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Mental Health Discrimination: A Rising Risk for Employers

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Mental health is the latest emergent issue for employers due to recent events such as the ongoing COVID-19 pandemic, resulting recession and other factors like the perpetual display of racial injustices in the media.

The American Rescue Plan, enacted under President Joe Biden's administration in response to the COVID-19 pandemic, includes funding for programs that support mental health care, with a recent grant of funding to specifically address the mental health and wellness of the health care workforce.[1]

According to researchers, thanks to the pandemic, the number of people seeking help for mental health conditions — like anxiety and depression skyrocketed.[2] In the past, stigma and implicit biases surrounding mental health conditions may have kept those issues hidden.

However, increased public awareness and a shift in public perception should alert employers to prepare for a likely increase in mental health concerns and claims raised by job applicants and employees, including potential mental health discrimination claims.

Under federal law, mental disabilities have the same legal protections as physical disabilities. However, unlike most physical disabilities, mental disabilities may not be immediately visible and may present differently among different people, resulting in potential uncertainty for employers and courts navigating mental disability claims.

In light of these challenges unique to mental disabilities, employers should prepare for a potential rise in mental health discrimination claims and consider implementing measures to mitigate risks associated with individuals who suffer from mental health conditions.

Federal Legislation Regulating Mental Health Employment Claims

Congress enacted the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, in order to provide for the elimination of discrimination against people with disabilities and to create clear standards for addressing such discrimination. [3]

Governing employers with 15 or more employees, the act prohibits discrimination, retaliation or harassment against a qualified individual on the basis of a disability in hiring, firing, advancement, compensation, training, and other terms, conditions and privileges of employment.[4] The ADA also requires employers to provide qualified individuals with reasonable accommodation for their disability.

A qualified individual is someone who can meet the legitimate experience, skill, education or other requirements of the position, and perform the essential functions of the position with or without reasonable accommodation.[5] The individual must also have a legally recognized disability, defined as a physical or mental disability that substantially limits one or more of their major life activities.[6]

The act lists the following nonexhaustive mental health conditions as potentially recognized disabilities: major depressive disorder, post-traumatic stress disorder, bipolar disorder, schizophrenia, obsessive compulsive disorder and personality disorder.[7]

Adding to the uncertainty that employers may face in this area, the act notes that not all mental health conditions are disabilities or even impairments under the ADA.[8] And, as emphasized in Zuckerman v. GW Acquisition LLC by the U.S. District Court for the Southern District of New York last year, an employee cannot simply establish a mental disability based on a diagnosis alone.[9]

In addition to the legal protections provided by the ADA, employers should be aware that employees may pursue mental health claims pursuant to the Family and Medical Leave Act, which requires that covered employers provide eligible employees with up to 12 weeks of unpaid leave for treatment of or recovery from a serious health condition.[10]

The definition of a serious health condition is broader than the definition of disability, and could apply to mental health claims.[11] Mental health claims may also arise in situations where employees contemporaneously raise hostile work environment or retaliation claims stemming from other protected activities.

Although this article discusses federal cases and statutes, state and local laws may also apply to a mental health disability claim and should be reviewed.

Recent Legal Trends Related to Mental Health Claims

The U.S. Equal Employment Opportunity Commission, tasked with enforcing the ADA, received approximately 24,324 disability charges of discrimination in 2020. According to the EEOC, ADA charges filed in 2020 on the bases of anxiety disorder and depression ranked third and fourth, respectively.[12] This increase in the number of disability charges filed on the bases of anxiety disorder and depression has occurred each year since 2018.[13]

Moreover, the EEOC is prioritizing these types of charges. In December 2021, the EEOC filed a complaint on behalf of a former chief financial officer against the CFO's former employer, Ranew's Management Co., alleging that it discriminated against the CFO by terminating his employment as a result of his mental disability.[14]

The CFO allegedly suffered from major, severe and recurring depression, which caused him to experience suicidal thoughts and mental impairments that affected his ability to work, sleep, concentrate and think.[15] The complaint alleges that the CFO informed his employer of his mental health condition and took time off from work to receive treatment.[16]

However, the EEOC alleges that when the CFO sought to return to work after being cleared to do so by his doctor, the employer terminated him.[17]

Employers may grapple with how to mitigate the risks associated with a current or prospective employee who has a mental disability, including how to determine if a mental health-related condition — like anxiety — is protected under the ADA or governing state law.

Recently, a U.S. district judge in the Southern District of New York, evaluating this very issue in the Zuckerman case, dismissed an employee's claim that she was terminated as a result of her general anxiety disorder because she failed to show she actually had a mental disability.[18] The employee alleged that her general anxiety disorder substantially interfered with her ability to concentrate, think, sleep and interact with others.[19]

In dismissing the employee's disability discrimination claim, the court noted that "difficulties with sleep and concentration are widespread" and "many employees are anxious when interacting with their bosses and that many people find certain social settings to be stressful and awkward."[20]

The court found that employees must plead facts to support that the generalized anxiety disorder substantially limits a major life activity to adequately assert a mental health discrimination claim under the ADA.[21]

Additionally, employers may not know when a mental health disability prevents the employee from performing the essential functions of the job. Just last month in Jessup v. Barnes Group Inc., the U.S. Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment in favor of an employer in a mental disability discrimination action because the employee was not a qualified individual under the ADA.[22]

As set forth in the opinion, after the employee experienced a panic attack as a result of work-related stress, his employer granted his request for a leave of absence and a subsequent request for an extension of the same.[23] Soon after returning to work, the employee suffered another panic attack.[24]

The employer denied the employee's new request for a leave of absence and terminated the employee.[25] The Fourth Circuit found that the employee admitted that he was not a qualified individual as he was unable to work since his second panic attack, and therefore could not perform the essential functions of his job at the time of his termination.[26]

The Fourth Circuit also affirmed the dismissal of the employee's hostile work environment claim because the conduct the employee experienced was not sufficiently severe or pervasive.[27] Although the employee pointed to an email where his supervisor stated that he had gone crazy and was "a train wreck," the employee was not aware of that email at the time that he was allegedly subject to a hostile work environment.[28]

Evidencing the unpredictability of the outcomes in this emergent legal area, in 2015 in Jacobs v. the North Carolina Administrative Office of the Courts, the Fourth Circuit reversed the U.S. District Court for the Eastern District of North Carolina's judgment in favor of an employer who terminated an employee suffering from social anxiety disorder.[29]

As set forth in the opinion, the employee alleged that she experienced extreme stress, nervousness and panic attacks during work when servicing customers at the front counter.[30] The employee advised her employer of her mental disability and requested fewer shifts at the front counter, but the employer terminated her.[31]

The Fourth Circuit disagreed with the district court's decision that the employee did not suffer from a mental disability as a matter of law.[32] Contrary to the facts in Zuckerman, the employee in Jacobs allegedly endured extreme stress and panic attacks when interacting with the public as a result of her disability, which the Fourth Circuit found sufficient to support that her disability substantially limited a major life activity.

And, contrary to the holding in Jessup, wherein the Fourth Circuit found the employee could not perform his job at all, the Fourth Circuit held that the employee in Jacobs could still perform the essential functions of her job — i.e., she could perform all her other job functions except for working at the front counter.

Even if an employee does not have a recognized mental disability under the ADA, there are other legal considerations an employer may want to evaluate, such as potential claims under the FMLA.

In Summerland v. Exelon Generation Co., the U.S. District Court for the Northern District of Illinois recently evaluated the ADA and FMLA claims of an employee suffering from adjustment, anxiety and depression disorder.[33] The employee's mental health conditions sometimes prevented her from working, driving or otherwise leaving her home, and would occasionally manifest in panic attacks.[34]

After the employee took FMLA leave twice, the employer pulled her badge, put her on a last-chance agreement and threatened to permanently revoke her work site access if she requested additional FMLA leave.[35] The court held that those actions were sufficient to allege interference and retaliation under the FMLA and ADA.[36]

However, the court dismissed the employee's reasonable accommodation claim asserted under the ADA.[37] The employee requested a changed work schedule in order to attend therapist appointments, but the court found that the employee was able to attend those appointments without a change in schedule, and could perform the essential functions of her job without such accommodation because she received only satisfactory evaluations and had no disciplinary record.[38]

Mitigating Risk in the Workplace

Mental health conditions may not always be apparent and may be mistaken for performance-related issues.

Given increased public awareness surrounding mental health and the corresponding legal trends, employers may want to evaluate their current infrastructure, including, but not limited to, providing support for employees with mental health conditions and reviewing processes and policies to address any claims raised.

Create an open door and safe environment for employees with mental health conditions.

Although there is an increase in discussions about mental health conditions and awareness, there is still a lingering stigma and bias associated with mental health conditions. As a means to address these cultural concerns in the workplace, employers may consider creating a disability affinity group for employees who identify as disabled.

Senior leadership may solicit recommendations from the affinity group to foster discussions on ways to support employees with disabilities. By acknowledging and considering these diverse perspectives, employers may witness a cultural shift in the workplace that minimizes the stigma and biases associated with physical and mental disabilities.

Implement policies and training.

Employers may ensure that their human resources professionals, supervisors and managers are adequately trained on how to support employees with known or suspected mental health conditions in the workplace and to handle requests for accommodation under the ADA, FMLA and other applicable laws.

For example, an employer is generally prohibited from making disability-related inquiries and requiring medical examinations of employees with known or suspected mental health conditions except in limited circumstances, such as (1) after making the employee a job offer and before employment begins, so long as the employer asks the same questions of all other employees in that job category, or (2) when the employee seeks a reasonable accommodation.[39]

Employers may also choose to develop policies that help the employee overcome any reluctance to request a reasonable accommodation or disclose a mental disability. Consider making such policies well-publicized and readily available.

If an employee raises concerns related to the treatment of a mental health condition in the workplace, consider whether to discuss such concerns with legal counsel to determine the best course of action.

Evaluate, document and monitor requests for accommodations.

Employers may evaluate a request for reasonable accommodation by a qualified employee on a case-by-case basis, as mental disabilities often vary by individual.

For mental health conditions, a major life activity may be considered substantially limited, for example, if it causes diminution or an inability to use neurological functions, communicate, interact with others, concentrate, regulate thoughts or emotions, eat, sleep and even simply care for oneself.[40] Mental health conditions may not need to be severe or permanent to warrant a reasonable accommodation.[41]

When evaluating an accommodation request, employers may document all measures considered, communications related to the request and evaluation of the same.

Documentation may include following up with the employee or their treating physician on the duration of the needed accommodation and clarity on the needed accommodation to the extent such request is vague. Employers may consider implementing confidential safeguards for documentation related to the accommodation and associated disability.

Employees are not entitled to the reasonable accommodation of their choosing. The ADA does not require that an employer eliminate an essential function of the job, lower production standards or provide personal use items needed in accomplishing daily activities.[42]

Furthermore, an employer does not need to provide accommodation that would cause the employer an undue hardship.[43]

Examples of reasonable accommodations for employees with mental disabilities may include:

- ???Changing the employee's work schedule;

- ???Providing additional break time;
- ???Allowing the employee to change locations or to telework;
- ???Offering individual office space;
- ???Changing job position;
- ???Alternating supervisor methods like providing written instructions; or
- ???Permitting the employee to take a leave of absence under the FMLA, state law or company

Before denying an accommodation due to undue hardship, consider performing a fact-intensive analysis of factors, such as the cost of the accommodation and whether such accommodation would alter the nature or operation of the business.

With regard to an employee's request to work remotely, the EEOC has advised that employers are not required to grant such an accommodation request simply because the employer previously closed its offices and allowed employees to work from home as a result of the COVID-19 pandemic.[44] However, an employee may point to their success teleworking during the pandemic to support that the accommodation is reasonable.[45]

Once an employer grants an accommodation, it may consider following up with the employee and those individuals that supervise the employee to make sure that such accommodation has been effectively implemented. Supervisors and others monitoring an employee's accommodation may not use that accommodation as the basis for adverse action.

To the extent the accommodation is not implemented effectively, adjustments to the accommodation may be considered and discussed with the employee or their treating physician.

In conclusion, mental health awareness is essential for employers to create a successful workplace environment. As we shift to a new normal workforce composed of a hybrid of employees working in-person and remotely in a society coping with mental health conditions, implementing mitigating measures could be beneficial to employers and create a better workplace environment for employees.

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[1] See Press Release, U.S. Department of Health & Human Services, HHS Announces $3 Billion in American Rescue Plan Funding for SAMHSA Block Grants to Address Addiction, Mental Health Crisis (May 18, 2021), https://www.hhs.gov/about/news/2021/05/18/hhs-announces-3-billion-in-american-rescue-plan-funding-for-samhsa-block-grants.html; Press Release, U.S. Department of Health & Human Services, Biden-Harris Administration Awards $103 Million in American Rescue Plan Funds to Reduce Burnout and Promote Mental Health and Wellness Among Health Care Workforce (Jan. 20, 2022), https://www.hhs.gov/about/news/2022/01/20/biden-harris-administration-awards- 103-million-american-rescue-plan-funds-reduce-burnout-promote-mental-health-wellness-among-health-care-workforce.html.

[2] See Mental Health American, COVID-19 and mental Health: A Growing Crisis (2021), https://mhanational.org/sites/default/files/Spotlight%202021%20-%20COVID-19%20and%20Mental%20Health.pdf.

[3] 42 U.S.C. § 12101.

[4] 42 U.S.C. § 12112, 12202; see, e.g., Fox v. Costco Wholesale Corp. , 918 F.3d 65, 69 (2d Cir. 2019).

[5] 42 U.S.C. § 12111(8).

[6] 42 U.S.C. § 12102(1).

[7] 29 C.F.R. § 1630.2(j)(3)(iii).

[8] 29 C.F.R. § 1630.2(j)(1)(ii).

[9] See, e.g., Zuckerman v. GW Acquisition LLC , No. 20-cv-8742, 2021 WL 4267815, at *11 (S.D.N.Y. Sept. 20, 2021).

[10] 29 U.S.C. § 2612.

[11] U.S. Department of Labor, Employment Laws: Medical and Disability-Related Leave, https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-laws- medical-and-disability-related-leave.

[12] U.S. Equal Employment Opportunity Commission, ADA Charge Data by Impairment/Bases – Receipts (Charges Filed with EEOC) FY 1997 – FY 2020, https://www.eeoc.gov/statistics/ada-charge-data-impairmentsbases-receipts- charges-filed-eeoc-fy-1997-fy-2020.

[13] Id.

[14] See EEOC v. Ranew's Management Co., 5:21-cv-00443-MTT.

[15] Pl.'s Compl. ¶ 16.

[16] Id. at ¶¶ 19–29.

[17] Id. at ¶ 28.

[18] Zuckerman, 2021 WL 4267815, at *12.

[19] Id. at *11.

[20] Id. at *11, *12 n.4.

[21] Id. at *12.

[22] Jessup v. Barnes Grp., Inc. , No. 20-1801, 2022 WL 164016 (4th Cir. Jan. 19, 2022).

[23] Id. at *1.

[24] Id.

[25] Id. at *1–*2.

[26] Id. at *3.

[27] Jessup, 2022 WL 164016 at *5.

[28] Id. at *6.

[29] Jacobs v. N.C. Admin. Office of the Cts. , 780 F.3d 562 (4th Cir. 2015).

[30] Id. at 566.

[31] Id. at 567.

[32] Id. at 573–74.

[33] Summerland v. Exelon Generation Co. , 455 F. Supp. 3d 646 (N.D. Ill. 2020).

[34] Id. at 653.

[35] Id. at 654.

[36] Id. at 658–59, 662–63.

[37] Id. at 662.

[38] Id.

[39] U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable- accommodation-and-undue-hardship-under-ada.

[40] 29 C.F.R. § 1630.2(i).

[41] U.S. Equal Employment Opportunity Commission, Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights, https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health- conditions-workplace-your-legal-rights.

[42] U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable- accommodation-and-undue-hardship-under-ada.

[43] Id.

[44] U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[45] See Peeples v. Clinical Support Options, Inc. , 487 F. Supp. 3d 56, 63–64 (D. Mass. 2020).

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