The ADA and Mental Disabilities

Emerging Trends and Accommodation Issues

By Michele Ballard Miller and Jennifer Cotner

Counsel must be prepared to assist their employer clients understand their ADA obligations and face the serious challenges involved with recognizing and accommodating employees with mental disorders.

One of the biggest challenges facing employers today is the growing number of lawsuits alleging discrimination on the basis of disability and, in particular, mental disability. According to the National Alliance on Mental Illness, one in four adults—approximately *57.7 million Americans*—experience a mental health disorder each year. The most common disorders include depression, bipolar disorder, panic, obsessive-compulsive, post-traumatic stress, generalized anxiety disorders, schizophrenia, eating disorders, attention deficit hyperactivity disorder, autism, and Alzheimer's disease. The World Health Organization has reported that four of the ten leading types of disability in the United States and other developed countries are mental disorders. It is predicted that by 2020 major depressive illness will be the leading cause of disability in the world for women and children. Most people with severe mental disorders do not work, but many with milder cases do. Therefore, most employers will at some point have to grapple with managing an employee whose mental disorder interferes with his or her job. To compound this, navigating the legal and regulatory framework governing accommodating employees with mental disabilities has become increasingly challenging for employers.

Unsurprisingly, employment-related case filings involving the Americans with Disabilities Act, (ADA), 42 U.S.C. §12112(b)(5), have risen significantly. For example, in April 2012, 183 cases alleging employment discrimination based on the ADA were filed in the federal courts, a 21 percent increase over the previous month and a 12 percent increase over April 2011, according to the Transactional Records Access Clearinghouse at Syracuse University. In fact, the number of ADA lawsuits has risen steadily over the past five years for a total increase of *90 percent*. The U.S. Equal Employment Opportunity Commission (EEOC) reports that charges of disability discrimination hit an all-time high in fiscal year 2011, comprising 25.8 percent of all charges received by the agency. In 2011, the EEOC recovered $103.4 million for dis-

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ability bias victims, compared to $76.1 million in 2010 and $67.8 million in 2009. And the EEOC continues to file numerous lawsuits against employers for ADA violations, including violations involving employees with mental disorders. In September 2012, the agency sued a medical center for failing to accommodate a hospital greeter with a cognitive disability and a retail food company that failed to provide a sufficient leave of absence for an employee to manage her bipolar condition.

The stakes in these cases are high because juries in ADA cases commonly award large damages. For example, in October 2010, a California jury in *Martinez v. Rite Aid*, No. BC401746, awarded $3.4 million in compensatory damages and $4.8 million in punitive damages to an employee who contended that she was discriminated against and harassed due to a psychiatric disability, namely work-related anxiety. Supervisors allegedly called the employee a "basket case," "bipolar," and "crazy." That same month, a Wisconsin jury in *Ekstrand v. School Dist. of Somerset* awarded $2 million to a teacher who suffered from seasonal affective disorder (SAD), although it was later reduced due to the statutory cap on damages. The teacher had worked for the school district for five years when she was transferred to a room without windows. She requested a transfer to an exterior room because treatment for SAD requires exposure to natural light. Despite an empty exterior room and a coworker who offered to change rooms, the school district denied the teacher's request to change rooms. The verdict was upheld on the appeal to the Seventh Circuit. 683 F.3d 826 (7th Cir. 2012).

Lawsuits involving mental disabilities pose serious challenges for employers both in terms of recognizing and accommodating employees with these disorders. This article will attempt to clarify those employer obligations under the ADA.

What Is a Mental Disability?

The ADA defines mental disability as a "mental impairment that substantially limits one or more major life activities." The Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (as codified in 42 U.S.C. §12101 *et seq.*), took effect on January 1, 2009, and the final EEOC regulations implementing the ADAAA took effect on May 24, 2011. 76 Fed. Reg. 16,977 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630). The stated objective of the ADAAA is to "reinstate" the original ADA "broad scope of protection" for disabled individuals. The ADAAA and the EEOC regulations provide that the definition of disability must be construed "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act," and the focus should be on whether discrimination occurred and not on whether an individual meets the definition of disabled. The effect of the ADAAA, described in more detail below, has been to broaden the reach and scope of federal disability laws significantly, and many more individuals now qualify as having mental disabilities as a result.

The ADAAA and EEOC regulations implementing it define "mental impairment" quite broadly to cover "any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities." The regulations further specify that common personality traits such as poor judgment or a quick temper do not constitute impairments when they are not symptoms of a mental or a psychological disorder. Similarly, environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is not an impairment; however, various medical conditions commonly associated with age may constitute impairments.

Mitigating measures, such as medication, auxiliary aids or services, learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, or physical therapy, are *not* to be considered in assessing whether an individual has a mental disability. The ADAAA notably makes an exception when the mitigating measure is "ordinary eyeglasses or contact lenses." Rather, determining whether a disability exists must focus on whether an individual would be "substantially limited" in performing a major life activity without the mitigating measure. Non-ameliorative or negative effects of mitigating measures, such as negative side effects from medication or burdens associated with a particular treatment regimen, generally may be considered when assessing whether an employee has a substantial limitation in performing a major life activity.

Recent case law involving employees with mental impairments suggests that courts have lowered the bar for proving a disability since the ADAAA became law. For example, in *Kinney v. Century Services Corp.*, No. 1:10-CV-00787, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011), the plaintiff had isolated bouts of depression that were debilitating when active but did not impact work performance when inactive. The court denied the employer's motion for summary judgment, holding that although intermittent depressive episodes may not have qualified as a "disability" before the ADAAA, the plaintiff's condition raised a genuine issue of fact whether she was a qualified individual under the ADAAA. And in *Gesegnet v. J.B. Hunt Transportation, Inc.*, No. 3:09-CV-828, 2011 WL 2119248 (W.D. Ky. May 26, 2011), the plaintiff alleged that his bipolar disorder and anxiety constituted disabilities under the ADA, and the defendant discriminated against him when it failed to accommodate him during initial drug testing. Although the court found *no* evidence that precisely defined the extent of the plaintiff's condition and medical limitations, the court nevertheless assumed that the plaintiff had a disability based on "the broad definition of disability Congress intended." These decisions are consistent with other federal court decisions broadly construing the expanded definition of disabil-

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ity under the ADAAA. Employers should expect courts to find that more conditions, including episodic conditions, are disabilities, and should take seriously their duty to engage in the collaborative process of determining what reasonable accommodations may be available.

On the other hand, not all allegations of mental disability will survive a summary judgment motion. For example, in *Faiola v. APCO Graphics, Inc.*, 629 F.3d 43 (1st Cir. 2010), the court found no evidence that the employee's impairment—low-level depression—substantially limited a major life activity. The employee was fired after telling her manager that she was not up to going to a business conference because she was going through a "personal crisis" and "rough times." The major life activity of work was not substantially limited because the employee was not restricted in a "class" or "broad range" of jobs. That is, the inability to attend a particular conference did not amount to a substantial work limitation.

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Employers should also know that some states such as California and Connecticut have statutes and regulations interpreting what may constitute a disability more broadly than the ADA as amended by the ADAAA. So they should consult with state-specific counsel when appropriate.

"Regarded as" Disabled Claims

The ADAAA also radically expanded the definition of "regarded as" disabled. Before the ADAAA, most courts held that an employer had to believe that an employee had an impairment that substantially limited a major life activity for the employee to be "regarded as" disabled. According to the ADAAA, however, an employee is now "regarded as" disabled and thus entitled to protection from discrimination if the employer believes the employee has any mental or physical impairment, regardless of whether the employer believes the impairment limits a major life activity in any way. Although an employer is not required to accommodate an employee that the employer "perceives" as disabled, an employer cannot discriminate against an employee on the basis of such a perception. The amended "regarded as" definition effectively swallows the definition of "disability" with respect to the ADA's antidiscrimination provision. *See Wallner v. MHV Sonics, Inc.*, No. 8:10-cv-2039-JDW-EAJ, 2011 WL 5358749 (M.D. Fla. Nov. 4, 2011) (finding that an employer "regards" an individual as having a disability if it takes an action prohibited by the ADA based on an individual's impairment or based on an impairment that the employer believes the individual has unless the impairment is transitory and minor).

In *Kagawa v. First Hawaiian Bank/Bancwest Corp.*, 819 F. Supp. 2d 1125 (D. Haw. 2011), the court denied the employer's motion to dismiss a "regarded as" claim brought by an employee who was terminated after telling a coworker that she had a dream in which God told her that the coworker had romantic feelings for her. The court determined that the employee sufficiently alleged that her employer regarded her as having a mental illness because the employer ordered the employee to seek counseling within 10 days or be terminated, the manager's report received by the counselor stated that the employee "hears a voice" and does what the voice tells her to do, implying that the employee was mentally ill, and the counselor instructed the employee to see a doctor.

In *Miller v. Illinois Department of Transportation*, 643 F.3d 109 (7th Cir. 2011), the court reversed a summary judgment for the employer, finding that there was an issue of fact whether the employer regarded the employee as disabled. The employee, a bridge worker, had a panic attack and was diagnosed with acrophobia (fear of heights). The employer then precluded him from performing any bridge tasks, even those that he could perform on the ground. After the employee was cleared to return to work by two psychiatrists, the employer continued to preclude him from returning to work.

To avoid "regarded as" claims, employers should train supervisors not to make comments or to ask questions that may suggest that they perceive an applicant or employee as having a mental or physical disability. For example, it is reasonable to ask an employee who does not appear to be his or herself if the employee is okay, but it is dangerous, from an ADA standpoint, to ask, "Are you depressed?" Supervisors should focus on performance and behavior without speculating or asking about the potential cause of the problem. For example, when referring employees to counseling, supervisors should use language that focuses on the performance or behavior problems, such as, "We've received complaints that you have yelled at co-workers," or "You've been late to work three times in two weeks," rather than "You seem to have a drinking problem," or "You're all stressed out. You'd better get help."

Accommodating Employees with Mental Disabilities

An employer has a legal duty to reasonably accommodate the known mental disability of an applicant or employee unless the accommodation would constitute an undue hardship for the employer. An employer also has a duty to engage timely in what the courts call the "good-faith, interactive process" with the employee or the applicant to determine effective reasonable accommodations in response to a request for accommodation by an employee or an applicant with a known mental disability. An employee or a prospective employee must be able to perform the essential job functions of the current or potential employment position, either with or without reasonable accommodation. The law does not prohibit an employer from refusing to hire or discharging an employee with a mental disability when a disability makes the employee unable to perform his or her essential job functions even with a reasonable accommodation.

An employee may use "plain English" to communicate the need for accommodation. He or she does not need to mention any magic words, such as the ADA or "reasonable accommodation," to trigger an employer's duty to accommodate. If an employee's need for accommodation is not obvious, the employer may ask for reasonable documentation of the disability and accommodation needs. Commu-

nicating a request for an accommodation involving a mental disability may be particularly difficult because an employee may have concerns about disclosing a psychiatric disability. For example, an employee asking for time off because he is "stressed and depressed" likely would include enough information to put the employer on notice that the employee is requesting an accommodation. On the other hand, if an employee never requests an accommodation or indicates that he is suffering from a mental disability, the employer does not have a duty to offer an accommodation. For example, if an employee asks for a few days off to rest after a major project, this typically would not suffice to put the employer on notice that the need for time off is related to a mental condition. *See*, *e.g.*, *Kobus v. The College of St. Scholastica, Inc.*, 608 F.3d 1034 (8th Cir. 2010) (involving depression); *Muhonen v. Cingular Wireless Employee Servs., LLC*, 802 F. Supp. 2d 1025 (D. Minn. 2011) (involving post-traumatic stress disorder).

The ADA does not entitle an employee *carte blanche* to any accommodation that the employee chooses. In *McKane v. UBS Financial Services., Inc.*, 363 F. App'x 679 (11th Cir. 2010), the court ruled that an employer did not violate the ADA by refusing to accommodate its employee's inability to get along with coworkers by moving the employee's office away from other employees so that he would not have to interact with them. Maintaining peaceful relations with coworkers was an essential function of the job, and therefore the employer was not required to eliminate this function by removing the employee from contact with others. In *Theilig v. United Tech Corp.*, 415 F. App'x 331 (2d Cir. 2011), the court found that an employee's request for an accommodation of no contact with any coworkers and his two supervisors, based on the psychiatrist's evaluation that the employee's return to the workplace posed a risk of workplace violence or suicide, was unreasonable as a matter of law. And in *Shin v. University of Maryland Medical System Corp.*, 369 F. App'x 472 (4th Cir. 2010), the court found that a medical intern with attention deficit disorder who had "significant impairment in visual-spatial reasoning and visual memory" could not perform the job's essential functions with or without a reasonable accommodation and therefore was not a qualified individual with a disability under the ADA. The intern had to be "shadowed heavily" by resident doctors to prevent medical errors, such as misdiagnosing patients or prescribing incorrect dosage, and he was very argumentative with his supervisors and coworkers. To prevent problems, his workload had been reduced significantly to the extent that he was excused from participating in certain internship program requirements. The court noted that the ADA does not require an employer to assign an employee to "permanent light duty" or to reallocate job duties if doing so changes the essential functions of a job. Also, employers are not required to excuse job prerequisites such as a degree or certificate requirement in the accommodation process. For example, in a recent case, *Johnson v. Board of Trustees of Boundary County School District No. 101*, 666 F.3d 561 (9th Cir. 2011), the court found that an employer was not required to accommodate a teacher's disability, depression, by granting her request to teach without the requisite teaching certificate.

Similarly, an employer is not required to change an employee's supervisor as a reasonable accommodation under the ADA even if that supervisor allegedly causes the employee stress, depression, or anxiety. The inability to work with a particular supervisor does not constitute a substantial limitation on a major activity as a matter of law. *See*, *e.g.*, *Flynt v. Biogen Idec, Inc.*, No. 3:11-cv-22, 2012 WL 4588570 (S.D. Miss. Sept. 30, 2012); *Larson v. Commonwealth of Virginia, Department of Transp.*, No. 5:10-cv-00136, 2011 WL 1296510 (W.D. VA, April 5, 2011). Similarly, an employer is not required to create an entirely new position to accommodate an employee. *See*, *e.g.*, *Otto v. City of Victoria*, 685 F.3d 755 (8th Cir. 2012); *Watkins v. Ameripride Servs.*, 375 F.3d 821 (9th Cir. 2004); *Howell v. Michelin Tire Corp.*, 860 F. Supp. 1488, 1492 (M.D. Ala. 1994). On the other hand, the ADA might require a supervisor to change his or her supervisory methods as a reasonable accommodation for a mentally disabled employee. *See* Equal Employment Opportunity Comm's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html (last visited Jan. 2, 2013). The EEOC provides the following example: A supervisor frequently schedules team meetings on a day's notice, often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings because they have conflicted with previously scheduled physical therapy sessions. The employee asks for two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming that no undue hardship would result, the supervisor must make this accommodation. While the EEOC hypothetical appears to confront a physical disability more directly than a mental disability, it is easy to substitute a mental disability in this set of facts.

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Under the ADA, an employer cannot require medication or treatment or require that an employee use mitigating measures. *See* Final Rule Implementing ADA Amendments Act of 2008, 76 Fed. Reg. 16,977, 17009 (Mar. 25, 2011) (app. to pt. 1630 offering interpretive guidance on Section 1630.2(j)(1)(vi)); Equal Employment Opportunity Comm's Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008. Depending on the circumstances, the ADA may require an employer to provide a temporary job coach to assist with training a mentally disabled employee, or to permit the employee to have a job coach accompany the employee on the job site. An employer may also be required to use room dividers, soundproofing, or visual barriers, or to move an employee away from

workplace noise. Whether or not working from home is a reasonable accommodation depends upon the nature of the work, that is, whether the employee can perform the essential functions of his or her position from home.

Finally, it is important to note that neither side may obstruct the interactive process, although courts are reluctant to find an employee obstructive. Generally, cases finding that the employee has not participated in the good-faith interactive process involve the employee's refusal to participate in the process *altogether*, for example, by failing to show up for meetings or to return calls and rejecting all accommodation offers. If an employee will not accept a proposed accommodation, the employer cannot force an employee to accept it. But, an employee who does not accept a reasonable accommodation and, as a result, cannot perform the job, cannot meet conduct or performance standards, or poses a direct threat, will not be considered "qualified."

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To avoid potential lawsuits, an employer should proactively (1) review and ensure that its written procedures, policies, and forms regarding accommodation and disability leave mirror the language of the ADA and corresponding state law; (2) communicate updated policies to employees; (3) train managers, supervisors, and human resource personnel on the ADA, the reasonable accommodation obligation, and how to engage in the interactive process; and (4) regularly update job descriptions to ensure that they accurately reflect essential job function details. An employer must understand state-by-state accommodation requirement differences. For example, see the comparison chart prepared by the California Fair Employment and Housing Commission, http://www.dfeh.ca.gov/res/docs/Publications/dfeh-208dh.pdf.

Attendance and Misconduct

Attendance problems are common with some mental disabilities. Nevertheless, federal courts generally affirm that an employer can lawfully terminate an employee for excessive absenteeism even when the absences are due to a disability covered by the ADA if regular attendance is an essential function of the position, such as when an employee must perform a job on-site. *See Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012); *Vandenbroek v. PSEG Power CT LLC*, 356 F. App'x 457 (2d Cir. 2009); *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002); *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000); *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994).

Having written job descriptions and clearly communicated and consistently applied written attendance policies make it far more likely a court will find that attendance is an essential job function. An employer should review job descriptions periodically to ensure that they contain thorough and current details of job responsibilities, including that regular attendance is essential. Before terminating a mentally disabled employee for attendance issues, however, an employer should first consider whether a reasonable accommodation would help an employee fulfill the essential functions of the position, such as (1) flexible scheduling, (2) a modified break schedule, (3) a leave of absence, or (4) working from home. Any such reasonable accommodation should, of course, be consistent with the needs of the employer's business.

As far as workplace conduct, most courts and the EEOC take the position that an employer may discipline an individual with a disability for violating a workplace conduct rule if the misconduct resulted from the disability, *provided that the rule is job-related for the position in question and consistent with business necessity*. For example, an employer can maintain violence-free workplaces or discipline an employee who steals or destroys property. Thus, an employer may discipline an employee for engaging in misconduct if it would impose the same discipline on an employee without a disability. An employer should take caution, however, before resorting to termination. *See Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007) (holding that an employer violated the ADA by discharging an employee whose misconduct was caused by bipolar disability). When the discipline involves something less than termination, however, an employer must consider possible accommodations prospectively to help the employee comply with the conduct rule. *See* Equal Employment Opportunity Comm's Applying Performance and Conduct Standards to Employees with Disabilities, http://www.eeoc.gov/facts/performance-conduct.html (last visited Jan. 2, 2013).

An employer may also lawfully exclude an employee for safety reasons if the employment of that person poses a "direct threat," meaning a *significant* risk of substantial harm to the health or safety of the individual or others, which the employer cannot eliminate or reduce by a reasonable accommodation, and the employer can identify the *specific behavior* that poses the threat. *See, e.g., Johnson v. City & County of San Francisco Dept. of Public Health*, No. 11-cv-04113, 2012 WL 4953099 (N.D. Cal. Oct. 17, 2012) (finding the employee was not a "qualified individual" when two psychologists concluded he was unable to perform his job with or without a reasonable accommodation because of his erratic behavior, which involved making highly provocative comments that implied threats of harm); *Calandriello v. Tennessee Processing Center*, No. 3:08-1099, 2009 WL 5170193 (M.D. Tenn. Dec. 15, 2009) (holding that terminating an employee with bipolar disorder because of fear of potential violence by that employee was a legitimate nondiscriminatory reason for the termination). Employers must avoid stereotypes about mental disabilities, however, including assuming that employees with mental disabilities automatically pose workplace threats. Rather, an employer's apprehension must be based on legitimate safety concerns. In *Lizotte v. Dacotah Bank*, 677 F. Supp. 2d 1155 (D. N.D. 2010), a federal court denied summary judgment to an employer that terminated an employee who returned to work without medical restrictions following a suicide attempt. In rejecting the employer's argument that it had safety concerns about the employ-

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ee's return, the court cited the employer's expressed concerns about its image and an executive's statement that he was "blown away" that someone who attempted suicide was not in jail. The court held that such evidence raised a question of fact whether the employer's concerns were based on myths, fears, or stereotypes about depression, as opposed to legitimate safety concerns. Similarly, in *EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505 (W.D. Pa. 2010), another federal court held that the employer failed to make an adequate individualized assessment whether a recovering addict on methadone could safely perform the essential functions of a production-worker job and therefore wrongly regarded him as disabled. The court also held that the employer had offered insufficient evidence to establish a "direct threat." To determine whether an employee poses a direct threat the employer must undertake an individualized assessment of the employee's present ability to safely perform the essential functions of the job and base its decision on that assessment. An employer cannot base an analysis of a potential direct threat on subjective judgments. An employer must base a potential direct threat analysis on the best available objective evidence.

Conclusion

Due to the prevalence of mental disorders in the United States, most employers will sometime or another face the challenging issue of managing an employee with a mental disability. To avoid ADA violations and significant liability exposure, employers should provide managers with training to ensure that they understand the law and their obligations under the ADA, such as recognizing when an employee may need an accommodation, the need to engage in the interactive process to explore reasonable accommodations and what the interactive process entails, and best practices for handling performance and discipline issues with a mentally disabled employee.

Moreover, defense counsel should work with their clients to develop written job descriptions, employment policies and procedures relating to disability and accommodations, and training programs for managers on managing employees with mental disabilities to help avoid potential liability under the ADA and similar state laws. FD