

Mental Health Discrimination Claims in the Workplace

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Today's Agenda

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 - Implement Policies, Benefits, and Training for Supervisors
 - Develop and Maintain Standard Document Procedure
 - Establish Uniform Practices for Accommodation Requests

Current State of Mental Health



Increase of Mental Health Awareness



Naomi Osaka

Dan Harris

Cheslie Kryst

Michael Phelps

Selena Gomez

Simone Biles

Mental Health By the Numbers

- **According to the National Alliance on Mental Illness:**
 - 1 in every 5 adults in America (nearly 53 million people) will experience a mental illness in their lifetime
 - 19.1% (48 million) live with anxiety disorders
 - 8.4% (21 million) live with serious depression
 - 2.8% (7 million) live with bipolar disorder
 - Depression is a leading cause of disability worldwide
 - Serious mental illness costs America \$193.2 billion in lost earnings each year



The Impact of COVID-19 on Mental Health

- **Household Pulse Survey**

- U.S. Census Bureau survey designed to collect data on how people’s lives have been impacted by the coronavirus pandemic

Year	Anxiety Disorder	Depressive Disorder	Anxiety or Depressive Disorder
2019	8.1%	6.5%	10.8%
2020	36.9%	30.2%	42.4%
2021	27.9%	22.8%	32.1%

- Most recent data from January 26 to February 7, 2022 shows that 27.2% of adults aged 18 and over had symptoms of anxiety disorder, 22.2% had symptoms of depressive disorder, and 31.5% had symptoms of anxiety disorder or depressive disorder

Federal Legislation Regulating Mental Health Employment Claims



The Americans with Disabilities Act

- The ADA governs employers with 15+ employees
- Employers cannot engage in 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
- 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
- An individual is considered disabled if they: (i) have a physical or **mental impairment** that **substantially limits** one or more major life activities; (ii) have a record of such an impairment; or (iii) are regarded as having such an impairment

The Americans with Disabilities Act

- **Mental health conditions recognized as disabilities:**
 - Major depressive disorder
 - Post-traumatic stress disorder
 - Bipolar disorder
 - Schizophrenia
 - Obsessive/compulsive disorder
 - Personality disorder
 - Anxiety disorder
- Not all mental health conditions qualify as disabilities or impairments

The Americans with Disabilities Act (cont'd)

- **The impairment must substantially limit a major life activity**
- For mental health conditions, a major life activity may be substantially limited if it causes diminution or an inability to:
 - Use neurological functions
 - Communicate
 - Interact with others
 - Concentrate
 - Regulate thoughts or emotions
 - Eat
 - Sleep
 - Care for oneself

Accommodations Under the ADA

- Employers must gather “objective evidence” to assess essential job functions
- Mental health conditions need not be permanent or severe to warrant a reasonable accommodation
- Employers are not required to eliminate an essential function of the job, lower production standards or provide personal use items needed in accomplishing daily activities
- Once an accommodation is granted, it cannot be used as the basis for adverse action
 - *E.g.*, giving a negative review due to the use of extended leave to treat a medical condition

Accommodations Under the ADA (cont'd)

- 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, including:

(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

Accommodations Under the ADA (cont'd)

- 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, including:

(2) When the employer knows that an applicant has a disability—either because it is obvious or the applicant has voluntarily disclosed the information—and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions

Accommodations Under the ADA (cont'd)

- 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, including:

(3) When the employee seeks a reasonable accommodation

Accommodations Under the ADA (cont'd)

- **Examples of reasonable accommodations include:**
 - Altered break and work schedules
 - Quiet office space or devices
 - Changes in supervisory methods
 - Allowing an employee to listen to music to block out distractions
 - Recording meetings/training sessions for later playback
 - Modification or removal of non-essential duties
 - Permission to work from home
 - Changing job position
 - Intermittent leave for therapy and related appointments
 - FMLA or similar leave
- Employees are not entitled to the reasonable accommodation of their choosing

The ADA and the Direct Threat Defense

- Employers may not discriminate based on disability unless the employee would pose a direct threat to safety or health
- **Very high threshold under the ADA**
- Significant risk of substantial harm to health or safety of the individual or others, which cannot be eliminated or reduced by reasonable accommodation

The ADA and the Direct Threat Defense (cont'd)

- Must be based on legitimate safety concerns, rather than stereotypes, assumptions, or unsubstantiated fears
 - *i.e.*, the notion that all individuals with psychiatric disorders are prone to violence
- Employer must **identify specific behavior** that constitutes a threat, not merely rely upon an employee's medical/psychiatric condition
- EEOC regulations identify four factors to consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm

Family and Medical Leave Act

- Employees may also pursue mental health claims pursuant to the Family and Medical Leave Act (FMLA)
- Covered employers must provide eligible employees with up to 12 weeks of unpaid leave for treatment of or recovery from a **serious health condition**
- The definition of a serious health condition is **broader** than the definition of disability and could apply to mental health claims
 - Mental health claims may also arise in situations where employees raise hostile work environment or retaliation claims stemming from other protected activities
- State and local laws may also apply to a mental health disability claim and should be reviewed

Recent Case Law



The U.S. Equal Employment Opportunity Commission

- The U.S. Equal Employment Opportunity Commission (EEOC) is tasked with enforcing the ADA
- In 2020, the EEOC received more than 24,000 disability charges of discrimination
- There has been an increase in the number of disability charges filed with the EEOC on the bases of anxiety disorder and depression each year since 2018
- ADA charges filed with the EEOC in 2020 on the bases of anxiety disorder and depression ranked third and fourth, respectively

High Stakes and Unpredictable Outcomes

- *Martinez v. Rite Aid Corp.*, 63 Cal. App. 5th 958 (2021)
 - Supervisors allegedly referred to employee as a “basket case,” “bipolar” and “crazy”
 - In 2010, jury awarded \$3.4M in compensatory damages and \$4.8 million in punitive damages
 - 2014 retrial after appeal – Jury awarded \$321,000 for wrongful termination and \$20,000 for intentional infliction of emotional distress
 - 2018 retrial after another appeal – Jury awarded \$2M for wrongful termination and \$4 million for intentional infliction of emotional distress
 - On appeal, the Court reduced the award for wrongful termination by \$140,840, but in all other respects affirmed

Recent Decisions

- *Jessup v. Barnes Grp., Inc.*, 23 F.4th 360 (4th Cir. Jan. 19, 2022) (affirming summary judgment for employer in a mental disability discrimination action because employee was not a qualified individual under the ADA)
- *Zuckerman v. GW Acquisition LLC*, 2021 WL 4267815 (S.D.N.Y. Sept. 20, 2021) (dismissing employee's claim that she was terminated due to her general anxiety disorder because she failed to show she actually had a mental disability)
- *Summerland v. Exelon Generation Co.*, 455 F. Supp. 3d 646 (N.D. Ill. 2020) (evaluating ADA and FMLA claims of an employee suffering from adjustment, anxiety and depression disorder)

Recent Decisions (cont'd)

- *Peeples v. Clinical Support Options, Inc.*, 487 F.Supp.3d 56 (D. Mass. 2020) (granting preliminary injunction requiring telework as a reasonable accommodation during the pandemic to employee suffering from asthma)
- *Solloway v. White*, 738 Fed. Appx. 985 (11th Cir. 2018) (affirming summary judgment to employer that reasonably accommodated employee with PTSD by allowing telework 2-3 days per week)
- *Robles v. Medisys Health Network, Inc.*, 2020 WL 3403191, (E.D.N.Y. 2020) (employer was obligated to engage in interactive process to determine if an additional 1-2 weeks of leave was a reasonable accommodation for employee with depression and bipolar disorder)

Mitigating Risk in the Workplace



Create Open Door and Safe Environment for Mental Health

- Different approaches to consider adopting:
 - Disability affinity group
 - Programs such as yoga sessions, webinars, therapy and meditation classes
 - Presentations by mental health professionals and/or “office hours”
 - Designating certain time periods as “meeting-free”
 - Additional vacation days
 - Social events/happy hours to address isolation
 - Remote daycare/support programs for parents
- Long-term upside:
 - Employees may feel more comfortable with remote options for counseling and support
 - Open dialogue and increase in empathy surrounding job demands
 - Sustainable policies regarding flexible/remote work and paid leave



Implement Policies and Benefits

- **Develop policies** to overcome employees' reluctance to request accommodations
 - Adopt and implement well-publicized policies and procedures on how requests for accommodation should be made
 - Consider policies regarding anti-retaliation, anti-discrimination, workplace violence, open communication, work from home, flexible hours, parental leave, or short-term disability
 - Supervisors and HR should ensure that the policies are followed
- Offer benefits related to mental health such as insurance that provides coverage for mental health

Implement Training for Supervisors

- **Train supervisors** not to make comments or ask questions that may suggest they perceive an employee as having a mental disability
 - Asking an employee, who does not appear to be acting as they usually do, if they are okay vs. asking “Are you depressed?”
- Focus should always be on **performance or behavior** rather than speculating on a cause
 - “We’ve received complaints you’ve been yelling at co-workers” or “You’ve been late to work 5 times in the last 2 weeks” vs. “You seem really anxious” or “I think you have a drinking problem”

Develop and Maintain Standard Document Procedure

- Evaluate a request for reasonable accommodation on a **case-by-case basis**, as mental disabilities often vary by individual
- Document all measures considered, communications related to the request, and evaluation of the same
- Implement **confidential safeguards** for documentation related to the accommodation and associated disability
- Documentation may include:
 - Follow up with the employee or treating physician on the duration of the accommodation
 - Getting clarity on the needed accommodation to the extent such request is vague

Establish Uniform Practices for Accommodation Requests

- Utilize a **standard form** for employees and/or their treating physicians to complete in response to an accommodation request
 - What accommodation are you requesting?
 - What job functions do you have difficulty performing?
 - What limitation is interfering with your ability to perform your job?
 - How will the accommodation assist you?
- Ensure that job descriptions and other policies align with different accommodations available
 - Remote Work Policy
 - Business models during the height of COVID-19 are different than business models now

Questions?



Mental Health Discrimination Claims In The Workplace



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