

DISABILITY DILEMMAS

Celia J. Collins

OVERVIEW OF THE ADA

- Prohibits employers from discriminating against qualified individual with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment
- Applies to employers with 15 or more employees
- An employer must make a reasonable accommodation to allow a disabled employee to perform the essential functions of the job unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business.

DEFINITION OF DISABILITY

ADAAA (ADA Amendments Act of 2008)

- “definition construed in favor of broad coverage of individuals”

3 Categories of Protection:

- Impairment that substantially limits one or more major life activities
- Record of a substantially limiting impairment
- Being regarded as having a substantially limiting impairment

SUBSTANTIALLY LIMITED

- EEOC regulations – “not meant to be a demanding standard”
- Impairment is a disability if individual:
 - Unable to perform a major life activity; or
 - Restricted in the condition, duration or manner under which a major life activity can be performed as compared to the average person
- Duration must be more than several months
- Consider severity
- Without regard to “ameliorative effects” of mitigating measures
 - Medication, medical supplies, equipment, or appliances
 - Prosthetics
 - Hearing aids and other hearing devices
 - Coping strategies

“RECORD OF IMPAIRMENT”

- Substantially limiting in the past
- Includes individuals mischaracterized as having a disability
- May be relevant cases where someone is using a mitigating measure to control a condition

“REGARDED AS” DISABLED

- Impairment is not substantially limiting, but individual is treated as such
- Impairment is substantially limited as the result of the attitudes of others
- No impairment, but employer treats an individual as if he or she has a substantially limiting impairment

WHAT IS REASONABLE ACCOMMODATION?

- A change in the workplace in the way things are customarily done that provides an individual with a disability with equal employment opportunities
- Accommodations are available for the application process, to enable an individual with a disability to perform essential job functions, and to provide equal benefits and privileges of employment

TYPES OF ACCOMMODATIONS

- Physical modifications
- Modified work schedules
- Job restructuring
- Changing supervisory methods
- Job coach
- Telework
- Leave
- Reassignment to a vacant position

ACCOMMODATIONS NOT REQUIRED

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Removing an essential function
- Monitoring an employee's use of medication
- Actions that would result in undue hardship (i.e. significant difficulty or expense)

WHAT IS UNDUE HARDSHIP

- Limitation on employer's obligation to provide reasonable accommodation
- Significant difficulty or expense and focuses on resources and circumstances of particular employer in relationship to cost or difficulty of providing specific accommodation
 - Consider employer's size, financial resources, the nature and structure of its operation
- Not only financial difficulty, but to accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter nature or operation of business
- Assessed on case-by-case basis

SAFETY ISSUES

- Individual with a disability may only be excluded for safety reasons if he or she poses a “direct threat” to the health or safety of him/herself or others.
- Direct threat means a significant risk of substantial harm to self or others that cannot be reduced or eliminated through reasonable accommodation
- Determination relies on best available objective evidence from treatment provider or other reliable source and not on stereotypical generalizations or bias about mental illnesses.
- An individualized assessment is required

DIRECT THREAT FACTORS

- **Nature of the risk** and severity of the potential harm
- **Duration** of the risk
- **Likelihood** that the potential harm will occur
- **Imminence** of the risk
- Availability of **reasonable accommodation**

CONFIDENTIALITY

- Information about an employee's reasonable accommodation must be kept confidential
- **EXCEPTION:** Information may be disclosed to supervisors and managers for necessary work restrictions or reasonable accommodations
- **EXCEPTION:** Information may be disclosed to individuals involved in making decisions about reasonable accommodations
- **Exceptions:** Where necessary for emergency treatment; to officials investigating compliance with Rehabilitation Act; for workers' compensation and insurance purposes

THE REASONABLE ACCOMMODATION INTERACTIVE PROCESS

INTERACTIVE PROCESS

“To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”

29 CFR 1630.2(o)(3)

IMPLEMENTING THE INTERACTIVE PROCESS

- Analyze the particular job, its purpose and essential functions
- Consult with the employee to ascertain job-related limitations and possible accommodation
- Consult with the employee, identify potential accommodations and assess effectiveness
- Select and implement most mutually appropriate accommodation with consideration to employee's preference
- Continuing obligation

LEGAL DUTIES INVOLVED IN INTERACTIVE PROCESS

- Communication
- Good faith exploration of possible accommodations
- Neither side delays or obstructs process

IMPORTANT NUANCES

- Not required to engage in interactive process or provide reasonable accommodation to individual who meets the definition of disability solely because they are “regarded as” being disabled
- Not required to engage in interactive process if there is an obvious reasonable accommodation
- If the employee rejects the employer’s choice of a reasonable accommodation that would allow the employee to perform the essential functions of the job, then the employee may no longer be considered a qualified individual

WHAT TRIGGERS INTERACTIVE PROCESS?

- Specific request for accommodation
- Obvious disability
- Employer's recognition of need for accommodation
- Employee's attempt to return to work after LOA for disability

INTERACTIVE PROCESS CHECKLIST

Step One

- Review job description
- Discuss job duties with supervisor
- Review available medical information

Step Two

- Meet with employee
- Address specific essential functions from job description
- Ask employee for suggestions
- Determine what additional medical information is needed
- Obtain medical release to allow communication with health care provider
- DOCUMENT
 - Attempts to schedule meeting
 - Summary of meeting
 - Timeline for returning information
 - Breakdown in process attributable to employee

Step Three

- Analyze possible accommodations
- Cost
- Potential hardships to operations
- Employee's preference (not binding)
- Whether trial accommodation or permanent fix

Step Four

- Offer accommodation
- Implement accommodation

Step Five

- Evaluate success
- If not working, start over
- DOCUMENT
 - All efforts
 - All communications
 - All agreements
 - Breakdown in process attributable to employee

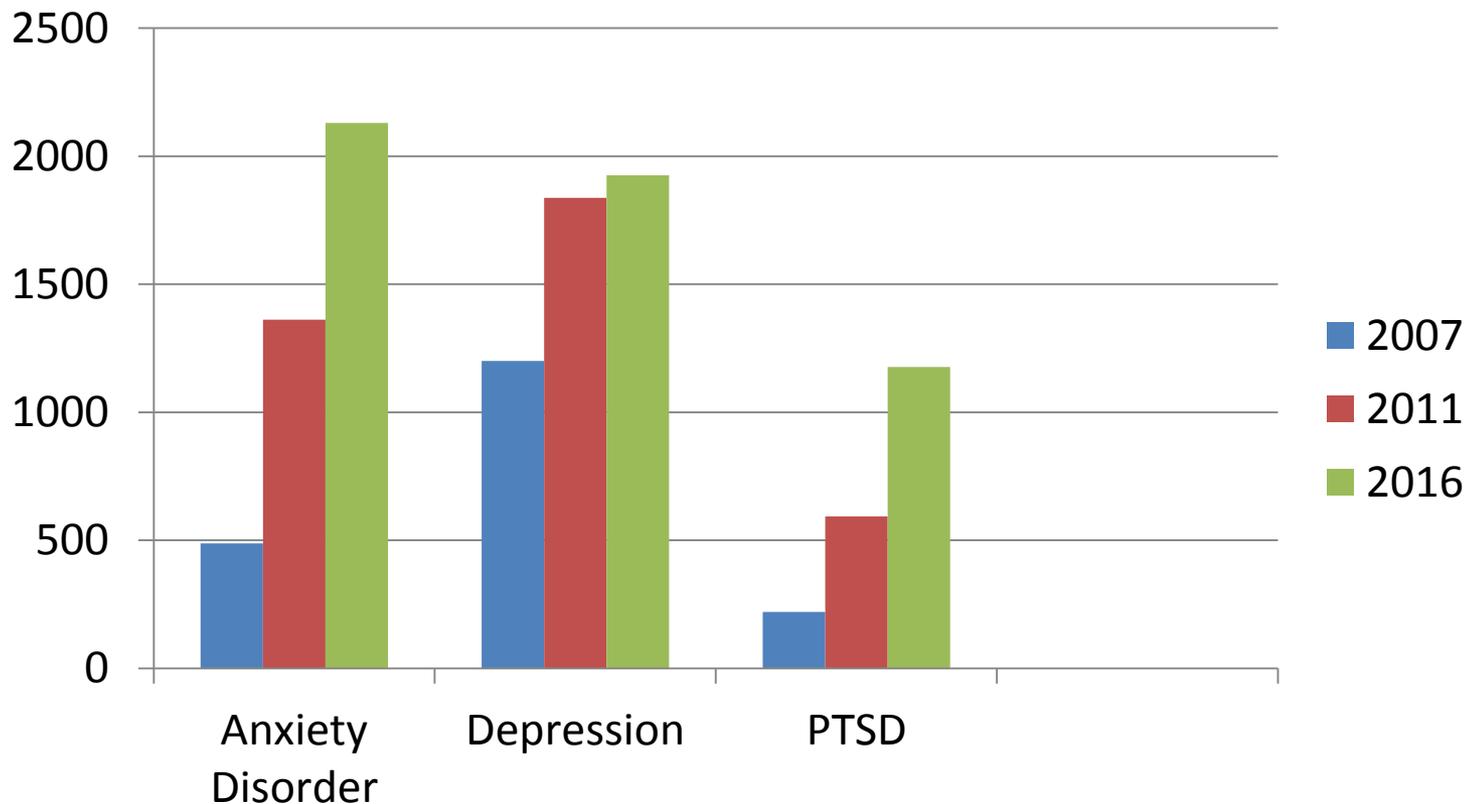
ACCOMMODATIONS NOT REQUIRED

- Permanent light duty
- Create a special position
- Bump another employee
- Indefinite leave of absence
- Tolerate persistent sporadic unscheduled absence
- Removing essential job functions

MENTAL HEALTH DISABILITIES

EEOC resolved 5000 charges of discrimination based on mental health conditions in 2016 and obtained \$20 million for employees denied employment and reasonable accommodation.

Increase in EEOC charges filed per common mental health disabilities



STATUTORY DEFINITION OF MENTAL IMPAIRMENT

Mental Impairment under the ADA – “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities”

EPISODIC/REMISSION

- Conditions that are episodic or in remission are disabilities if they substantially limit a major life activity when active
- Examples:
 - Manic Depressive Disorder
 - Bipolar disorder and PTSD

MAJOR LIFE ACTIVITIES TYPICALLY IMPLICATED BY MENTAL HEALTH IMPAIRMENT

- Thinking
- Concentrating
- Interacting with others
- Sleeping
- Caring for oneself
- Working
- Communicating

TYPES OF PROTECTED PSYCHIATRIC IMPAIRMENTS

- Anxiety disorder
- Panic disorder
- Bi-polar disorder
- Depression
- Post-traumatic stress disorder
- Schizophrenia
- Adjustment disorder

IMPAIRMENTS NOT COVERED

- Pyromania
- Kleptomania
- Compulsive gambling
- Current illegal use of drugs
- Certain sexual disorders ???

PERSONALITY TRAITS ARE NOT COVERED IMPAIRMENTS

- Poor judgment
- Chronic lateness
- Irritability
- Inability to get along with supervisor or co-workers

MANAGING EMPLOYEES WITH PSYCHIATRIC DISABILITIES

- The ADA does NOT protect an employee from misconduct, even if the misconduct is related to disability
- Courts have upheld terminations for misconduct even when the misconduct was the symptom of a mental illness

“An employer consistent with the ADA...may terminate an employee for inappropriate behavior even when that behavior is precipitated by the employee’s disability.”

“So long as the employee’s misconduct is related to the performance of her job, an employer may discipline or terminate the employee even if her misconduct was caused by the disability.”

MANAGING EMPLOYEES WITH PSYCHIATRIC DISABILITIES

A SECOND CHANCE IS NOT A REQUIRED ACCOMMODATION

- The Accommodation request should come before the discipline.

EEOC Guidance, the Americans with Disabilities Act, Applying Performance and Conduct Standards to Employees with Disabilities

“If an employee states that her disability is the cause of the conduct problem and requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee’s disability or request for reasonable accommodation.”

“Excusing workplace misconduct to provide a fresh start/second chance to the employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA”

EEOC GUIDANCE DECEMBER 2016

Depression, PTSD and Other Mental Health Conditions in the Workplace: Your Legal Rights

- Can't discriminate because of a mental health condition or rely on myths or stereotypes about the condition to decide whether employees can perform the job
- Must have objective evidence that employee cannot perform job or creates a safety risk even with a reasonable accommodation
- Employee can keep condition private unless they ask for accommodation or there is objective evidence that he or she can't perform the job or poses a safety risk
- Employee has right to reasonable accommodation for any mental health condition that substantially limits ability to concentrate, interact with others, communicate, eat, sleep, care for self, regulate thoughts or emotions or do any other major life activity.

EEOC GUIDANCE DECEMBER 2016

Depression, PTSD and Other Mental Health Conditions in the Workplace: Your Legal Rights

- Episodic symptoms may qualify – major depression, PTSD, bi-polar, schizophrenia, OCD
- Employer does not have to excuse poor performance caused by a medical condition or the side effects of medication
- If a reasonable accommodation would help the employee do his job, the employer must provide unless it involves significant difficulty or expense
- If the employee can't perform essential functions and has no paid leave, he may be entitled to unpaid leave as a reasonable accommodation
- If employee is permanently unable to perform his tasks, he may ask employer to reassign to one he can do, if available.

LEAVE AS A REASONABLE ACCOMMODATION

ADA

- An employer must make a reasonable accommodation to allow a disabled employee to perform the essential functions of the job unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business.

ADA GUIDELINES ON LEAVE AS A REASONABLE ACCOMMODATION

Employer-Provided Leave and the Americans with Disabilities Act - EEOC May 9, 2016

An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer.

Even when:

- Leave is not offered as an employee benefit
- The employee is not eligible for leave under company policy
- The employee has exhausted all available leave (including FMLA)

INTERACTIVE PROCESS

Individual with a disability must inform employer of the need for leave as a “reasonable accommodation”

- If leave can be offered under existing program, then employer must grant leave request under such program
- If leave cannot be offered by existing program, then undergo interactive process to determine feasibility of granting request.

With employee’s permission, employer may request the following information from employee’s health care provider:

- Specific reason(s) for which leave is needed
- Whether the leave will be a block of time or intermittent
- When the need for leave will end
- Whether accommodation other than leave may be effective

Communication during leave and prior to return to work

- If employee did not specify return date, or if employee requires additional leave beyond original date, then employer may continue the interactive process and request the same type of additional information from the health care provider
- If employee provided fixed return date, employer may not require employee to provide periodic updates but may contact to check on employee’s progress

ABSENCE / LEAVE POLICIES

Maximum Leave Policies Permitted

But, additional leave must be granted as reasonable accommodation unless employer can show undue hardship.

Unscheduled Absence Policies

Employers may have to modify application of discipline policy for excessive unscheduled absence if absence is due to disability and Employer cannot show modifying policy would create undue hardship

Communication regarding end of available leave

Form letters regarding return to work by a certain date or face termination may need to be modified.

(EEOC suggests advising Employee that he/she may request additional leave as a reasonable accommodation)

Third party disability benefit providers should be advised to avoid automatic termination form letters

Third party providers should be advised to forward additional leave requests to Employers' HRDepartment

Return To Work Issues

Employer may not require employee to be 100% healed to return to work unless it can show undue hardship

Employer may not refuse reinstatement because physical restrictions create safety risk without showing proof employee poses “direct threat”

- “Significant risk of substantial harm to self or others”
- Even if direct threat must consider reasonable accommodation

Interactive Process and Return to Work

Employer may ask the employee and doctor to specify the accommodation(s) required;

Employer may ask why the restrictions are required;

Employer may ask how long the reasonable accommodation may be needed;

Employer may explore with employee and doctor possible accommodations that will enable employee to perform essential job functions consistent with doctor’s recommended limitation; and

Reassignments to another position

If reassignment is required, employer must place employee in vacant position for which he/she is qualified, without competing for position

Reassignment does not include promotion

Do not have to place employee into position for which another employee is entitled under uniformly-applied seniority system

CONSIDERATIONS FOR “UNDUE HARDSHIP” DEFENSE

- Amount or length of leave required
- Frequency of the leave
- Flexibility with respect to the days on which leave is taken
- Whether need for intermittent leave is predictable or unpredictable
- Impact of absence on coworkers and on whether the specific job duties are being performed in an appropriate and timely manner
- Impact on employer’s operations and ability to serve customers/clients appropriately and in a timely matter (**taking into account the size of the employer**)
- Fluid return date or lack of definitive return date
- Amount of leave already taken
- Leave includes right to return to the employee’s original position, but if employer determines holding the job open will cause undue hardship, it may consider alternatives to permit the employee to complete the leave and return to work

Indefinite leave (i.e. employee cannot say whether or when he/she will return to work) constitutes “undue hardship”

OUT, Fall of 2017

ADA was not intended to be a leave law: “The idea that it can go on and on forever is problematic.”

RECENT DECISIONS

BILLUPS v. EMERALD COAST UTILITIES AUTHORITY 11TH CIRCUIT 2017

- An accommodation is unreasonable unless it would allow the employee to perform the essential functions of their job “presently or in the immediate future.”
- Continuing requests for leave extensions without a certain return to work date is a request for indefinite leave and not a reasonable accommodation.

RECENT DECISIONS

SEVENSON v. HEARTLAND WOODCRAFT, INC. 7th CIRCUIT COURT, 2017

- Request for 3 additional months of leave after FMLA expired is not a required accommodation.
- Multi-month extensions of leave aren't required by law.
- “The accommodations required by the ADA are those designed to allow the employee to perform the essential functions of their job, not to allow extended job abandonment.”

On April 2, 2018, the US Supreme Court declined to address the issue, despite the split among Circuit Courts.

THE ADA AND PREGNANCY ISSUES

PREGNANCY ISSUES ADA/ADAAA

“ A disability is a physical or mental impairment that substantially limits major life activities.”

ADA Law Prior to ADAAA

- Healthy pregnancy not a disability
- Pregnancy temporary
- Some complications of pregnancy covered, but not normal pregnancy impairments

POST ADAAA

Expanded “major life activities”

“caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

And includes “major bodily functions”

“the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”

POST ADA (CONTINUED)

“Substantially limits” a major life activity no longer a “severe impact” but just a limitation on major life activity as compared to the general population

Temporary conditions may be disabilities

So, under the ADA the following typical pregnancy conditions could meet the definition of disability

- Severe morning sickness
- Swelling
- High blood pressure
- Lifting restrictions

Reasonable Accommodation Analysis and Interactive Process may be required.

PREGNANCY ISSUES

LIGHT DUTY

Young v. U.P.S., U.S. Supreme Court 2015

Employers who provide light duty to some categories of employee medical conditions, i.e. work injured employees, union employees pursuant to a CBA, may have the burden of justifying why they cannot provide light duty to pregnant employee under the Pregnancy Discrimination Act

- If employer accommodates others, it cannot refuse to accommodate pregnant employees because it “is more expensive or less convenient”
- Accommodation policies may be a pretext for discrimination if they impose a “significant burden on pregnant workers outweighing any employer justification.”
- “Why, when an employer accommodated so many could it not accommodate pregnant women as well?” (SCOTUS)

PREGNANCY ISSUES

EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, JUNE 25, 2015

Light Duty

If employer grants light duty to some employees (i.e. injured on the job), but denies to pregnant employees, pregnant employee may have a claim if she can show that employer's policies impose a significant burden on pregnant workers, and employer's reasons are not sufficiently strong to justify the burden.

Leave of Absence

Under the ADA, an employer may have to provide leave in addition to that provided under its normal leave policy as a reasonable accommodation for someone with a pregnancy related impairment that is a disability.

PREGNANCY ISSUES

CHIPOTLE RESTAURANT CASE AUGUST, 2016

After employee announces pregnancy, employer expresses irritation at the timing, revokes her work from home privileges and terminates her for leaving work without permission (to attend a prenatal doctors appointment)

JURY VERDICT FOR PLAINTIFF
\$550,000
(plus Plaintiff's attorneys fees)

TAKE AWAY

Treat pregnancy issues seriously and train your supervisors to do so.

ADA/FMLA/WORKERS' COMP INTERPLAY

FMLA

- 1 Company has 50 employees within 75 mile radius
- 2 Employee has 12 months of employment
- 3 Employee has worked 1250 hours in last year.

If no to any of above, no FMLA issues

- 4 Employer notified of need for leave
- 5 Need for leave involves serious health condition of employee or covered family member
- 6 Employer provided notice of rights
- 7 Medical certification received
- 8 Employee notified time is designated as FMLA
- 9 Employee health insurance benefits continue
- 10 Job protected for 12 weeks (or whatever FMLA time remains)

AFTER 12 WEEKS
Grant additional non-FMLA leave
without job protection;
Employee can be put on COBRA
or
Terminate

ADA

- 1 Company has 15 or more employees.
- 2 Employee suffers disability affecting major life activity.

If no to either question,
no ADA issues

- 3 Essential functions of job reviewed
- 4 Can employee perform essential functions
- 5 Can reasonable accommodation be made to allow employee to perform essential function.
- 6 If employee cannot perform essential functions of job with or without accommodation, are there any vacant positions that he/she can be placed in given physical restrictions and qualifications.

If no to 3, 4 and 5
Grant leave if appropriate
or
Terminate

WORKER'S COMPENSATION

- 1 Employer has 3 or more employees
- 2 Employee claims to have suffered injury arising out of or in the course of employment

If no to either of above
No Worker's Compensation issues

- 3 Employee given all accrued time off and all FMLA and leave of absence time allowed under company policy
- 4 No light duty work available

OR

- 5 Employee refuses light duty work offered
- 6 Employee at MMI and can't perform previous job
- 7 Employee not at MMI but has been off longer than company's maximum time on employment rolls without active work
- 8 Employee has returned to work but has documented performance problems which would normally result in termination

If yes to 3-7, terminate
If yes to 8, terminate with caution





Celia J. Collins
(251) 441-9241
cjc@johnstoneadams.com