

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
- Mental health conditions are one of the most common sources for lawsuits under the Americans with Disabilities Act (“ADA”)
- 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 unpaid 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 (CONT.)

Does Anne have a disability under the ADA?

- A. Likely yes, because pregnant employees typically receive short term disability insurance benefits
- B. No, because all conditions that last less than six months do not qualify as a disability under the ADA
- C. Likely yes, since postpartum depression is a pregnancy-related complication that can qualify as a disability under the ADA
- D. No, because all pregnancy-related claims are covered by the Pregnancy Discrimination Act

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. No, because she is not even entitled to 12 weeks of FMLA leave benefits
- B. Likely yes, because her leave request is for a defined period of time, which likely will not impose an undue hardship on the company as the leave is unpaid

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
- 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. No, because you have nothing other than non-particularized subjective employee opinions
- B. Yes, since you should take any and all allegations of fraud or abuse seriously by thoroughly investigating even the most imprecise allegation
- C. Maybe, but only after reviewing Anne's employment history for any red flags and likely interviewing Anne about the concerns raised

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 regional sales coordinator for a hospitality company. He is an Iraq War veteran and has struggled on and off with post-traumatic stress disorder.

For the last ten 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 (CONT.)

Do you need to accommodate Robert's request?

- A. Yes, because Jim volunteered, so no undue hardship will likely be imposed on the company
- B. No, because the media has been covering the turmoil in the Middle East for years
- C. No, because his request conflicts with a new production standard of the job
- D. Yes, because the ADA only requires an employee satisfy the production standards in place at the time the employee took the job

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 (CONT.)

Eight guidelines to follow for job reassignment accommodations:

- 1) Ordinarily only do so if no reasonable accommodation is possible for the current job
- 2) Need not reassign a job applicant
- 3) Employee must be able to perform the essential functions of the reassigned role, either with or without a reasonable accommodation
- 4) Do not use reassignments to place a disabled employee in an undesirable role or location
- 5) Must transfer an employee to a position of equivalent pay and status if such a job is vacant “within a reasonable amount of time”
- 6) May transfer a disabled employee to a lower position only if an equivalent position is unavailable
- 7) Not required to maintain a reassigned employee’s salary if that is not the company’s usual practice
- 8) No requirement to promote an employee as a reasonable accommodation

REASONABLE ACCOMMODATION (CONT.)

- 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
 - Example: A phlebotomist (person who draws blood) must be able to safely draw blood
 - 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 that Peggy is rude and does not appear able to concentrate on her work. Multiple people have told you that Peggy has made comments that she is “worthless” and should “hang herself already.”

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

FINAL ADVICE

- Never ask for a job applicant's mental/psychiatric illness treatment history on an application
- Post-offer, pre-employment psychiatric exams are permitted so long as the employer subjects all entering employees in the same job category to the exam
- Fitness for duty psychological/psychiatric exams 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
- Absent special circumstances, employers should only disclose it is complying with federal law (or is acting for legitimate business reasons) when a coworker inquires about whether the employer is providing a specific person with an accommodation

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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