Mental Illness and the ADA: What Employers in the Retail Industry Need to Know

Presented By:
Melinda J. Caterine
Jim E. Hart
Holly M. Robbins

July 19, 2016
Increase in Mental Illness in the Workplace

• Increasingly prevalent
  – Approximately 21 million individuals (6% or 1 in 17 Americans) have a serious mental illness

• Protections under the ADAAA:
  – Discrimination or harassment
  – Duty to accommodate
  – Anti-retaliation protection
The Americans with Disabilities Act Amendment Act

• What is a disability under the ADAAA?
  – a physical or mental impairment that substantially limits a major life activity; or
  – a record of a physical or mental impairment that substantially limited a major life activity; or
  – when an employer takes an action prohibited by the ADA based on an actual or perceived impairment
The Americans with Disabilities Act Amendment Act

• Effect of Amendments
  – While the definition of “disability” did not change, the amendments change the way the existence of a potential disability is evaluated

• Mandates liberal interpretation of “substantially limits”
  – To “maximum extent” permitted by ADA

• Expanded definition of “major life activities” to include a range of activities such as:
  – Eating, sleeping, standing, lifting or bending, learning, reading, thinking, concentrating, and communicating
What are Mental Impairments Protected By the ADAAA?

According to the EEOC regulations, a physical or mental impairment includes:

- Any mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2 (h)(2)
Potentially Protected Mental Impairments

The EEOC opines that the following will virtually always be found to impose a substantial limitation on brain function, a major life activity:

- Intellectual disability
- Schizophrenia
- Bipolar disorder
- Autism
- Major depressive disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder

29 C.F.R. § 1630.2 (j) (3) (ii)-(iii)
Mitigating Measures

In determining whether a mental impairment constitutes a disability, mitigating measures, such as the following may not be considered:

- Medication
- Learned behavioral or adaptive neurological modifications
- Psychotherapy, behavioral therapy, or physical therapy

29 C.F.R. § 1630.2 (j)(1)(vi)
Episodic Conditions and Conditions in Remission

• Conditions that are episodic or in remission are substantially limiting if they would be when active
  – Impairments that may be episodic include, but are not limited to, major depressive disorder, bipolar disorder, and schizophrenia
  – Need for accommodation may vary

29 C.F.R. § 1630.2 (j)(1)(vii)
Reasonable Accommodation Defined

- A modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity
- Allows performance of essential job functions
- Duty to accommodate is not absolute
- Employee cannot present risk of harm to self or others
Defining What Is “Reasonable”

• Need provide only **effective** accommodation (one that enables person to perform essential functions)
• No requirement to provide every accommodation requested or the “best” accommodation
• Medically required v. employee preference
• Need not change essential job functions
• Need not lower production standards, qualitative or quantitative (but may have to accommodate to enable standards to be achieved)
• May seek documentation from health care provider to determine functional limitations and possible accommodations
This May Include:

- Time off work
- Modified work schedule
- Permitting individual to wear headphones
- Moving individual away from no work area
- Access to a tape recorder for training sessions or important meetings
- Room dividers, partitions, or other soundproofing or visual barriers between workspaces
It May Also Include:

- Policy modifications
- Modifications to supervisory style
- Reassignment
- What about rescinding discipline?
- What about making sure the employee takes her medication?
Must You Permit Work From Home as an Accommodation?

- It depends . . .
  - *Humphrey v. Memorial Hosp. Ass’n*, 239 F.3d 1128 (9th Cir. 2002) (work from home may be reasonable accommodation for medical transcriptionist suffering from OCD).
  - *EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 7502 (6th Cir. April 22, 2014) (may be reasonable accommodation even if employee works as part of a team and job involves frequent interaction with co-workers).
  - *But see Mason v. Avaya Comm.*, Inc., 357 F.3d 1114 (10th Cir. 2004) (service coordinator with PTSD not qualified for position because on-site attendance was an essential function of the job. Management could not adequately supervise her and she would not be available to cover other coordinators at busy times).
Is a Second Chance
A Reasonable Accommodation?

What is the relationship between the second chance and the claimed impairment? Does the employee actually assert (and does his doctor support) that his performance shortcomings were caused by his disability?
Some Questions To Ask

• What are the specific performance problems that you (or your doctor) say were caused by your disability?

• What are the specific accommodations that you need to perform the essential functions satisfactorily?

• How would those accommodations work to overcome the performance problems?
Remember...

• The focus is on accommodations that will allow performance of the essential functions. There is no duty to provide accommodations that will not lead to effective performance.
What Must Employee Say to Request a Reasonable Accommodation?

• *Be Aware of Plain English...*
  – “I haven’t been myself since my doctor put me on these meds.”
  – “I think I just need some time to get it together.”
  – “I need some time off because I am depressed and stressed.”
  – Employee’s wife calls in to say employee can’t come into work because he is disoriented and mentally falling apart.
Does the Request for an Accommodation Need to be in Writing?

- No. Requests for accommodation do not need to be in writing. Employees (or their representatives) may make such requests verbally or via another method of communication.
Special Rule for Mental Disabilities?

• In cases involving mental disabilities, employee may not need to ask for accommodation if employer has reason to believe that job performance affected by obvious or known disability and employee is sufficiently impaired from asking
  – But, where mental disability not apparent, employee must generally request accommodations to commence the interactive process
When Accommodation is Requested – What is the Employer Entitled to Know?

• Employer may generally ask the employee for information about the purported disability.

• Employer is entitled to know whether the employee has a covered disability and the employee’s functional limitations.

• If the disability or requested accommodation is not obvious – an employer can ask an employee for reasonable documentation about the disability and functional limitations.
  
  – **Example 1**: Documentation that person has a disability under the ADAAA and that functional limitations of disability necessitate requested accommodation (OK)
  
  – **Example 2**: All medical records regarding employee’s mental health history (not OK)
Permitted Inquiries/Examinations – Current Employees

• Medical examinations and disability inquiries must be:
  1.  Job related
  2.  Consistent with business necessity

• An employer may ask questions and/or require a medical examination if:
  – it has reason to question whether an employee’s ability to perform the essential job functions will be impaired by a medical condition, or
  – whether the employee can perform the job without posing a direct threat of harm
Permitted Inquiries/Examinations – Current Employees

• Employer’s concerns must be reasonable and supported by objective evidence

• Factors to consider:
  ✓ duration of the risk;
  ✓ nature and severity of the potential harm;
  ✓ likelihood that the potential harm would occur; and
  ✓ imminence of potential harm
Employer should ask the employee to voluntarily supply medical information.

Employer can require an examination at its own expense if

- the employee fails to do so, or
- having provided incomplete information, the employee fails to cure the deficiency
What Does the Employee’s Doctor Know?

- Defining Essential Functions
  - Why does the position exist
  - Job description is a starting point
  - If not up to date or missing key information, ask the employee to agree on the additional functions that are essential
  - Provide job description and agreed information to the employee to give to doctor
  - Define in writing the specific questions that you want the doctor to answer, and give this to the employee
Things to Never, Ever, Ever Say in the Accommodation Dialogue

- “He didn’t actually *ask* for an accommodation”
- “She said she was depressed, but she never said she was *disabled*.”
- “That’s our policy. We don’t do that here”
- “This is a full-time job, so we cannot consider a reduced schedule.”
- “You can come back to work once you have a full release.”
“He’s got [insert mental health condition here]. There’s no way he can do this job.”

“We need to know all of the prescription medications you are taking.”

“I know you have [insert mental health condition here] because my mother had the same thing.”
Other Common (and Costly) Mistakes

• Not talking to the employee!
• Asking for more medical information than company is entitled to
• Breaching confidentiality and over-sharing
• Not properly securing medical records (or over-sharing those records)
• Self-diagnosing the employee
When Does Duty to Accommodate End?

- The duty of reasonable accommodation applies to applicants and to employees all through the employment relationship
  - Includes disciplinary decisions, including termination decisions
  - May have to revisit termination decisions if disability caused the behavior that led to termination
Mental Illness and the ADA:
What Employers in the Retail Industry Need to Know

WHEN THE ADA AND THE FMLA COLLIDE
Intermittent and Extended Leaves of Absence for Employees’ Own Medical Conditions
FMLA May Apply to Seemingly Ineligible Employee

• Be aware of the employee who uses all available FMLA, and then takes an ADA-covered leave as an accommodation.
  – The FMLA year may begin again while employee is on leave and employee will be entitled to 12 more weeks of FMLA leave

• Be aware of the employee who has not yet worked for the Company for a full year and takes an ADA-covered leave.
  – While on leave, the employee may have his or her one-year anniversary, and so long as hours requirement is met, employee may become FMLA eligible, and be entitled to 12 weeks of FMLA leave from that date forward
Note the ADA/FMLA Crossover

- No “undue hardship” argument under FMLA.
- FMLA permits temporary transfer only for employee who needs intermittent or reduced schedule leave that is foreseeable based on planned medical treatment.
- Many mental health absences are unpredictable in nature.
There is No Safe Zone Outside the FMLA

- The EEOC has long maintained—and is now aggressively enforcing—that you may have leave obligations to your employees regardless of whether you or any of your employees is covered by/eligible for FMLA, and regardless of what your policies say.
Isn’t Attendance an Essential Job Function?

“An employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential ones.”

Another View

Sometimes employees need not to work in order to be able to work.

- EEOC Commissioner Chai Feldman
The Battle Over Indefinite Leave

- How much leave have you already provided to the employee?
- What do your policies say and how have they been applied?
- How will your business be impacted by additional leave?
- **Will the leave enable the employee to return to work and perform the essential functions of the position?**
Interactive Process

• Focus on essential function of the job
• Consider accommodations that would allow disabled employees to satisfy the attendance requirements
• Attendance may be more critical for certain jobs
• Do not need to discard your policies
Interactive Process (cont.)

• Fact-specific inquiry:
  – Work commute need not be accommodated (e.g., to start work an hour late, or allow work through lunch to leave early for narcoleptic employee). *Regan v. Faurecia Auto. Seating Inc.*, No. 11-1356 (6th Cir. March 10, 2012)
Request For Leave Extension... and Another... and Another

- Employee brings a doctor’s note, stating that she needs four weeks of leave
- Four weeks later she brings in another note stating that she needs four more weeks
- The pattern of extending her leave continues several times
- Supervisor wants to terminate employment because supervisor anticipates another note in four weeks
The Basic “Undue Hardship” Factors

Can a request for a four week leave of absence ever be considered an undue hardship?

Factors to consider:

• The nature and cost of the accommodations
• The overall financial resources of the business
• The overall number of individuals employed by the employer
• The effect the accommodation would have on the resources of the business
• The impact the accommodation would have on the business

– 29 C.F.R. § 1630.2(p)(2); see also 42 U.S.C. § 1211(10)(B)
Six Facts That Can Kill Your “Undue Hardship” Argument

1. A policy that provides for leaves of that length. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999)


3. Successful coverage during this leave by co-workers or subordinates. *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998)
Six Facts That Can Kill Your “Undue Hardship” Argument (cont.)

4. Successful coverage, or ability to cover, this leave by temporary employees. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000); *Nunes*, supra


6. Failure to quickly replace the employee after termination. *Haushmann*, supra (took 6 months to replace); *Garcia-Ayala*, supra (never replaced)
Cautionary Notes

• In enacting the FMLA, Congress has already determined that 12 weeks is not an unreasonable burden to pose on employers of a certain size
• Difficult defense when you have already provided the employee with a substantial amount of leave
• What does the job description say?
• How have you handled the absence?
• How have other employees been treated?
Holding the Position

- Duty to hold the position open?
- Ability to replace the employee?
- What job is the employee entitled to upon her return?
  - The same position?
  - A comparable position?
  - A completely different job?
  - No position at all?
• EEOC agrees that an employer can discipline an individual with a disability for violating a workplace conduct standard even if the misconduct resulted from a disability.

• NOTE, however, that the conduct standard must be job-related and consistent with business necessity.

• Consistency is key.
Conduct Issues

• An employer must make reasonable accommodations to enable an otherwise qualified person with a disability to meet a conduct standard that is job-related for her position and consistent with business necessity – so that she can meet the conduct standard in the future, absent undue hardship.
Conduct Issues

- Macy v. Hopkins County-School Board, 484 F.3d 357 (6th Cir. 2007)

  Plaintiff, who suffered from “post-concussive head syndrome,” was terminated after telling a group of middle school students that she would kill or seriously injure them and reiterated that she “meant it.” She also made inappropriate comments about the students and their families.
• Macy v. Hopkins County-School Board, 484 F.3d 357 (6th Cir. 2007)

  – Court rejected employee’s argument that this was not a legitimate non-discriminatory reason to terminate her because her behavior was symptomatic of her disability, stating: “an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualified the employee from his or her job.”
Conduct Hypothetical

- Employee steals money from his employer, which violates the employer’s policy against theft. When confronted, he attributes the theft to his disability.

What do you do?
Employee works in a warehouse, and has no customer contact and limited coworker contact. He has been coming into work increasingly disheveled. Coworkers have also reported that he has been anti-social and rude. The employee’s work product has not suffered. But, this conduct violates the employer’s policies on dress code and courtesy to coworkers. When the employer sits down to discipline the employee, he attributes his behavior to his psychiatric disability, which was exacerbated during this time period.
A nurse frequently loses her temper at work, shouting at patients and coworkers. After receiving a Final Written Warning as the third step in her employer’s progressive disciplinary policy, she discloses that she has bi-polar disorder, claims it was the cause of her outbursts and requests a leave of absence for treatment.
How Should Employer Respond?

• Should the employer proceed with the Final Written Warning?

• Does the employer need to rescind the prior discipline?

• Should the employer grant the requested accommodation?

• If the employer grants the accommodation, and further problems persist, what should the employer do?
Conduct Hypothetical

• Last Saturday, an employee reports he saw his manager, naked, in the copy room. The manager doesn’t deny the truth of this story, but says the cause was prescription medication. Disability? Misconduct? Should you fear a repeat?
Helen Conge

Life’s a beach, at least for me. I’ll be at Lake Calhoun sunning myself this afternoon.

Anyone want to join me?

Like · Comment · Share · 29 minutes ago

2 people like this

Jack Hammer ...stuck at work ... how long you there?

1 minute ago · Like
Direct Threat?

• Jane’s job requires use of a company vehicle for business errands

• She had a bad car accident the week before returning to work. She tells a coworker that she ran a red light due to a migraine

• Jane’s supervisor is worried about Jane’s ability to drive and the implications if she has an accident while on company time
Is Jane a “Direct Threat”? 

• First: Essential function of the job?  
• ADA – Direct threat:  
  – a significant risk of substantial harm  
  – to the health or safety  
  – of the employee or others  
  – that cannot be eliminated or reduced by a reasonable accommodation
Is Jane a “Direct Threat”?

• Case-by-case basis
• Cannot be speculative or remote, must be current
• Must be based on objective, scientific evidence
  – Relevant evidence:
    • Input from employee
    • Opinions of medical doctors with expertise in the employee’s condition or direct knowledge of the employee
• Employer’s burden of proof
Threat Analysis

• Show high probability of substantial harm
• Show that employer considered:
  1. Duration of risk
  2. Nature and severity of potential harm
  3. Likelihood that the potential harm would occur
  4. Imminence of potential harm
• If there is a “significant risk,” employer must consider whether there is a reasonable accommodation that might eliminate that risk
Questions?