Accommodating Employees with Mental Health Challenges
The Federal Framework and Practical Considerations

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• Federal Statutory Framework
  • FMLA
  • ADA
• Case Law on Employee Mental Health
• Best Practices, Policies, Procedures, + Recommendations

Mental Health Leave and the FMLA
FMLA
- Employees with mental health problems can be entitled to leave under the FMLA and any contractual or bargaining agreements that may be in place.
- 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” make the employee unable to perform one or more of the essential functions of his or her job.

“Serious Health Condition”
“An illness, injury, impairment, or physical or mental condition that involves … inpatient care … or continuing treatment by a health care provider.”
- A mental health problem, like physical impairment, must require hospitalization or ongoing treatment that meets the FMLA description
- Such as a period of incapacity of more than three consecutive calendar days involving
  - Treatment two or more times by, or under the orders of, a health care provider, or
  - Treatment by a health care provider on at least one occasion that results in a supervised regimen of continuing treatment
- “Health care provider” = clinical psychologist and social workers, as well as physicians.
- Some “serious health conditions” may be ADA “disabilities.”
Drug + Alcohol Treatment

- Employees who receive counseling or treatment for alcohol or substance abuse may be eligible for FMLA.
- “Chronic condition” – condition causes at least occasional period of incapacity and requires treatment by a health care provider at least twice a year.
- Leave only allowed for treatment, and not because of use of the substance.
- 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.

Serious Health Conditions

- May take leave on an intermittent or reduced schedule basis.
- These requests are more frequent for mental health problems than for other medical problems.
- May only be taken with the employer’s permission, unless the arrangement is “medically necessary.”
- Once all 12 weeks of leave are used, 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.
Process for FMLA Leave/ ADA Accommodation

Interactive Process

Recognizing an Accommodation Request → Gathering Information → Exploring Accommodation Options

→ Implementing the Accommodation → Choosing an Accommodation

→ Monitoring the Accommodation

→ Successful Accommodation
Reasonable Accommodations

- Must only provide accommodations to an employee who is “qualified.”
- Laws do not require employers to lower standards of performance or change qualifications; however, employers are expected to be flexible about the way the work gets done.
- ADA does not protect employees who exhibit or threaten violence on the job.

Reasonable Accommodations

May Include:

1. Changing facilities,
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,
6. Any other reasonable accommodation the employer and employee can devise.
Reasonable Accommodations

Two Exceptions:

1. An employer is not required to provide accommodation if it will impose an *undue hardship* on the operation of its business.
2. An employer may refuse to employ or provide accommodations to someone who poses a "direct threat" to the health or safety of him/herself or others in the workplace.

Reasonable Accommodations

Four Factors When Deciding if a “Direct Threat” Exists:

1. The duration of the risk;
2. The nature and severity of potential harm;
3. The likelihood that the potential harm will occur;
4. The imminence of the potential harm.
Employer Inquiries Into Employee Mental Health

- Disability related inquiries and medical examinations of current employees must be "job-related and consistent with business necessity."
- If an employer has reasonable belief, based on objective evidence that:
  - 1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or
  - 2) an employee will pose a direct threat due to a medical condition

Inquiries into Employee Mental Health

- Different rules for the employment application process
- Prior to an employment offer, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- After an offer, but before start of work, 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 category.
Inquiries Into Employee Mental Health

- 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 job functions.
- Must not exceed the scope of the specific medical condition and its effect on employee’s ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

Factors for Employers to Consider

When assessing whether information learned from another person is sufficient to justify asking disability-related questions or requiring a medical examination

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.
EEOC Example

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.

EEOC Example, cont.

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.
EEOC Example, cont.

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 she 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.

Inquiries Into Employee Mental Health

An Employer May Require an Examination When...

- It has reasonable belief that the employee will pose a direct threat.
- 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.
Inquiries Into Employee Mental Health

- Must be kept confidential.
- Must be collected and maintained on separate forms in separate medical files, apart from the usual personnel files.
- May not be discussed with other employees whether or not reasonable accommodations are being provided.

Case Law Regarding Employee Mental Health
**Bultemeyer v. Fort Wayne County Schools, 100 F.3d 1281 (7th Cir. 1996)**

**Summary**
- Bultemeyer was a custodian at Fort Wayne Community Schools.
- Suffered from serious mental illnesses, including bipolar disorder, anxiety attacks, and paranoid schizophrenia.
- Refused to take a physical and requested to work at a school less stressful than the one to which he was assigned.
- School decided to fire Bultemeyer, who filed a suit claiming the school district failed to reasonably accommodate him as required by the ADA.
- States that the School knew of his illness, and had a note from his doctor requesting a less stressful school placement.
- Trial court granted summary judgment for the School; Bultemeyer appealed.

**Holding**
- 7th Circuit held that the McDonnell-Douglas burden-shifting method of proof, while appropriate for disparate treatment claims, was unnecessary and inappropriate in ADA reasonable accommodation claims.
- Held that material issues of fact existed regarding the custodian’s ability to perform essential job functions, and whether the school engaged in an interactive process to determine necessary reasonable accommodations.
- Summary Judgment was precluded.
E.E.O.C. v. Cottonwood Financial, Ltd., 2010 WL 3500555

Summary
- Sean Reilley was hired by the “Cash Store,” owned by defendants Cottonwood Financial.
- Reilley informed his supervisor and HR that he suffered from bipolar disorder.
- Reilley did well at work, and was promoted, but then stopped taking prescribed medications.
- Reilley began experiencing manic behavior and informed his supervisor he was unable to work.
- Supervisor informed Reilley that he needed to come to work until she got there.
- Reilley was unable to take time off and get back onto medication. After he had returned to the store and the cash deposit was short one night, Reilley responded with an obscenity. His employment was terminated.
- He filed suit claiming discrimination based on bipolar disorder, and was denied reasonable accommodation.

Holding
- Defendants filed a motion for summary judgment on the grounds that
  - Reilley was not disabled by his bipolar disorder;
  - There was no knowledge that decision-making managers had knowledge of Reilley’s disorder;
  - Reilley failed to initiate the interactive process; and
  - Reilley’s employment was terminated for legitimate, non-discriminatory reasons.
**E.E.O.C. v. Cottonwood Financial, Ltd., 2010 WL 3500555, cont.**

**Holding, cont.**

- In order to be considered 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 granted summary judgment for Defendants on the failure to accommodate claim, on the grounds that the Ninth Circuit has ruled that an employer does not have a duty to reasonably accommodate an employee that it regards as disabled.

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**Summary**

- Walton was employed with Defendant Spherion Staffing, and experienced suicidal ideations for the first time while traveling for work.

- Suicidal and homicidal ideations continued, and he reached out to his supervisor and parents for help. 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 him because of his disability and failed to make reasonable accommodations.

- Defendant moved for summary judgment on the grounds that Walton’s threat of violence took him outside the protection of the statutes.

Holding

- 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.
- More harm than good could be done by terminating an employee who had sought assistance facing a mental health crisis.
- 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 to his expression of violent intentions.
- Summary judgment was denied.

Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d

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.


Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d

Holding

- 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; contrary to the evidence as Jacobs emailed her supervisor requesting an accommodation and had discussed it with other employees.

Holding, cont.

- 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.

- 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.

- 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.

**Summary**

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

**Holding**

- The court dismissed Mundo’s claim for 2 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 adequately set forth that she was substantially limited in the life activity of working.

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 was rated below average and placed on a probationary period.
- After he told his supervisor that he was unsure if he could perform his job, as he was under the influence of cocaine, he was referred to the employee assistance program.
- Zenor was then told to see his own doctor, and spent time in a hospital and detox center.
- He was concerned about his job, and filled out paperwork for a leave under FMLA.
- 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.

Holding

- The Fifth Circuit held that
  1. Zenor was currently engaged in the illegal use of drugs at the time he was informed of his termination, 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 rehab before he was terminated did not bring him within the ADA’s “safe harbor” provision for drug users.
Best Practices + Recommendations

Aspects of a Mentally Healthy Workplace Culture

- Wellness program constructed to be inclusive of all employees, regardless of current physical health, weight, or ability and incorporating mental and financial health. Chronic diseases have been strongly connected with depression, so a holistic approach is key.
- Policies/procedures discouraging toxic behavior and de-stigmatizing mental illness.
- Health care programs that treat mental illness with the same urgency as physical illness.
More Aspects of a Mentally Healthy Workplace Culture

- Supervisors trained 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.
- Human resources should be aware of options available for individuals struggling with mental illness, and be ready to discuss resources and accommodations should an employee approach them.
- Maintain compliance with the FMLA, ADA, and other laws that forbid discrimination based on disability.

Identifying Employees in Need

*Employees who express suicidal thoughts or intent, or intent to harm others, should receive medical attention immediately.*
Addressing + Preventing Workplace 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:
- Presence of a substance use disorder,
- A history of violence,
- Juvenile detention,
- Physical abuse,
- Recent stressors.

Red Flag Behaviors

- 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
- Personal relationship problems
Thank you.