

WHAT YOU SHOULD KNOW ABOUT MENTAL DISABILITIES UNDER THE ADA

Under the Americans with Disabilities Act (ADA), employers are prohibited from discriminating “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions and privileges of employment.” 42 U.S.C. § 12112(a). In recent years, the number of individuals claiming mental impairments under the ADA has grown significantly.

An employer may learn of an individual’s mental disability during the pre-offer/interview stage. Although an employer may not ask questions that are likely to elicit information about an individual’s mental disability, the applicant may have a visible disability or may voluntarily disclose that he or she has a disability and will need a reasonable accommodation to perform the job. At this point in time, the mental disability or possibility of a mental disability manifesting itself becomes the employer’s business.

Nonetheless, it is more likely that the employer will offer a job to an applicant without having any knowledge that the individual has a mental disability. The employer could learn of such a disability in a number of ways including:

- 1) the employee’s voluntary request for a reasonable accommodation
- 2) the employee’s responses to a post-offer medical questionnaire
- 3) the results of a required post-offer medical examination

This article provides the basic information for dealing with mental impairments under the ADA. It is important to note that every situation is different and often complex, and it is, therefore, important to consult with an attorney.

The ADA defines a “mental disability” as (1) a mental impairment (2) that substantially limits (3) one or more major life activities. A mental impairment is defined as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. Common personality traits, such as a quick temper, are not impairments where such traits are not symptoms of a mental or psychological disorder. Further, stress, chronic lateness, irritability and poor judgment are not automatically a mental impairment although it may be shown that they are related to mental impairments. The EEOC Enforcement Guidance cites to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) as relevant for identifying these disorders. However, not all conditions listed in the DSM-IV are disabilities or even impairments for the purposes of ADA, such as the illegal use of drugs.

Courts have recognized the following mental disabilities under the ADA or Section 504 of the Rehabilitation Act: mental illness, paranoid schizophrenia, bipolar disorder, depression, anxiety neurosis or disorder, panic disorder, post traumatic stress disorder, agoraphobia (fear of open spaces), and claustrophobia. On the other hand, courts have refused to recognize the following conditions: sexual behavior disorders, having a violent temper, chronic lateness syndrome, personality traits such as arrogance, rudeness and poor judgment.

Even if a condition is an impairment, it is not automatically a “disability.” To rise to the level of “disability,” an impairment must “substantially limit” one or more major life activities of the individual. Although there is no exhaustive list of major life activities, the EEOC Enforcement Guidelines identify some major life activities that can be restricted by a mental impairment. These include learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, and sleeping. It is important to note that an individual does not necessarily need to be substantially limited in the major life activity of working. In fact, working is only analyzed as a substantial limitation if no other major life activities are substantially limited by an impairment.

Once it is determined that a mental impairment has affected one or more major life activities, the next step is to assess whether the impairment substantially limits the major life activity or activities. Substantial limitation is evaluated in terms of the severity of the limitation and the length of time it restricts a major life activity. The EEOC Enforcement Guidance states that a mental impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. For instance, depression lasting over a year that significantly restricts an employee’s ability to concentrate, sleep and work with others is a substantial limitation. On the other hand, a mood disorder lasting a month that occasionally results in some agitation at work would not be considered a substantial limitation. Some types of mental illness (such as bi-polar disorder) manifest themselves in episodes over several months or years. The chronic nature of the condition would make the illness a disability under the ADA, if the episodes substantially limit a major life activity. The evaluation of an individual’s mental impairment must be based on how the impairment affects the individual and not on generalizations about the condition. Furthermore, the individual should be compared to an average person in the general population.

Assuming that an employee is found to be disabled as defined by the ADA, the employer is obligated to provide an employee with a “reasonable accommodation.” To determine the appropriate reasonable accommodation it may be necessary for the employer to initiate an informal interactive process with the individual. The EEOC compliance manual and case law provide that a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Requests for reasonable accommodations do not need to be in writing and may be requested using “plain English.” While the notice does not have to be in writing or be made by the employee or use the words “reasonable accommodation,” the notice must make clear that the employee wants assistance for his or her disability.

An employer can refuse to provide a reasonable accommodation if doing so would cause an undue hardship. Under the EEOC Enforcement Guidance, undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation. If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Simply refusing to accommodate the employee would violate the ADA.

The following points are suggestions for dealing with an employee's mental impairments under the ADA:

1. Refrain from disability related questions during interviews.

An employer may not ask if a job applicant has a disability or what the nature or severity of a disability might be. However, the employer may obtain information as to whether an applicant can perform the essential functions of a job as long as all applicants are asked the same questions. If that inquiry indicates the presence of a disability or that a person could not perform an essential function due to a disability, that is acceptable. Do not ask questions such as: "Do you have a mental illness?" "Have you ever been hospitalized?" or "Are you currently taking medication?"

2. Evaluate whether an individual is a "qualified individual with a disability."

In order to be a "qualified individual," the individual must satisfy certain prerequisites for the position such as possessing the appropriate educational background, employment experience, skills, licenses, certificates and be able to perform the essential functions of the position with or without reasonable accommodations.

3. Carefully identify reasonable accommodations and do not ignore an employee's efforts to communicate a problem or a need for assistance.

Examples of reasonable accommodations for individuals with mental disabilities include (1) changes to workplace policies, procedures, or practices; (2) physical changes to the workplace or obtaining extra equipment; (3) time off or modified work schedules; (4) adjusting supervisory methods; (5) providing a job coach; and (6) reassignment to a different position.

To determine the appropriate reasonable accommodation, it may be necessary for the employer to initiate an informal, interactive process with the employee. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations. The interactive process does not dictate that any particular concession must be made by the employer; nor does the process remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions. All the interactive process requires is that employers make a good-faith effort to seek accommodation.

An employer can show their good faith in a number of ways: meet with the employee who requests the accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered the employee's request, offer and discuss available alternatives when the request is too burdensome. However, do not simply refuse an accommodation.

4. Define the essential mental functions of the job.

Defining the essential mental functions required for the job will help an employer identify reasonable accommodations for mentally impaired individuals and distinguish disabled persons from those who claim they are disabled.

5. Monitor the conduct of the individual.

Despite a disability, an employer may still discipline individuals for violating workplace conduct standards. An employer may discipline an individual with a disability for violating a workplace conduct standard even if the misconduct resulted from a disability. The workplace conduct standard must be job-related for the position in question and consistent with business necessity. Workplace rules prohibiting violence, threats of violence, theft and destruction of property are always appropriate when applied equally to all employees. Note that an employer must make a reasonable accommodation for an individual who requests one even after violation of a conduct rule, assuming that the employee is not terminated. The employer is not, however, required to excuse past misconduct.

6. Determine if there is a direct threat.

Employers can exclude an individual from employment if the individual poses a direct threat to the safety of themselves or others in the workplace. A “direct threat” is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” In determining whether there is a direct threat, the employer should consider (1) duration of the risk, (2) nature and severity of the potential harm, (3) likelihood that the potential harm will occur, (4) imminence of the potential harm, and, (5) an individualized assessment of the individual’s present ability to perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. Relevant evidence may include input in the form of opinions of medical doctors, rehabilitation counselors or physical therapists who have expertise in the disability or direct knowledge of the individual with a disability.

If an individual has a history of violence or threats of violence, the employer must make an individualized assessment and must identify the specific behavior that would cause the direct threat.

7. Seek Professional/Legal Advice.

If there is ever a question about what do concerning an individual with a disability, it is highly recommended that legal advice is sought before taking any action.

8. Training, Documentation and Awareness.

Consistent application of policies and work rules, documentation of employee misconduct, and training as to supervisory responsibilities in this area should reduce the likelihood of discrimination claims and resulting liability. Documentation of accommodations afforded to other employees may help to defend against a claim of ADA discrimination.

9. Maintain Confidentiality.

There may be confidentiality issues that arise with an individual with a mental impairment. Reasonably accommodating an employee with a mental disability may be noticeable to other employees. However, employers may not tell other employees how, when or whether they are providing particular employees with reasonable accommodations.

The following documents should be kept in confidential files which are segregated from personnel files: workers' compensation file, correspondence from doctors, logs of accommodations and requests for accommodations, expert reports, physical/mental examinations, health questionnaires, any information regarding an individual's physical and/or mental status and treatment by health care professionals.

Employers must keep confidential all information concerning the medical condition or history of its applicants or employees, including information about mental disability. This includes medical information that an individual voluntarily tells his/her employer.

There are several exceptions to the ADA confidentiality requirements:

- a) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- b) first aid and safety personnel may be told if the disability might require emergency treatment; and,
- c) government officials investigating compliance with the ADA must be given relevant information on request.

Employers should be aware of the seriousness and potential consequences of ignoring mental disabilities of any employee or individual seeking employment. It is extremely important not to ignore potential ADA related situations and to train supervisors not to ignore requests for accommodations. Employers can significantly reduce their risk of future litigation by identifying situations early and seeking guidance from their attorney.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.