

Mental Health Issues in the Workplace

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MENTAL HEALTH ISSUES

- According to the National Institute of Mental Health, **an estimated 1 in 4 adults** suffer from a diagnosable mental health condition every year
- EEOC charges based on mental health conditions are on the rise - in 2016, EEOC resolved almost **5,000 charges of discrimination based on mental health conditions** (approximately \$20 million) for individuals with mental health conditions who were unlawfully denied employment and reasonable accommodations

LEGAL CONSIDERATIONS

- ADA
 - Failure to Accommodate claims
 - “Regarded As” claims
 - Extended leave
- FMLA
 - Abuse and fraud issues
 - Fitness for duty
- Workplace Violence
 - When should you act on your or your employees’ concerns (and how)

SCENARIO 1

Anne is a marketing representative for your company. She has been employed for eight months. She had a baby five weeks ago. She was not eligible for FMLA, but she was eligible for nine weeks of maternity leave under your Company policies and has been out since her baby was born. Prior to going out, Anne frequently told you that nine weeks was not enough and that she read an article indicating that it was ideal for women to have at least 12 weeks off to bond with their new baby.

Anne has been keeping in touch with you via email about her return to work. When you last asked how she was doing, she told you that she was great, albeit a little sleep deprived. She also sent you pictures of her and her new baby at the park and at the mall. She looks great and is always smiling.

Today, one week before she was supposed to return to work, she submitted a doctor's note from her OB/GYN indicating that she was suffering from post-partum depression and that she was expected to return to work without restrictions in five weeks.

SCENARIO 1

Does Anne have a disability under the ADA?

A. Yes

B. No

ARE ALL MENTAL HEALTH CONDITIONS DISABILITIES?

- **No** – not all conditions listed in the DSM-IV are disabilities, or even impairments, for purposes of the ADA
 - Addiction (current users of illegal drugs/conduct at work resulting from alcohol abuse not covered)
 - Conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child, generalized “stress”) are not covered
- **BUT...**
 - ADA definition is broad – depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders should “easily qualify”
 - Condition does not need to be permanent or severe
- **WHEN IN DOUBT, ASSUME EMPLOYEE IS COVERED BY ADA/FMLA**

SCENARIO 1 – PART 2

Do you need to accommodate Anne's request for five weeks of additional leave?

A. Yes

B. No

LEAVE AS A REASONABLE ACCOMMODATION

- EEOC: Permitting or extending leave of absence **may be a reasonable accommodation**, for:
 - Medical treatment
 - Rehabilitation services
 - Recuperation
- But, an **indefinite** leave of absence is never a reasonable accommodation

REASONABLE ACCOMMODATION – UNDUE HARDSHIP

- No need to accommodate if it would create an “undue hardship”
- But, “undue hardship” is a commonly misused phrase
- “Undue Hardship” means:
 - **Significant difficulty or expense** considered in light of the following factors:
 - Overall financial resources of the covered entity, the effect on expenses and resources, the number of employees and the number, type and location of facilities
 - Net cost of the accommodation, taking into consideration tax credits, deductions, or outside funding

LEAVE AS A REASONABLE ACCOMMODATION

- Include language in your policies and communications to protect from EEOC scrutiny
 - Example: An extension of an approved medical leave will depend on whether the Company can reasonably accommodate the request for leave in light of the individual circumstances (i.e, ability operate without the employee; critical nature of the employee’s position, amount of time requested, etc.)
 - Example: Request for extension must be submitted prior to exhaustion of the approved leave period
- Engage in interactive process on an individualized basis
 - Talk to the individual on leave before termination. If the employee’s physician cannot estimate when the employee can return to work, termination may be permissible.
 - Analyze and document how a requested leave of absence is not reasonable

SCENARIO 1 – PART 3

When you tell Anne's manager that she is going to be out for five more weeks, he is enraged. He tells you that he remembers Anne's comments about the Company's maternity leave policy and that he finds it "more than a coincidence" that she is now "getting more than the 12 weeks off she wanted all along."

He also comments that she doesn't seem depressed in the photos she has sent with her and her baby. One of Anne's co-workers, who had a baby last year, is also upset that Anne is "gaming the system" to get more leave.

Anne's manager tells you that you need to investigate Anne's "abuse of the process" before you decide to allow her to return to work.

SCENARIO 1 – PART 3

Should you investigate Anne for abuse or fraud?

A. Yes

B. No

ABUSE AND FRAUD

- **Be careful!**
- Obtain “particularized facts”
- Confront employee
- Make “reasonably informed and considered decision”
- Talk to your supervisors and managers about expectations and employee rights

SCENARIO 2

Robert is a sales associate for a pharmaceutical company. He is an Iraq War veteran and has struggled on and off with post-traumatic stress disorder.

For the last 10 years, Robert's territory has covered a three-state region. He must travel to each state three times a year. Due to staff cutbacks, the Company is increasing the number of states for each salesperson from three to five.

After the change is announced by the Company, Robert explains to his manager that with the recent media attention of the military events in the Middle East, his PTSD has gotten worse and that he has only been able to sleep one to two hours each night. He states that he cannot handle the extra two states and the increased travel. He asks that he be allowed to have responsibility only for his original three states. Robert's co-worker and friend, Jim, volunteers to take on Robert's additional workload for him.

SCENARIO 2

Do you need to accommodate Robert's request?

A. Yes

B. No

REASONABLE ACCOMMODATION

- Reasonable accommodations include:
 - Physical accommodations in the workplace
 - Modifying non-core job duties
 - Acquiring or modifying job-specific equipment
 - Changing some policies
 - Reassignment to a vacant equivalent position, or lower paid position if none is available

REASONABLE ACCOMMODATION

- Reasonable accommodations **do not** include:
 - Requiring a change in performance standards
 - Removing a supervisor
 - Requiring others to work harder or do essential functions
 - Changing the essence of the job
 - Removing essential functions
 - Creating a new position
 - Bumping another employee

SCENARIO 3

Peggy is a receptionist at your office. She has worked in that position for 10 years without any noteworthy incidents until she began experiencing problems in her personal life last year. Last year, her marriage ended in divorce and her daughter was prosecuted after she left the scene of a deadly hit-and-run accident. These issues appear to have bled over into her work. Customers and co-workers have complained the Peggy is rude and does not appear able to concentrate on her work. Multiple different people have told you that Peggy has made comments that she is “worthless” and should “put a gun to her head.”

SCENARIO 3

What should you do about Peggy?

DIRECT THREAT

- No need to accommodate if it would create a “direct threat”
- A **significant risk of substantial harm** to the health or safety of the **individual or others**
- Cannot be eliminated or reduced by reasonable accommodation
- Based on a reasonable medical certainty -- most current medical knowledge and on the best available objective evidence
- Balancing test:
 - The duration of the risk
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur
 - The imminence of the potential harm

FITNESS FOR DUTY

- Employer has right to require a fitness for duty exam when it has a “**reasonable belief**” that:
 - Employee’s ability to perform an essential function is impaired by a medical condition
 - Employee will pose a direct threat to himself/herself or others due to a medical condition
- Reasonable Belief
 - Direct observation
 - Reliable information from credible sources
- Watch out for “regarded as” issues

QUESTIONS?



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THANK YOU

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