



KEMPSMITH_{LAW}



Mental Health Issues in the Workplace

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MENTAL DISABILITIES: LIMITING?



- The list of people with mental or learning disabilities reads like the Hall of Fame of Western Civilization:
 - Science: Sir Isaac Newton; Galileo; Werner von Braun; Leonardo da Vinci; Albert Einstein; Thomas Edison
 - The Arts: Mozart, John Lennon; Steven Spielberg; Walt Disney; Kurt Vonnegut; William Butler Yeats; Ernest Hemingway; Tom Cruise; Michelangelo; van Gogh
 - Politics: Eleanor Roosevelt; John F. Kennedy; Benjamin Franklin; George Patton; Dwight Eisenhower; Napoleon; Winston Churchill
 - Business: Henry Ford; Alexander Graham Bell; Charles Scwab; Richard Branson; William Hewlitt; John T. Chambers (Cisco), Steve Jobs

MENTAL DISABILITIES: PREVALENCE IN U.S.



- One in five adults (20%) in any given year
- Annual lost earnings cost (U.S.): \$193.2 B
- Debilitating MH disorders affect 10.4 million adults in the U.S. (4.2%)
- Number receiving public mental health services: 7.1 M (80% unemployed)
- Percentage of inmates with MH disorders, estimate: 70-80%

MENTAL DISABILITIES: 8 COMMON TYPES



- 1. Schizophrenia. (1.1% of U.S. adults); causes mixed; dissociative behavior; slightly to completely disabling.
- 2. Panic and Anxiety Disorders (“PAD”). (19.1% of U.S. adults); includes anxiety disorders, OCD, PTSD, generalized anxiety disorder and phobias; slightly to moderately disabling.
- 3. Clinical Depression. (6.9% of U.S. adults); major cause of missed workdays and unproductivity; annually accounts for \$44 B in losses from absenteeism, lost productivity and direct treatment costs. Highly treatable for 80% of the population.

MENTAL DISABILITIES: 8 COMMON TYPES



- 4. Substance Abuse Disorders. (5% of U.S. adults); lifetime risk of significant adverse alcohol-related event 40%); opioid addiction up 38% since 2013 (2d leading cause of death, US). Treatable in chronic form for 75% of the population.
- 5. Bi-polar Disorder. (2.6% of U.S. adults); involves periodic mood swings from depression to mania; no test for the disorder; five types; three levels of severity. No cure, but it can be medically managed. Job accommodations are effective.
- 6. Mood or Affective Disorders. (9.7% of U.S. adults in any given year; 21.4% during lifetime); includes but goes beyond mood disorders like bi-polar and substance induced mood disorders. Treatable.

MENTAL DISABILITIES: 8 COMMON TYPES



- 7. Learning Disorders. (2-10% of U.S. persons); generally measured by 2+ σ negative standard deviation on tests; often correlated with other disorders like ADHD, major depressive disorder and dysthymic disorder. Treatable.
- 8. Attention Disorders. (3-7% of relevant population); persistent inattention and/or hyperactivity/impulsivity; sufferers make careless mistakes; appear not to be listening; multitask rather than finish one first; avoid hard tasks; disorganized; easily distracted. Impulsivity manifests itself as impatience, delayed responses and scattered actions. Treatable.

ADA AND ADAAA



- Prohibits discrimination against qualified individuals with disabilities
- A disability includes a mental impairment that substantially limits one or more major life activities, having a record of an impairment or “being regarded” as having an impairment

ADA AND ADAAA



- Mental Impairments
 - Psychological disorders
 - Emotional or mental illnesses (anxiety disorders, mood disorders, intellectual disabilities)
 - Specific learning disabilities

ADA AND ADAAA



- Major Life Activities
 - Caring for oneself
 - Performing manual tasks
 - Seeing, hearing, eating, sleeping, standing, etc.
 - Learning, concentrating, communicating, concentrating
 - Working

ADA AND ADAAA



- With respect to an individual with a disability, the employer's obligation is to reasonably accommodate so that the employee can perform the essential functions of the position, but no obligation if the accommodation would impose an undue hardship
- Once aware, employer must engage in interactive process

QUALIFIED INDIVIDUAL



- Must be qualified before protected by the ADA
- Not Qualified:
 - *Sepulveda-Vargas v. Carribbean Restaurants*, 888 F.3d 549 (1st Cir. 2018)
 - ✦ Manager who suffered PTSD and major depression after being held up at gunpoint
 - ✦ Required to work rotating shift, but requested fixed shift
 - ✦ Not qualified because rotating shifts were essential
 - ✦ Temporary accommodation does not establish nonessentiality
 - *McNelis v. Penn. Power & Light*, 867 F.3d 411 (3d Cir. 2017)
 - ✦ Nuclear security officer not “fit for duty” because of various mental health issues
 - ✦ Not qualified because regulations require officers be “fit for duty”

QUALIFIED INDIVIDUAL



- Can an employer change essential functions to render an employee unqualified?
- *Stevens v. Rite Aid Corp.*, 851 F.3d 224 (2d Cir. 2017)
 - Stevens was a long-term pharmacist
 - In 2011, Rite Aid pharmacists were required to perform immunizations
 - Stevens had trynaphobia
 - Rite Aid terminated him after he failed to complete immunization training
 - He sued and a jury award over \$2.0 million

QUALIFIED INDIVIDUAL



- *Stevens v. Rite Aid*, cont'd
 - Second Circuit: Stevens was no longer qualified for the position as he could not perform an essential element of the position
 - Court also analyzed reasonable accommodation arguments, concluding that none of the following were reasonable:
 - ✦ Help Stevens get medical treatment for his fear of needles
 - ✦ Assign a nurse to work with him to administer the immunizations
 - ✦ Transfer him to another location that had a second pharmacist on duty, who could administer the immunizations

QUALIFIED INDIVIDUAL



- Is attendance an essential function? Usually yes, but:
- *McMillan v. City of NY*, 711 F.3d 120 (2d Cir. 2013)
 - Schizophrenic case manager, whose medication made him very groggy in mornings
 - His department allowed a flex time arrival and departure of between 9 and 10 a.m. and 5 and 6 p.m.
 - He was regularly late for work and finally terminated (after many years)
 - Court held that there was a fact issue of whether being at work at a specific time was essential because City tolerated tardiness for many years, had flex time arrivals and departures suggesting punctuality was not essential and tardiness did not appear to interfere with job performance

ACCOMMODATION ISSUES



- Transfer to Another Position
- *Lawler v. Peoria Sch. Dist.*, 837 F.3d 779 (7th Cir. 2016)
 - Teacher with PTSD who taught learning disabled students
 - After a relapse of PTSD, school district transferred her to a different school where she also taught students with emotional and behavioral problems
 - After being injured by a disruptive student, she suffered another relapse and asked to transfer to a different teaching position with fewer students with emotional and behavioral problems but district said no and then terminated her for performance issues
 - Court held that district had failed to engage in the interactive process, noting there were at least 7 open positions for special education teachers and also noting that her performance issues were tied to her PTSD

ACCOMMODATION ISSUES



- Telecommuting

- *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2002)

- ✦ Medical transcriptionist with OCD that affected her ability to get to work on time; other than attendance, she was a strong performer
 - ✦ Hospital allowed certain positions to work from home, as long as employee had no disciplinary record; refused to allow her and ultimately terminated her
 - ✦ Court held that Hospital had failed to engage in interactive process and that telecommuting should have been pursued

- *Mason v. Avaya Communications*, 357 F.3d 1114 (10th Cir. 2004)

- ✦ Service coordinator with PTSD requested to work from home after a workplace incident
 - ✦ Court: because supervision of employee was essential, telecommuting was not reasonable

ACCOMMODATION ISSUES



- New Supervisor, please
 - *Weiler v. HFC*, 101 F.3d 519 (7th Cir. 1996)
 - ✦ Accounting manager with stress-related TMJ received poor evaluation and claimed her supervisor yelled at her and then requested a new supervisor
 - ✦ After request was denied, she went on leave for depression and anxiety
 - ✦ Court held that demand for a new supervisor was not reasonable
 - *Calero-Cerezo v. US DOJ*, 355 F.3d 6 (1st Cir. 2004)
 - ✦ Lawyer with major depression had issues with her supervisor and claimed she had to take anti-depressants because of alleged mistreatment
 - ✦ She requested transfer to a different supervisor (and supervisor supported request)
 - ✦ Reversing summary judgment, First Circuit held that there was a fact issue as to whether this was reasonable

ACCOMMODATION ISSUES



- Stress-free, please
- *Marino v. U.S. Postal Service*, 25 F.3d 1037 (1st Cir. 1994)
 - Postal clerk with long history of anxiety neurosis assaulted his supervisor after a stressful incident and was fired
 - Argued that employer should have reasonably accommodated him by not placing him in stressful situations
 - Court said not reasonable to require employers to shield employees from stress

MY DISABILITY MADE ME DO IT



- EEOC: an employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity
- And the ADA does not protect employees from the consequences of violating such rules even if the conduct is caused by a disability

MY DISABILITY MADE ME DO IT



- *Szuskiwicz v. JP Morgan Chase Bank*, 257 F. Supp.3d 319 (E.D.N.Y. 2017)
 - Financial advisor had psychotic break, during which he harassed a co-worker and was arrested for stalking (and pled guilty)
 - After treatment, sought to return to work but was terminated
 - He claimed his conduct was caused by his mental illness
 - Court: does not matter, not immunized from disciplinary action
- *McElwee v. County of Orange*, 700 F.3d 635 (2d Cir. 2012)
 - Employee with neurodevelopmental problems engaged in inappropriate behavior of a sexually harassing nature
 - Court: not reasonable to educate women about his condition

SERVICE AND EMOTIONAL SUPPORT ANIMALS



- Title III of ADA: service animal is a dog (or miniature horse) trained to perform tasks for the benefit of a disabled individual
- Examples: guiding vision impaired individuals, calming an individual with PTSD during a panic attack
- Places of public accommodation must allow service animals to accompany their owners

SERVICE AND EMOTIONAL SUPPORT ANIMALS



- Emotional support animals are not trained to perform work or specific tasks; they provide a benefit by being present
- They are not governed by Title III
- Request to bring an emotional support animal must be evaluated as a reasonable accommodation request

SERVICE AND EMOTIONAL SUPPORT ANIMALS



- *Maubach v. City of Fairfax*, 2018 WL 2018552 (E.D. Va. 2018)
 - Maubach worked in the City's Emergency Operations Center (EOC) and asked to bring her dog, Mr. B, to work to help her avoid panic attacks
 - Her supervisor denied the request, but the City agreed (while the supervisor was on vacation) to allow it after Maubach obtained a letter from a professional counselor that Mr. B would help
 - Supervisor returned from vacation to find Mr. B, his bed and clumps of dog fur and dander in the EOC; supervisor was allergic to Mr. B, so Mr. B no longer allowed to accompany Maubach to work
 - City offered to allow Maubach to bring a hypoallergenic dog to work as an accommodation but she said no, could not afford a new dog

SERVICE AND EMOTIONAL SUPPORT ANIMALS



- Maubach sued on a failure to accommodate claim
- Court held that Mr. B imposed an undue hardship on other employees with allergies, and that City had offered a reasonable accommodation



THE END

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