

The Current State of Disability Law:
Dealing with Employees with Psychiatric Disabilities

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Introduction

Approximately one in five Americans has a diagnosed or diagnosable psychiatric disorder at any time (NIMH, citing Regier, Narrow, and Rae, et al, 1993; <http://www.nimh.nih.gov/publicat/numbers.cfm>). In addition, psychiatric disorders comprise four of the top ten conditions that result in work disability in the U.S. and developed countries: major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder (NIMH, citing Murray and Lopez, 1996). Given these statistics, it is likely that supervisors and managers will encounter workers (or students) with psychiatric disabilities that may affect their work performance or their behavior at work.

Not surprisingly, individuals filing employment discrimination claims with the Equal Employment Opportunity Commission (EEOC) are more likely to identify a psychiatric disorder than any other type of disability. In FY 2003, the latest year for which data are available, 20 percent of the disability discrimination claims received by the EEOC cited a psychiatric disorder as the claimant's type of disability (www.eeoc.gov). This figure mirrors the prevalence of individuals with psychiatric disorders in the U.S. population.

Individuals with psychiatric disabilities face serious problems in the workplace if their disability is made public. Mental disorders tend to stigmatize individuals who have

them, and co-workers often believe the stereotypes of individuals with mental disorders as potentially violent, or as difficult to work with, or as unproductive. Furthermore, the unpredictability of symptoms for some disorders may mean that the individual is asymptomatic for long periods of time, but may present symptoms on other occasions (Zuckerman, Debenham, and Moore, 1993). Co-workers and managers may believe that the individual “just isn’t trying” or is malingering, particularly if co-workers have little or no information about the characteristics of the disorder.

Research conducted on the attitudes of supervisors and managers toward employees with psychiatric disabilities shows that many managers are not comfortable with these individuals. In surveys of managers conducted in business organizations, managers’ “most preferred” disability was mobility impairment, and their “least preferred” disability was psychological impairments (Lee 1996; Bernardin and Lee, 2002). For these reasons, some employees with psychiatric disorders do not disclose their disabilities, fearing discrimination, stigmatizing, or stereotyping. Nondisclosure of a disorder to the employer means that the worker cannot claim the protections against disability discrimination under state or federal law.

On the other hand, many workplaces experience problems when a worker has difficulty getting along with supervisors, co-workers, or customers, or when the individual’s behavior is problematic in other ways. Some managers believe that any worker with a psychiatric disability is “untouchable” because of ADA protection, while others automatically assume that anyone whose behavior or performance is affected by a psychiatric disorder can be summarily dismissed. The truth is somewhere between these two extremes, and depends on a variety of facts. This paper will review what the ADA

requires (and what it does not), review the reactions of federal (and some state) courts to these claims, and suggest strategies for managing employees with disabilities, as well as their co-workers. The paper will also discuss the barriers erected by the law itself to constructively managing workers with psychiatric disabilities.

What the ADA Protects, and What it Does Not

Not every worker with a diagnosed or diagnosable mental or psychiatric disorder is covered by the Americans With Disabilities Act. The individual must demonstrate that he or she meets the ADA's definition of "disabled," in that the individual must prove that he or she has a disorder that "substantially limits one or more major life activities" (42 U.S.C. §12102(2)). The courts have been inconsistent in categorizing "work" as a "major life activity," although other activities, such as caring for oneself, breathing, walking, and procreating have been affirmed as "major life activities." Even those courts that have ruled that "work" is a major life activity have required the plaintiff to demonstrate that he or she is unable to work in a wide range of jobs, rather than simply being unable to perform the job the individual holds (see, for example, *Williams v. Toyota Motor Mfg., Ky., Inc.*, 534 U.S. 184 (2002)). Federal courts have interpreted the definition of "individual with a disability" very narrowly, and many plaintiffs with genuine mental or physical disorders have been unable to demonstrate that they meet this definition of "disability," leaving them unprotected by the ADA (Lee, 2003).

Because of several U.S. Supreme Court rulings in 1999 (Lee, 2003), an individual whose disability is "mitigated" by medication or in other ways may not be able to meet the definition of "individual with a disability" under the ADA. For example, an

individual with bipolar disorder whose symptoms are controlled by medication would not meet the definition of an “individual with a disability.” An individual whose medication did not completely control the symptoms, or who did not use some form of “mitigation,” might be able to meet the test for disability, assuming that he or she were able to demonstrate that the disorder affected one or more “major life activities.”

The EEOC lists “interacting with others” as a major life activity (*EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities*, n. 15). However, since the federal courts do not always defer to the EEOC’s interpretation of the ADA (see, for example, the U.S. Supreme Court’s *Sutton* trilogy, discussed in Lee, 2003), courts and legal scholars differ as to whether “interacting with others” should be considered a “major life activity,” which would potentially provide more protection to employees with psychiatric disabilities. Many courts have been reluctant to include interacting with others in the category of major life activities, which has led to dismissal of a number of lawsuits brought by employees with psychiatric disorders (Hensel, 2002; Stephenson, 2004).

Even if the individual successfully establishes that he or she is an “individual with a disability,” the next test is whether or not the individual is “qualified” for the position held or desired. In order to meet the requirements for being “qualified,” the individual must demonstrate that he or she can perform the essential functions of the position. Individuals with behavior or performance problems often have difficulty demonstrating that they are “qualified.” For example, if an employee cannot get along with a supervisor or with co-workers, a court may rule that the individual cannot perform an essential

function of the position, because interacting professionally with supervisors, peers, or customers is typically viewed as an essential function of virtually any job.

Assuming that the employee with a psychiatric disability establishes that he or she is “qualified,” the next question is whether there is a reasonable accommodation that will enable the employee to perform the job. As noted above, getting along with supervisors and others is considered an essential function, and the courts have rejected employee requests to order accommodations such as transferring the employee to a different supervisor or allowing the individual to work unsupervised. Modest rearrangements to the work space may be considered reasonable by a court, but major changes in the way the work is done or removing “essential functions” from the job are not required by the law and will not be ordered by a court.

The most frequent type of accommodation requested by workers with psychiatric disabilities is time off from work, either for periods of in-patient care, or for psychotherapy. The dual protections of the ADA and the Family and Medical Leave Act require employers to provide these leaves to qualified workers. But courts are less likely to require other accommodations frequently requested by workers with psychiatric disorders, such as the transfer to a different supervisor (or the transfer of the individual’s current supervisor to another position), a “stress-free” work environment, or working at home. Depending on the individual’s job responsibilities, it may not be possible to provide a “reasonable accommodation” that enables the individual to be a productive employee, but the employer must go through the interactive process of attempting to identify an accommodation that is appropriate.

Although the statute provides that an employer need not accommodate an employee who is a “direct threat” to him- or herself or others, this defense is rarely used in litigation involving workers with psychiatric disorders. Nevertheless, if an employee is behaving in ways that appear to threaten the worker, coworkers, students, or others, the “direct threat” defense may be used to justify a refusal to retain the employee.

Judicial Reactions to Claims by Employees with Psychiatric Disorders

Commentators have noted the difficulty that plaintiffs with psychiatric disorders have encountered in lawsuits brought under the ADA. They assert that judges appear to hold the same stereotypes concerning individuals with psychiatric disorders that are held by the general public (Stefan, 2000, pp. 272-273). Furthermore, the ADA’s requirement that the plaintiff show that she or he is “substantially limited” makes it difficult for all but the most seriously disabled workers to state a claim under the ADA (Meuti, 2003).

Meeting the ADA definition. As noted above, the plaintiff must first establish that he or she meets the ADA’s definition of an “individual with a disability.” If the individual cannot demonstrate that the disorder creates a “substantial limitation” in a major life activity, the claim will fail and, in many cases, the judge awards either summary judgment or a directed verdict for the defendant employer. For example, in *Johnson v. New York Medical College*, 1997 U.S. Dist. LEXIS 14150 (S.D.N.Y. 1997), a clerical worker with depression and colitis was unable to persuade the court that she was disabled because neither of her disorders had caused her to miss work, with the exception of one pre-approved disability leave. Individuals who have self-accommodated, or whose use of medication or other therapies has mitigated the effects of their disorder, are

similarly not viewed as “substantially limited” by the courts (see, for example, *Doane v. City of Omaha*, 1156 F.3d 624 (8th Cir. 1997) (police officer with one blind eye self-accommodated)).

Several federal appellate courts have addressed the issue of whether “interacting with others” is a major life activity. The U.S. Court of Appeals for the Ninth Circuit ruled that interacting with others was a major life activity (*McAlindin v. County of San Diego*, 192 F.3d 1266 (9th Cir. 1999)), cautioning that merely having difficulty getting along with coworkers was not sufficient to show a substantial limitation in interacting with others. That opinion was criticized by the U.S. Court of Appeals in *Jacques v. DiMarzio*, 386 F. 3d 192 (2d Cir. 2004), in which an employee whose bipolar disorder and depression led to frequent confrontations with her supervisors and co-workers. The court rejected the Ninth Circuit’s definition of “interacting with others” (“characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary”) (192 F.3d at 1235). The Second Circuit crafted a much more narrow definition—“When the mental or physical impairment severely limits the fundamental ability to communicate with others” (386 F.3d at 203), arguing that the Ninth Circuit’s test was “unworkable, unbounded, and useless as guidance to employers, employees, judges, and juries” (386 F.3d at 202). Under the Second Circuit’s definition, behavior such as “cantankerousness,” hostility, argumentativeness, apathy, or poor judgment would not be symptoms of a substantial limitation in the ability to interact with others. And, according to the U.S. Court of Appeals for the Fourth Circuit, a plaintiff must have difficulty interacting with everyone, not just selected co-workers or supervisors, in order to be considered disabled (*Roham v.*

Networks Presentations LLC, 375 F.3d 266 (4th Cir. 2004); see also *Steele v. Thiokol Corp.*, 241 F.3d 1248 (10th Cir. 2001)).

Furthermore, courts may not view the disorder as sufficiently serious to meet the law's definition, as in *Boldt v. Wisconsin LIRC*, 2 ADA Cases 554 (Wisc. Ct. App. 1992), in which a night watchman with depression was discharged for making harassing telephone calls from work. When the worker asserted that he had depression and ensuing marital problems, the court declared that "fighting with one's wife is not a mental illness," and rejected his claim. And, unless the disorder disqualifies the individual from an entire category of jobs, the courts may reject the claim. In *University of Maryland at College Park*, 2002 U.S. App. LEXIS 12757 (4th Cir. 2002)(unpublished), the court rejected the claim of a greenhouse worker with obsessive-compulsive disorder who was fired for his inability to meet performance deadlines and his refusal to wear safety gear. The court ruled that there was no evidence that the disorder limited the plaintiff's ability to work generally. And if the disorder (such as agoraphobia or certain panic disorders) interferes with an employee's ability to get to work, but does not affect performance at work, a court may rule that the individual is not substantially limited, as in *Schwartz v. Northwest Iowa Community College*, 881 F. Supp. 1323 (N.D. Iowa 1995)(library clerk with night blindness who could not drive to her night shift job not disabled because the condition did not affect her ability to work).

Establishing that the employee is qualified. Once the employee meets the ADA's definition of disability, the worker must establish that he or she is qualified—that the individual can perform the essential functions of the position. It is this test that poses difficulties for workers whose psychiatric disorders cause behavioral issues in the

workplace. For example, in *Motzkin v. Trustees of Boston University*, 938 F. Supp. 983 (D. Mass. 1996), a professor who was accused of sexually harassing students and colleagues was found to be unqualified to teach because his psychiatric disorder interfered with his ability to control his impulses. The court took judicial notice of the fact that an essential function of being a college professor is interacting constructively with students and colleagues.

Workers whose psychiatric disorders limit their ability to perform one or more of the essential functions of the job have been found not to be “qualified” for ADA purposes. For example, in *Hatchett v. Philander Smith College*, 251 F.3d 670 (8th Cir. 2001), a business manager who had been out on disability leave because of a psychiatric disorder sued, asserting that she deserved the new position with more responsibility that had been created in her absence. Because her doctor had told the college that the plaintiff must avoid conflict, deal with individuals one-on-one rather than in groups, and not confer with students or attend meetings, the college determined that she was not qualified for the more responsible position, and the court agreed.

Even unwritten functions may be considered “essential” by a court when reviewing a disability discrimination claim. For example, in *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992), a nurse whose medication for depression made it difficult for her get up in the morning and thus to arrive at work on time was found not to be qualified by the court, which ruled that working the specified shift was an essential function of the job. Similarly, courts have ruled that regular attendance is an essential function of all jobs, even if the employer does not establish a job-related reason for that requirement (*Greer v. Emerson Elec. Co.*, 185 F.3d 917 (8th Cir. 1999)).

Designing appropriate accommodations. As noted above, the accommodation most frequently requested is a leave of absence, a flexible work schedule, additional leave time for treatment, a work area that is free of distractions, and reassignment of certain job duties (Zuckerman, 1993; Parrish, 1991). For example, in *Menes v. C.U.N.Y.*, 92 F. Supp. 2d 294 (S.D.N.Y. 2000), a worker with depression requested a three-day work week, which the employer agreed to. When the plaintiff's performance continued to be unsatisfactory, the employer dismissed him. The court upheld the dismissal, noting that the plaintiff could not perform the essential functions of the position, even with accommodation.

Workers with psychiatric disorders may request additional leave time, but the employer is not required to assent if the additional leave would be an undue hardship for the employer. However, the employer needs to be able to demonstrate that the additional leave actually would be an undue hardship. In *Rogers v. New York University*, 250 F. Supp. 2d 310 (S.D.N.Y. 2002), an administrative assistant had taken FMLA leave to deal with her psychiatric disorders. After the expiration of the FMLA leave, she requested an additional month of leave. The university rejected her request, and she sued. The court denied the university's summary judgment motion, ruling that the plaintiff should be given the opportunity to demonstrate that she was qualified for the position and that the additional month of leave was a reasonable accommodation. Had she requested an unlimited extension of her leave, however, it is likely that the court would have ruled in the university's favor, as unlimited leaves are viewed as unreasonable by courts (see, for example, *Scott v. University of Toledo*, 739 N.E. 2d 351 (Ct. App. Ohio 2000)).

Although plaintiffs with psychiatric disorders are typically unsuccessful when suing under the ADA, state civil rights statutes may provide greater protection. For example, a plaintiff whom the court found not disabled under the ADA was allowed to pursue his claim under the NJ Law Against Discrimination (*Olson v. General Elec. Astrospace*, 966 F. Supp. 312 (D.N.J. 1997); see also *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144 (2d Cir. 1998) (similar outcome for plaintiff suing under ADA and New York’s Human Rights Law)). Therefore, prudent risk management and good human resource management practice suggest that managers and supervisors should heed the requirements of the ADA and state nondiscrimination laws when dealing with workers with psychiatric disorders.

Strategies for Managing Employees with Psychiatric Disorders and their Co-Workers

In dealing with employees—whether they be faculty or staff—with psychiatric disorders, it is important to ensure that performance expectations and workplace conduct rules are enforced consistently. Faculty members who “explode” at colleagues or subordinates should be told that this behavior is unacceptable, and should it be repeated, disciplinary action should be taken. Academic freedom does not protect abusive behavior, whether it be verbal or physical. For guidance on this issue, see the AAUP’s *Statement on Professional Ethics*, available at www.aaup.org. For guidance on general matters of dealing with employees with psychiatric disorders, see the *EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities*, available from www.eeoc.gov.

Although individuals with mental disabilities are only slightly more likely to engage in workplace violence than employees without such disorders (Hubbard, 2001 at 867), co-workers may fear that the individual will be violent, and may treat the individual differently. Co-workers may also tease or harass individuals with psychiatric disorders. Such behavior potentially violates the ADA and state civil rights laws, and it clearly is dysfunctional workplace behavior. Even though workers have had difficulty stating claims for workplace harassment on the basis of a psychiatric disorder (see, for example, *Chrouser v. DePaul Univ.*, 1998 U.S. Dist. LEXIS 8179 (N.D. Ill. May 20, 1998)), such harassment should not be allowed to occur in the workplace.

Workplace misconduct. Although most employees with disabilities do not behave inappropriately in the workplace, some do. They should be dealt with as one would any other worker, whether or not the supervisor knows that the individual has a psychiatric disability. Courts have uniformly insisted that compliance with reasonable work rules and professional behavior are essential functions of any position, and excusing an individual with a disability from these rules and standards would be viewed as an undue hardship for the employer. Courts have backed employers who discharged workers for rude and disruptive behavior (*Allen v. Stone*, 1992 U.S. Dist. LEXIS 1008 (D.D.C. 1992)) or for insubordination, even when the insubordination was linked to the mental disorder (*Mancini v. General Electric*, 820 F. Supp. 141 (D. Vt. 1993)). Even misconduct by supervisors has not necessarily insulated workers with psychiatric disorders from termination if the worker cannot perform the essential functions of the position (*Weiler v. Household Finance Corp.*, 1995 U.S. Dist. LEXIS 10566 (N.D. Ill. 1995)). In a sad commentary on some workplaces, a federal trial court ruled that a supervisor who was

“rude and hostile” to all of her subordinates did not incite a subordinate’s outburst, and thus the organization did not have to accommodate his “explosive personality disorder” (*Mazzarella v. USPS*, 849 F. Supp. 89 (D. Mass. 1994)).

But summary dismissal of a worker who has disclosed a disability is unwise; the employer should consider whether there is an accommodation that will enable the worker to function effectively, and whether that accommodation is reasonable. Employers who have neglected this interactive process have been denied summary judgment, even in cases where the facts might suggest that no “reasonable” accommodation was possible (see, for example, *Hindman v. GTE Data Services*, 1994 U.S. Dist. LEXIS 9522 (M.D. Fla. 1994) (worker who brought firearm to work because of “chemical imbalance” entitled to trial on whether company should have granted his request for a medical leave)).

Performance problems. In order to hold any employee responsible for meeting performance standards, such standards need to exist in writing and be communicated to employees. While this may be done routinely for staff, it may not be done as routinely for faculty. If performance standards are not clear, or are not communicated, the employee may attack the lack of standards instead of explaining why he or she did not meet them.

Newberry v. East Texas State University, 161 F.3d 276 (5th Cir. 1998) provides a good example of dealing with a faculty member with performance problems. Newberry, a tenured professor of photography, came to campus two days per week, worked afternoons only, refused to hold office hours, and engaged in numerous disputes with the department chair and other colleagues. After thirteen years of fractious relationships with

his colleagues, several of his colleagues asked the dean to intervene. The dean met with Newberry on several occasions to discuss Newberry's behavior, and warned him that he would be dismissed if his behavior did not improve. Although Newberry requested a leave of absence, he was terminated instead. A jury rejected his ADA claim, ruling that he was not qualified.

In *Motzkin v. Trustees of Boston University*, 938 F. Supp. 983 (D. Mass. 1996), an untenured professor of philosophy was terminated after being found guilty by a faculty committee of sexually harassing several students and a faculty colleague. Motzkin challenged the termination, stating that he had a "depressive disorder" which caused the misconduct. The court ruled that, because teaching and interactions with students and faculty colleagues were an essential function of Motzkin's job as a professor, he was not qualified, and thus was not protected by the ADA. The court also noted that the university was not aware of Motzkin's disorder when it terminated him.

Courts addressing ADA claims by faculty have not required colleges to have clearly-articulated performance standards, taking "judicial notice" of the fact that a professor must be able to interact positively with colleagues, other staff, and students in order to fulfill job responsibilities. However, a useful risk management strategy would be for the institution to adopt a standard of performance, such as the AAUP *Statement on Professional Ethics* noted above, in order to avoid future claims that the institution had not put faculty on notice that they had to behave professionally.

Performance expectations should be clarified in writing for staff (including graduate students serving as teaching or research assistants). If the employer is clear about the performance standards and evaluates the employee on a regular basis, a court is

very likely to defer to the supervisor's judgment about the employee's performance. For example, in *Voytek v. Univ. of California and Regents of Univ. of California*, 1994 U.S. Dst. LEXIS 12453 (N.D. Calif. 1994), *affirmed*, 1996 U.S. App. LEXIS 3531 (9th Cir. 1996), the university's associate director of environmental health and safety, who had depressive disorder, asked for and was granted several accommodations. He was excused from night and weekend work, was permitted to stop working when he was tired, and had no deadline pressure. After receiving these accommodations, his supervisor still rated his performance as unacceptable. He refused other positions that were offered to him. After reviewing his performance and the university's extensive efforts to accommodate him, the court ruled that he was not qualified.

An important lesson from the cases discussed above is that supervisors and managers should not allow the dysfunctional behavior or questionable performance to continue. Prompt resolution—or attempts to resolve—the performance problem will not only avoid exacerbating the workplace problems and involving co-workers, but will demonstrate to a court, should that become necessary, that the college attempted to resolve the issue constructively prior to any discipline or dismissal decision.

Attendance and scheduling problems. Many of the cases involving workers with psychiatric disabilities involve attendance or scheduling problems. As noted above, courts have uniformly declared that regular attendance is an essential function of every position. Apart from leaves of absence to which they are legally entitled (such as FMLA leaves), workers with disabilities may be held to the same attendance and scheduling requirements as workers without disabilities, unless the employer agrees to modify these requirements as part of the accommodation created for the employee.

With respect to college faculty, however, it may be difficult to accommodate faculty who cannot arrive on time for class, who need to leave early, or who cannot teach at certain times of the day. Absences from departmental meetings, office hours, or other important governance responsibilities may also create problems for the college. Of course, if the college enforces its attendance policy for faculty or staff with disabilities, it must do the same for all faculty or staff.

Some workers with psychiatric disabilities ask to work at home as a reasonable accommodation. Whether or not this request is “reasonable” depends on the job duties and the relevance of the location at which the work is performed. Faculty may write or develop curriculum at home, but normally do not teach from home. Staff who have service responsibilities will very likely need to perform those duties on site rather than at home. Again, the college should consider the request, but it does not have to grant it if it would be inconvenient, or would not allow the employee to perform all of the essential functions of the job.

Final Thoughts

The ADA protects individuals with disabilities who, if accommodated, can perform their jobs, or who can perform another job in the organization. It also protects individuals who the employer “regards” as disabled, even if they are not, or even if their disorder has no effect on their work performance. While it is understandable that Congress was concerned about eliminating stereotypes and myths about individuals who either have disabilities or who are perceived as disabled, the legal theory created by the

“regarded as” language has made it more difficult for employers who are motivated to attempt to help workers with psychiatric disabilities to provide meaningful assistance.

The language of the ADA, and its interpretation by the courts, may limit the ways that well-intentioned managers and supervisors deal with workers with psychiatric disorders. If a worker is “acting out” or having performance problems at work, but has not notified the employer of the presence of a psychiatric disability, the employer risks legal liability if a manager or supervisor inquires about the reason for the behavior or performance problem or suggests that the employee see a medical professional. Such well-meaning behavior would be used as evidence that the manager “regarded” the employee as disabled. Similarly, attempts to accommodate a struggling worker with a suspected psychiatric disability could lead to accusations at a later time that the manager “regarded” the employee as disabled. Managers may understandably be concerned about a worker with a behavior or performance problem, yet the protections against “regarding” a worker as disabled militate against taking a proactive approach in dealing with a worker with a psychiatric disorder. The best legal advice is to deal with the behavior rather than with the cause, which may mean that, instead of receiving help, the worker is disciplined or dismissed. Any performance or behavior problems that occurred before the employer was on notice of the disability are fair game for organizational discipline, since the employer’s motive cannot be disability discrimination if it was unaware of the disability.

Although plaintiffs who have litigated “regarded as disabled” claims succeeded at a slightly higher rate than those who litigated claims of disability discrimination (Lee, 2003), their success rate is still very low. Nevertheless, managers and supervisors—and university counsel--who are litigation-averse may prefer the safety of dealing with the

behavior rather than dealing with the source of the behavior. This outcome, in the long run, is dysfunctional for organizations, their managerial corps, and the workers with psychiatric disabilities who need help rather than punishment.

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