Breakout Sessions – Series 4

BEYOND BROKEN BONES
MENTAL HEALTH ISSUES UNDER THE ADA AND FMLA

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Americans are struggling with mental illness. In 2014, roughly 1 in 5 adults (18.1% or 43.6 million) had a diagnosable mental health disorder, and roughly 1 in 25 adults (4.1% or 9.8 million adults) had a serious functional impairment due to mental illness. The National Institute of Mental Health (NIMH) reports 30% of adults with a mental illness also have had a diagnosable alcohol and/or drug abuse disorder during their lives. In addition, 53% of adults who have had substance abuse disorders have had one or more mental illnesses during their lifetimes. Treatment and accommodation in these cases address both the effects of substance abuse as well as the effects of the person’s mental illness.

The Global Burden of Disease study assigned a single number—disability-adjusted life years or DALY score—to each of 291 conditions and injuries. The DALY score combines years of life lost to premature mortality and years lost to disability attributable to each condition. Of the 291 conditions and injuries assessed, major depressive disorder ranked #5 in terms of the DALY burden in the U.S., with anxiety #13, and schizophrenia #27. Across categories of illness and injury, brain disorders (mental, neurological, and substance abuse disorders) are the single largest source of DALYs in the U.S., representing nearly 20% of disability from all causes.

The Substance Abuse and Mental Health Administration estimated U.S. national expenditure for mental health care was $147 billion in 2009. Combining this figure with updated projections of lost earnings and public disability insurance payments associated with mental illness, an estimate for the financial cost of mental disorders in the U.S. in 2012 was over $467 billion.

The hidden costs are significantly higher. According to the Integrated Benefits Institute, on average, depression was associated with 2.2 days of absence and 7.5 days of presenteeism per employee per year. Presenteeism is the productivity loss caused by employees working with physical and mental health conditions. This means a company with 1,000 employees and an average salary of $50,000 per year has a payroll of $50,000,000 per year. Assuming the average employee is earning approximately $192 per day: 7.5 days x 1,000 x 192/day=$1,440,000 per year in salary spent on employees experiencing presenteeism due to depression alone.

What is a Mental Impairment?

The DSM-5 (the most recent version of the Diagnostic and Statistical Manual of Mental Disorders), which is published by the American Psychiatric Association (APA), provides diagnostic criteria for mental impairments. According to the DSM-5, a mental disorder is: a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion

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3. Id.
4. Insel, supra note 1.
5. Id.
8. Id.
regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning.9

Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts which are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above. The National Alliance on Mental Illness (NAMI) defines a mental impairment as: a medical condition that disrupt a person’s thinking, feeling, mood, ability to relate to others, and daily functioning. Just as diabetes is a disorder of the pancreas, mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life.10

What is a Psychiatric Disability?

The term psychiatric disability is used when mental illness significantly interferes with the performance of major life activities, such as learning, working, and communicating. The type, intensity and duration of symptoms vary from person to person. They come and go and do not always follow a regular pattern, making it difficult to predict when symptoms and functioning will flare-up, even if treatment recommendations are followed. The symptoms of mental illness often are effectively controlled through medication and/or psychotherapy, and may even go into remission. For some people, the illness continues to cause periodic episodes that require treatment. Consequently, some people with mental illness will need no support, others may need only occasional support, and still others may require more substantial, ongoing support to maintain their productivity. The most common forms of mental illness are anxiety disorders, mood disorders, and schizophrenia disorders.11

The Impact of Mental Impairments on the Workplace

The irregular nature of mental illness may create problems in establishing or maintaining consistent work patterns. Some individuals may need time off for medical appointments or to recuperate. The irregular nature of mental illness might also impair an individual’s performance.12

Anxiety often accompanies the effort to hide an illness and its symptoms. Many individuals do not disclose an illness for fear of stigma and discrimination. This fear may be compounded if an employee feels his or her job is in jeopardy.13

Despite their effectiveness for many people, medications can also have side effects that create difficulties at work. Each person has an adjustment period after starting, changing the dose of, or stopping medication. Some of the most common side effects include:

- drowsiness
- dizziness

10 Id.
12 Id.
13 Id.
Many people first develop symptoms of mental illnesses between the ages of 15 and 25 and traditional educational or vocational training may be delayed. This may affect their credentials for jobs.14

Mental Impairments and the ADA

The ADA applies to employers with 15 or more employees and requires employers to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would constitute an undue hardship.15 Employers have a duty to provide reasonable accommodations to employees and to applicants.16 A reasonable accommodation is any change in the work environment that enables a qualified individual with a disability to perform the essential functions of his/her position.17

Employers are largely unaware of their employee populations with mental disorders, and, in some respects, the ADA discourages initiation of discussions with employees about such conditions for fear that such individuals would be “regarded as” disabled under the ADA.18 Most employees with mental disorders manage their symptoms through medication and/or psychotherapy.19 Some will need no support, others may need only occasional support, and still others may require more substantial, ongoing support to maintain their productivity.20 For others, the illness continues to cause periodic episodes that require treatment.21

Some employees conceal mental disorders for fear of stigma and discrimination.22 This fear may be driven by common misconceptions that employees with mental disorders are generally prone to workplace violence, unable to deal with stress, incapable of developing and maintaining relationships with co-workers, customers and the general public and that medications used to treat such conditions render employees unsafe to operate equipment. This fear may be compounded if an employee feels his or her job is in jeopardy.23 Anxiety often accompanies the effort to hide a mental illness and its symptoms.24 To combat such fears, employers should communicate resources available for mental health conditions during the onboarding process and throughout the employment relationship.

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14 Id.
15 42 U.S.C. § 12112(b)(5)
16 Id.
17 42 U.S.C. § 12111(9)
18 29 C.F.R. § 1630.2(g)(1)(iii) (when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor).
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
Not all mental impairments are “disabilities” under the ADA. To constitute a disability, the impairment must substantially limit one or more major life activities.\(^\text{25}\) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.\(^\text{26}\) However, the terms *disability* and *qualified individual with a disability* may not exclude an individual who:

1. Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or
2. Is participating in a supervised rehabilitation program and is no longer engaging in such use; or
3. Is erroneously regarded as engaging in such use, but is not engaging in such use.\(^\text{27}\)

Major life activities limited by mental impairments differ from person to person. In March 1997, the Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.\(^\text{28}\) Several examples provided by the EEOC met with resistance and have not been universally enforced by courts, including the provision of job coaches, excusing behaviors that violate company policy, but are not job related and consistent with business necessity, and any suggestion that changing supervisors is a reasonable accommodation.

Examples of “major life activities” listed in the Enforcement Guidance include learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, working, and sleeping.\(^\text{29}\)

The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:\(^\text{30}\)

1. The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.
2. An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
3. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
4. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

\(^{25}\) See, 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)

\(^{26}\) 29 C.F.R. § 1630.3(a).

\(^{27}\) Id.

\(^{28}\) See, \text{http://www.eeoc.gov/policy/docs/psych.html}.

\(^{29}\) Id.

\(^{30}\) 29 C.F.R. § 1630.2(j)(1).
(v) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.

(vi) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(viii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(ix) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(x) The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in § 1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section.

(xi) The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

The ADA states that employers only need to provide accommodations to the known mental or physical limitations of someone with a disability that can be attributed to that disability.\(^{31}\) Employers are not required to accommodate limitations due to other characteristics, such as poor literacy skills (that are not due to learning disabilities), low educational levels or lack of credentials.\(^{32}\) You can ask the employee or a professional to document the types of functional limitations due to the disability that lead to the need for accommodations for that person.

To request a reasonable accommodation, individuals must let the employer know that he/she needs a change or modification of his/her job duties or work environment because of a medical condition. Individuals only need to use “plain English” when requesting accommodations. There is no “magic language,” and individuals need not mention the ADA or use the term “reasonable accommodation.”\(^{33}\) Once an employer is put on notice of an individual’s need for a reasonable accommodation, the employer should engage in the informal, interactive process, which is a dialogue between the employer and the individual requesting an accommodation to determine whether the individual is a qualified individual with a disability as defined by the ADA and whether there is an accommodation that will enable the individual to perform the essential functions of the position, with or without accommodation, without causing an undue hardship on the organization.

\(^{31}\) 42 U.S. Code § 12112(b)(5)
\(^{32}\) EEOC Compliance Manual § 902.2(c)(4).
\(^{33}\) EEOC Accommodation Guidance at Q1.
The determination of whether a requested reasonable accommodation constitutes an undue hardship must be based on an “individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.” In determining what constitutes an undue hardship, employers should consider a number of factors, including, but not limited to, the nature and cost of the accommodation and the overall financial resources of the facility involved and the employer. 

Supervisors and managers should be trained to “pass the baton” to human resource professionals upon identification of symptoms of mental illness and requests for reasonable accommodation. While a single symptom or isolated event is rarely a sign of mental illness, a symptom that occurs frequently, lasts for several weeks, or becomes a general pattern of an individual’s behavior may indicate the onset of a more serious mental health problem that requires treatment. Some of the most significant indications of a possible mental illness include:

- marked personality change over time;
- confused thinking; strange or grandiose ideas;
- prolonged severe feelings of depression or apathy;
- feelings of extreme highs or lows;
- heightened anxieties, fears, anger or suspicion; blaming others;
- social withdrawal, diminished friendliness, increased self-centeredness;
- denial of obvious problems and a strong resistance to offers of help;
- dramatic, persistent changes in eating or sleeping habits;
- substance abuse; and
- thinking or talking about suicide.

These symptoms are not always readily apparent. Employers and supervisors may be able to notice significant changes in their employees’ work habits, behaviors, performance, and attendance, such as:

- consistent late arrivals or frequent absences;
- low morale;
- lack of cooperation or a general inability to work with colleagues;
- decreased productivity;
- increased accidents or safety problems;
- frequent complaints of fatigue or unexplained pains;
- problems concentrating, making decisions, or remembering things;
- making excuses for missed deadlines or poor work; and
- decreased interest or involvement in one’s work.

People who experience problems such as those listed above may simply be having a bad day or week, or may be working through a difficult time in their lives. A pattern that continues for a long period may, however, indicate an underlying mental health problem.

34 EEOC Accommodation Guidance at Q43; 29 C.F.R. § 1630.2(p)(2).
37 Id.
Limitations Related to Mental Impairments and Potential Accommodations

Mental illnesses may interfere with functioning in different ways. Often, the employees or the professionals working with them can describe the functional limitations that are specific to each employee. The following is a list of some of the activities that people with psychiatric disabilities may have trouble doing:

- Screening out environmental stimuli – an inability to block out sounds, sights, or odors which interfere with focusing on tasks.

  *Example:* An employee may not be able to work next to a noisy printer or in a high traffic area.

  *Possible solutions:* Move printer away from work area, allow employee to wear headphones playing soft music, install high partitions around desk.

- Sustaining concentration – restlessness, shortened attention span, easily distracted, trouble remembering verbal directions.

  *Example:* An employee may have trouble focusing on one task for extended periods.

  *Possible solutions:* Break large projects into smaller tasks, allow brief but more frequent breaks to stretch, walk around, get fresh air, and assign tasks one at a time.

- Maintaining stamina – having energy to work a full day, combating drowsiness due to medications.

  *Example:* An employee may not be able to work a full 8-hour day.

  *Possible solutions:* Part time hours, rest breaks in middle of day, job sharing.

- Handling time pressures and multiple tasks – managing assignments and meeting deadlines, prioritizing tasks.

  *Example:* An employee may not know how to decide which tasks should be done first, or be able to complete tasks by the due date.

  *Possible solutions:* Break larger projects down into manageable tasks, meet regularly to help the employee to prioritize tasks or to estimate time to complete project.

- Interacting with others – getting along, fitting in, talking with coworkers, reading social cues.

  *Example:* An employee may not talk with coworkers at breaks, or may have trouble reading the subtle social cues of the workplace.

  *Possible solutions:* Establish a mentor or coworker buddy relationship to introduce the employee to others or to show the employee “the ropes.”
• Responding to negative feedback – understanding and interpreting criticism, knowing what to do to improve, initiating changes because of low self-esteem.

Example: An employee may not seem to understand the feedback given, or becomes upset when criticism is delivered.

Possible solutions: Arrange a meeting with the job coach and employee to facilitate feedback, use a feedback loop (ask employee’s perspective of performance, describe both strengths and weaknesses, suggest specific ways to improve), give employee the chance to read written feedback privately, and then discuss.

• Responding to change – coping with unexpected changes in work, such as changes in the rules, job duties, supervisors or coworkers.

Example: An employee may take longer to learn new routines, or feel stressed when new supervisors or coworkers start work.

Possible solutions: Prepare employee for changes that will be happening, explain new rules or duties, make a special effort to introduce new staff to employee and orient new supervisors to employee’s needs.  

One study conducted by the Center for Psychiatric Rehabilitation on Reasonable Workplace Accommodations for People with Psychiatric Disabilities found that the most common functional limitations for employees who were involved with a supported employment service involved:

• Interacting with others – interviewing for the job, describing strengths and weaknesses, clarifying instructions, asking for help, starting conversations with coworkers.

• Learning the job – remembering the routine, following instructions, learning new tasks.

• Maintaining work stamina/pace – working 3 hours without breaks, standing for long periods, taking scheduled breaks, completing tasks in allotted times, managing time.

• Managing symptoms/Tolerating stress – relaxing, recognizing.  


39 Id.
Accommodating Employees with Mental Impairments

Questions to Consider

1. What limitations is the employee with a mental impairment experiencing?
2. How do these limitations affect the employee and the employee’s job performance?
3. What specific job tasks are problematic as a result of these limitations?
4. What accommodations are available to reduce or eliminate these problems?
5. Are all possible resources being used to determine possible accommodations?
6. Has the employee with a mental impairment been consulted regarding possible accommodations?
7. Once accommodations are in place, would it be useful to meet with the employee with a mental impairment to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
8. Do supervisory personnel and employees need training regarding mental impairments?

At least anecdotally, in recent months, we have experienced a substantial increase in requests for emotional support animals, comfort animals, and therapy dogs. While Emotional Support Animals or Comfort Animals are often used as part of a medical treatment plan as therapy animals, they are not considered service animals under the ADA. These support animals provide companionship, relieve loneliness, and sometimes help with depression, anxiety, and certain phobias, but do not have special training to perform tasks that assist people with disabilities. Even though some states have laws defining therapy animals, these animals are not limited to working with people with disabilities and therefore are not covered by federal laws protecting the use of service animals. Therapy animals provide people with therapeutic contact, usually in a clinical setting, to improve their physical, social, emotional, and/or cognitive functioning. On the other hand, service animals perform tasks directly related to the individual’s disability. For example, a Psychiatric Service Dog is a dog that has been trained to perform tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine, providing safety checks or room searches, or turning on lights for persons with Post Traumatic Stress Disorder, interrupting self-mutilation by persons with dissociative identity disorders, and keeping disoriented individuals from danger. It does not matter if a person has a note from a doctor that states that the person has a disability and needs to have the animal for emotional support. A doctor’s letter does not turn an animal into a service animal.

40 Job Accommodations for People with Mental Health Impairments, Job Accommodation Network (Mar. 23, 2010), available at https://askjan.org/media/Psychiatric.html#acc.
41 https://adata.org/publication/service-animals-booklet.
42 Id.
When an Employee’s Mental Impairment Poses a Direct Threat

Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a “direct threat.” The EEOC’s ADA regulations explain “direct threat” means “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” A “significant” risk is a high, and not just a slightly increased, risk. The determination an individual poses a “direct threat” must be based on an individualized assessment of the individual’s present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat. An individual does not pose a “direct threat” simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability.

Charge Activity

In 2014, The U.S. Equal Employment Opportunity Commission received 5,571 new discrimination charges related to anxiety disorders, depression, manic depressive disorder, post-traumatic stress disorder, schizophrenia and other psychological disorders. The EEOC also resolved 4,979 workplace bias claims alleging violations of the ADA based on diagnosed mental health conditions in 2014—including 927 merit resolutions. Outcomes for administrative charges filed by people with psychiatric disabilities do not differ substantially from those for people with other disabilities.

Mental Impairments and the FMLA

As a general matter, courts have refused to require clairvoyance on the part of employers in interpreting requests for medical leave. Because a serious health condition is a prerequisite for FMLA leave, an employee must provide information to the employer to suggest his health condition could be serious. The 8th Circuit in Kobus v. College of St. Scholastica compared “stress and anxiety” to depression, explaining that these conditions have many variations. Accordingly, the 8th Circuit noted that complaining generally of stress and anxiety is not enough to put an employer on notice of a serious health condition.

The Kobus court relied on the previous 8th Circuit holding in Rask v. Fresenius Medical Care North America, which evaluated an employee’s general complaint of depression to her employer. The Rask court concluded that the employee would need to apprise her employer of more than the mere fact that she had been diagnosed with something called “depression” to put them on notice that she had a serious health condition. The 8th Circuit clarified that while the employee was claiming protection under the “continuing treatment” prong of the serious health condition, she would need to show a period of incapacity and there was no medical evidence in the record indicating that all forms of diagnosed depression, even if left untreated, would result in incapacity.

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43 See, 42 U.S.C. § 12113(b).
44 See, 29 C.F.R. pt. 1630 app. § 1630.2(r).
47 608 F.3d 1034 (8th Cir. 2010).
Similarly, in Gutierrez, the Western District of Michigan held that an employee did not put her employer on notice of a serious health condition where, at most, she made an oral complaint that she was “under extreme anxiety, stress, near breakdown.” Likewise, in Maitland v. Employease, the Northern District of Georgia determined an employee’s statements about feeling sick and seeking counseling for stress were insufficient to reasonably apprise the employer of her request to take time off for a serious health condition as defined by the FMLA.

In contrast, in Jones v. Willow Gardens Care Center, the Northern District of Iowa determined a jury should decide whether the employer was on notice of a request for leave where the employee told her employer she had “a lot of emotional problems that she needs to deal with. Stressed out. Doesn’t want to jeopardize herself or residents.” The court explained the statement by the employee reflected more than a “simple case of work stress,” and she had mentioned the words “medical leave” in her statements.

Moreover, where an employee submits a WH-380 medical certification form that is insufficient, the employer may request additional information regarding the employee’s condition. For instance, in Lewis v. USA, the employer requested the employee to provide additional information regarding her medical leave request form, which stated only that she was diagnosed with Post-Traumatic Stress Disorder and needed therapy, medical treatment, bed rest, and medication. The Ninth Circuit determined Lewis’ leave request failed to provide a summary of the medical facts that supported the diagnosis, provided no explanation as to why Lewis was unable to perform her work duties, and lacked discussion about whether additional treatments would be required for her condition. Accordingly, the Ninth Circuit held, when Lewis refused to submit any further documentation, her medical certification remained deficient.

Illustrative Cases Regarding a “Serious Health Condition”

An individual may have a serious health condition where the individual receives (1) inpatient care or (2) continuing treatment by a health care provider. With respect to “inpatient care,” for example, an employee who is hospitalized for a condition potentially brought on by stress may qualify for inpatient care even though the actual serious health condition has not yet been determined. In Taylor v. Invacare Corporation, the Sixth Circuit noted, although an employee’s “stress attack,” which caused him to be hospitalized, did not turn out to be a heart attack, the inpatient admission to determine the issue was a serious health condition in itself.

Where an employee did not receive inpatient care for a medical condition, the employee must establish they received “continuing treatment” by a health care provider to qualify for FMLA leave. To do so, the employee must first show he or she was incapacitated for more than three consecutive calendar days. If an employee cannot show he or she was incapacitated such that the individual could not perform the job, the employee is not covered under this section of the FMLA.

In multiple cases where an employee claimed to suffer from a serious health condition due to anxiety and/or stress, the individual failed to show incapacitation. For example, in Waltrip v. Conway Human Development Center, the Eastern District of Arkansas found an employee failed to provide evidence she was incapacitated for more than three consecutive

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50 2000 WL 34030845, at *3 (N.D. Iowa July 20, 2000).
51 641 F.3d 1174 (11th Cir. 2011).
calendar days. In particular, Waltrip contended her generalized anxiety and stress constituted a serious health condition; however, her doctor testified she did not intend for Waltrip to be off of work for any particular number of days, and she believed Waltrip was able to perform her daily functions even under stress. Similarly, in Cole v. Sisters of Charity of the Incarnate Word, the Eastern District of Texas found an employee failed to establish she suffered from a serious health condition based on stress where she provided no evidence that she was unable to perform the functions of her job.

Furthermore, once an employee establishes incapacitation, he or she must still establish he or she received “continuing treatment” for the condition. Specifically, for an anxiety-related condition to qualify as a serious health condition under the “continuing treatment” prong of the FMLA, courts have held that the continuing treatment must relate back to the condition that initially caused the incapacity to work. For example, in Lee v. Heritage Health and Housing Company, Lee contended the serious health condition for which she was entitled to FMLA leave was “acute stress.” Lee claimed that she could demonstrate her stress was a serious health condition for which she received continuing treatment because she was incapacitated for more than three days and visited two physicians. The court determined, however, one of the doctors’ notes did not establish the doctor treated Lee for the same condition. Lee also claimed she received a “regimen of continuing treatment” for her stress condition, such that she was seen by one health care provider who supervised the treatment. Ultimately, the court determined Lee’s single visit to her doctor, coupled with a prescription of “rest” could not qualify as a regimen of continuing treatment. The court explained that while “acute stress” may constitute a “serious health condition” under certain circumstances, for FMLA purposes, Lee failed to produce evidence that she received continuing treatment for the stress she allegedly suffered.

CONCLUSION

Mental illnesses and the stigma that accompany them are still very much alive and well in the 21st century. The combination of these two opens up employers to a multitude of dangers, including legal challenges, lost performance/productivity, and more. Accordingly, it is now more important than ever for employers to have strong policies that anticipate and prepare for the eventuality of mental health issues.

Beyond Broken Bones: Mental Health Issues Under the ADA and FMLA

Presenters
Jana S. Baker (Dallas) and H. Bernard Tisdale (Charlotte)

Moderator
Rodney A. Harrison (St. Louis)

Potential “Invisible” Disabilities

- Anxiety disorders/PTSD
- Depression/other mental health
- Attention deficit disorders (ADD or ADHD)
- Dyslexia and other learning disabilities
“Mental Illness” Defined

- “Health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress and/or impaired functioning”

Center for Disease Control
http://www.cdc.gov/mentalhealth/basics.htm

The Invisible Disabilities Association

- Non-profit organization providing resources and advocacy regarding invisible disabilities
- Resources help identify and address invisible disabilities
Part of the Human Condition

- 1 in 5 experience a mental illness
- 1 in 25 live with serious mental illness
- 50% begin by age 14, 75% by age 24
- 50% with addiction disorders

National Alliance on Mental Illness – [www.nami.org](http://www.nami.org)

Prevalent Conditions

- Anxiety Disorders – 18.1% of adults
- Major Depression – 6.9%
- PTSD – 3.5%
- Bipolar Disorder – 2.6%
- Schizophrenia – 1.1%

National Alliance on Mental Illness – [www.nami.org](http://www.nami.org)
Workplace Issues

- #1 cause of disability in the U.S.
- Up to 40% of sick leave
- Cost of in lost earnings – $193.2 billion
- Legal claims
- Workplace violence

So, who is disabled and who is not?
EEOC’s “Per Se” Mental Disabilities

- Autism
- Epilepsy
- Major Depression
- Schizophrenia
- Bipolar Disorder
- Post-Traumatic Stress Disorder
- Obsessive Compulsive Disorder

Mental Illness and the ADA(AA)

- The Americans with Disabilities Act
  - Protects qualified individuals with a disability from discrimination based on the disability
  - Covers employers with 15 or more employees
  - Medical condition must SUBSTANTIALLY LIMIT one or more MAJOR LIFE ACTIVITIES to qualify
FMLA – Mental Health Coverage

- “The employee’s own serious health condition that prevents the employee from performing the essential job duties”
  - Inpatient care
  - Continuing treatment for a chronic illness
- OR for a family member’s mental health condition!

Alcohol and Substance Abuse

- Alcoholism
  - Usually a disability under ADA
  - Treatment and absence would be “serious health condition”
- Drug Addiction
  - Current illegal drug users are not protected under ADA
  - Former illegal drug users can be protected under ADA
  - Treatment and absence would be “serious health condition”
Challenges of Hidden Disabilities

- Employers and co-workers don’t understand and are suspicious.
- Employees reluctant to disclose due to stigma.
- Accommodation process can be overwhelming.
- Can lead to performance issues.
- Difficult to manage absenteeism.

Performance Problems and Misconduct

- Address in same way you address with every other employee
- Having a disability does not excuse a person from workplace rules and policies
  - EXCEPT to the extent exceptions are granted as reasonable accommodations
Performance Problems and Misconduct

- Conduct regular performance evaluations
  - Make sure there’s a good job fit
  - Make sure everyone is on the same page
- Discipline and eventually remove employee from position

Why Current and Accurate Job Descriptions Are Important

- Understanding corporate structure and everyone’s role
- Day-to-day HR functions
- Defending employment litigation!
Importance of Job Descriptions for **ADA Accommodations**

- Identifies essential job functions
- Strengthens arguments about which accommodations are unreasonable

Importance of Job Descriptions for **Returns from Medical Leave**

- Identifies duties for healthcare provider to evaluate when releasing to return for work/identifying restrictions
- Determines whether position is appropriate for employee’s need for light duty
Effective Use of Job Descriptions

- Sample language to explain temperament requirements:
  - “Must interact well with others”
  - “Work in a high stress environment”
  - “Work in a fast-paced environment”
  - “Ability to prioritize and multi-task”
  - “Be able to resolve interpersonal conflicts”
  - “Work with difficult customers”

Supportive Supervision

- Flexible and supportive supervision style
- Help prioritize tasks
- Provide written instructions
- Disseminate summaries of meetings
- Conduct weekly/monthly meetings to discuss issues
- Address areas of concern
- Offer additional training
Job Expectations and Possible Accommodations

- Communicate job expectations at outset.
- Provide specific and measurable expectations for key tasks.
- Consider dividing large assignments into smaller tasks.
- Consider checklists.

When Employee’s Mental Illness Poses a Direct Threat

- Under the ADA, employers may lawfully exclude an individual from employment for safety reasons ONLY IF the employer can show that employment of the individual would pose a “direct threat.”
- Direct threat = significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.
When Employee’s Mental Illness Poses a Direct Threat

- Must consider four factors:
  1) the *duration* of the risk
  2) the *nature and severity* of the potential harm
  3) the *likelihood* that the potential harm will occur and
  4) the *imminence* of the potential harm

When Employee’s Mental Illness Poses a Direct Threat

- Must identify a specific behavior that is a direct threat
- Individual does NOT pose a direct threat simply by virtue of having a history of psychiatric disability or being treated for psychiatric disability
Laws Impacting Employers’ Responsibilities in Connection With Violence?

- Employers’ obligation to prevent violence:
  - OSHA
  - Negligent hiring/supervision/retention
  - Anti-harassment obligations

Potential Use of Service Animals

- Service dogs versus emotional support dogs?
Emotional Support Animals?
- We have noticed a trend recently; substantial increase in requests for emotional support animals, comfort animals, and therapy dogs at work.
- Need to treat these requests like any other reasonable accommodation request
  - So . . . “it depends”!

Attendance/Scheduling Accommodations
- Shift change/flexible work times
- Start or end times
- More frequent breaks
- No overtime
Avoiding Abuse of FMLA/Accommodations

- Block FMLA leave requires reasonable notice.
- Not so for intermittent leave, once granted.
- Make sure HCP Certifications are fully answered. HR should ask questions when unclear, per FMLA regs.
- Look for patterns that suggest abuse.
- Request new Certification & HCP’s input on patterns, per FMLA regs.

Hypothetical #1

A veteran returning to the workplace is having a hard time adjusting. He is frequently upset, has outbursts and requires time off.

He complains that he has a difficult time in his cubicle because he feels claustrophobic and is concerned about someone surprising him.

How should the company handle this situation?
Options:

1. Require the employee to submit to a fitness for duty examination.
2. Transfer the employee to a private office.
3. Put mirrors in his work space so he can see if someone is coming near him.
4. Discipline the employee for his disruptive outbursts.

Hypothetical #2

Jim is a long-term RN at Big Hospital. Jim reported to Mike, one of many Nurse Supervisors at Big Hospital, from 1992 until January 1, 2016, when Mike retired. Jim had a great working relationship with Mike, who was known as a hands-off manager.

Upon Mike’s retirement, Big Hospital reassigned Jim to work under Paul, who is widely regarded as a micro-manager. Within weeks, Jim applied for FMLA leave for “stress and anxiety.”
Hypothetical #2 (cont’d)

After 12 weeks of FMLA leave, Jim submitted return to work paperwork that stated Jim could return to work without restriction, under a different supervisor.

Is Big Hospital required to transfer Jim to a different supervisor to accommodate his mental impairments?

Options:

1. Jim is a qualified person with a disability, and transferring Jim to a different supervisor would not constitute an undue hardship, as Big Hospital has dozens of Nurse Supervisors.
2. A personality conflict with a supervisor or co-worker does not establish a disability within the meaning of the ADA, even if it produces anxiety and depression.
3. Big Hospital is required to consider Jim for open positions for which he is qualified.
4. Jim’s inability to work with a particular supervisor does not create a substantial limitation on the major life activity of working.
Final Thoughts

- Interaction and follow up is key
- Utilize experts and resources
- Continue the dialogue
  - “ATP” – ask the person what they want and need, and then go through the process to figure out options

Questions?
Beyond Broken Bones: Mental Health Issues Under the ADA and FMLA

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