- Be aware of options available for individuals struggling with mental illness.
- Be ready to discuss resources and accommodations should an employee request such assistance or when the employer is otherwise on notice of the need to offer them.

In sum, it is very important to maintain compliance with the FMLA, the ADA, and other laws that forbid discrimination based on disability. Most mental health disorders can easily qualify as a “disability” under the ADA. So, employers must be careful about making inquiries about an employee’s mental health. If an employee requests a reasonable accommodation for a mental disability, an employer must provide such an accommodation unless it is an undue hardship or the employee’s continued employment constitutes a direct threat.