

CORNELL HR REVIEW

HIRING AND FIRING THE MENTALLY AND PSYCHIATRICALY DISABLED: ADVICE FOR HR PROFESSIONALS

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Introduction

According to the National Institute of Mental Health (NIMH), an estimated 26.2 percent of Americans aged eighteen and older suffer from a diagnosable mental disorder in a given year.¹ Contrary to what most people assume, mental disorders are the leading cause of disability in both the U.S. and Canada.² Thus, the effect of mental disorders on the American workplace is significant.

In an effort to ensure that physically and mentally disabled persons were not discriminated against in employment situations Congress passed the Americans with Disability Act (ADA). Persons entitled to its protection include those with physical disabilities and mental disorders such as anxiety disorder, depression, manic depressive disorder, post-traumatic stress disorder, schizophrenia, and other psychological disorders.³

Almost immediately courts began interpreting the statute to make it difficult for those with disabilities, especially psychiatric disabilities, to prevail in cases claiming discrimination under the Act. As a result, Congress passed the Americans with Disabilities Amendments Act (ADAAA) in 2008 with the express intent that courts should expand the definition of disabled individuals entitled to accommodation.⁴

In this article I will discuss the ramifications of the 2008 amendments on human resource professionals who are tasked with following its mandates when interviewing job applicants and managing employees who allege, or are suspected of having, a psychiatric disability.

I. THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE 2008 AMENDMENTS

A. The ADA

The ADA applies to private employers with fifteen or more employees, state and local governments, employment agencies, labor organizations, and management committees.⁵

The ADA prohibits discrimination by employers on the basis of a person's physical or mental disability. Specifically, it states:

“No covered entity shall discriminate against a qualified individual **on the basis of disability** in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁶

B. The 2008 Americans with Disabilities Amendments Act (ADAAA)

The ADAAA went into effect on January 1, 2009. Just as with all legislative changes, attorneys are seeking the boundaries of the amended law and judicial definitions of its revised terms.

Definition of Disability

The ADAAA added language to the definition section in the “Rules of Construction Regarding the Definition of Disability” that results in an expansion of the definition of a disability.⁷ An individual may establish coverage under any of the three prongs of the definition of disability: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.⁸

Under the ADAAA a “major depressive disorder” . . . “should easily be concluded to . . . substantially limit brain function.” Furthermore, psychiatric problems that are episodic or in remission are now considered to constitute a disability if they would substantially limit a major life activity when active.⁹ The EEOC regulations also stress that “substantially limits” is “not meant to be a demanding standard” and is to be construed broadly in favor of expansive coverage.¹⁰ However, a plaintiff is not to be “regarded as” disabled if the actual or perceived impairment is “transitory and minor.” Transitory and minor impairments are defined as those having “an actual or expected duration of 6 months or less.”¹¹

1. Major Life Activity

Prior to the ADAAA employees had the difficult burden of convincing the court that their employer perceived their impairment to substantially limit a major life activity. For those with a psychiatric disability this proved extremely difficult. Now, however, they only need to demonstrate their employer has discriminated against them because of their impairment.¹² This is a significant change and one that will make it easier for plaintiffs alleging a mental disability.

2. Permanent or Long Term Disability

The ADAAA also brings into question the continued validity of the “permanent or long term impact” factor that was used previously.¹³ Under the new regulations, any mental or psychological disorder, intellectual disability (formerly referred to as mental retardation), organic brain syndrome, emotional or mental illness, and certain learning disabilities are considered disabilities under the statute.¹⁴ Thus, people who suffer from depression,

anxiety disorder, and manic depressive disorder may now have an easier time proving that their impairment constitutes a disability.

II. GUIDELINES FOR HUMAN RESOURCES PROFESSIONALS

Dealing with physically disabled employees under the ADA is difficult enough but determining how to treat individuals with a psychiatric or mental illness is even more complex.

A. Determining a Disability

Prior to the ADAAA, a person with a “disability” was an individual who could demonstrate:

- (1) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (2) a record of such an impairment;¹⁵ or
- (3) being regarded as having such an impairment¹⁶

In the past, the most contentious part of applying this statutory section for employers was determining whether a medical condition “substantially limited” a person’s “major life activity.”¹⁷

Under the ADAAA however, courts are no longer allowed to consider the ameliorating effects of medication or medical devices when determining a person’s impairment.¹⁸

Therefore, employers should no longer conclude that a person who is being treated with medication to improve or control their psychiatric condition is not impaired.¹⁹ Given this, how can an employer determine whether an employee or potential employee is mentally disabled under the ADAA?

B. Determining a Psychiatric Disability

Employers should not attempt to diagnose the mental condition of an individual themselves but if a psychological impairment is suspected they should refer the individual to a psychiatric professional for diagnosis. In the United States mental disorders are diagnosed based on the *Diagnostic and Statistical Manual of Mental Disorders*.²⁰

Does a Job Applicant or Employee Have to Disclose Their Mental Disability?

A job applicant or employee does not have to disclose their mental illness to an employer. However, if they do not do so and their work becomes unsatisfactory, the employer may hold them accountable just as with any employee.²¹ The courts recognize that it would be unfair to hold an employer liable if it has no knowledge of a condition that needs

accommodation and it will find no duty to accommodate an employee (or job applicant) who fails to inform the employer that they have a disability.²²

Employers are prohibited from making blanket inquiries into a prospective employee's medical or psychiatric condition but they may ask objective questions that help determine if a person can perform the essential duties of a job.²³ Just as questions may determine a person's ability to meet the physical standards for jobs involving physical labor, they may also assess other necessary job functions such as the ability to get along with others, finish tasks on time and come to work every day.²⁴

EEOC Assistance When Determining Whether an Employee Has a Mental Disability

The EEOC publication, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, gives examples of what constitutes a mental or psychological impairment.²⁵ It cautions that personality traits and behaviors alone are not considered mental impairments even though these behaviors may be symptoms of an impairment.²⁶ It lists irritability, chronic lateness, and poor judgment as examples of traits that are not disabilities. Also, irresponsible behavior, poor impulse control, and an inability to tolerate stress are not to be considered disabilities.²⁷ Examples of conditions that are considered mental impairments include major depression, bipolar disorder and anxiety disorders such as panic disorder, obsessive compulsive disorder, post-traumatic stress disorder, schizophrenia, and personality disorders.²⁸ Specific exceptions to the definition of a disability are also included. Some are: current illegal drug use, homosexuality, transvestitism, compulsive gambling, kleptomania, pyromania, psychoactive substance use and sexual behavioral disorders.²⁹

C. Determining Whether a Person with a Psychiatric Disability is a Qualified Individual

Since a person must be both a "qualified individual" *and* suffer a disability to be covered by the ADA, the determination that a prospective or current employee is qualified must be made before the issue of accommodation can be addressed.³⁰

The ADA defines a qualified individual as one whom, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.³¹

To determine whether an individual is qualified, the regulations apply a two pronged test: (1) does the individual have the requisite skill, experience, education and other job requirements of the position; and (2) can the individual, with or without reasonable accommodation, perform the essential functions of the position?³²

Courts give the employer's judgment great deference when determining the essential functions of a job. Therefore an employer may protect itself from liability by preparing a written job description before advertising or interviewing applicants for the job. This description is considered evidence of the essential job functions.³³ Also, although an employer may not conduct a medical examination or directly inquire about a disability it may make pre-employment inquiries into the ability of an applicant to perform job-related functions.³⁴

Discrimination may include using qualification standards, employment tests or other selection criteria that tend to screen out individuals with a disability. However, if the employment test or selection criteria is shown to be job-related and is consistent with a business necessity, it is acceptable.³⁵ Therefore, employment tests should be administered in a manner that ensures that test results accurately reflect the skills, aptitude, or other factors of the job applicant or employee rather than their impaired sensory, manual, or speaking skills.³⁶

An employer may also defend against ADA discrimination claims by showing that its use of qualification standards, tests, or other criteria that tend to screen out a disabled person is job-related and consistent with its business necessity. It may demonstrate that the necessary level of performance cannot be achieved by reasonable accommodation.³⁷

D. Determining Essential Job Functions

The EEOC regulations provide a nonexclusive list of factors employers should consider when determining whether a particular job function is essential:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employees available among whom the job function can be distributed; and/or
- (iii) The function may be highly specialized so that the person in the position is hired for his or her expertise or ability to perform the particular function.³⁸

Evidence of whether a particular job function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past people in the job; and/or
- (vii) The current work experience of people in similar jobs.³⁹

Although an employer may be required to restructure a particular job by altering or eliminating some of its marginal functions,⁴⁰ it does not have to eliminate an essential function of a job.⁴¹

Reasonable Accommodation of Mentally Disabled Employees

Once an employee or job applicant establishes they are qualified and that they suffer from a mental disability, and the employer is aware that accommodation is needed,⁴² the employer must provide “a reasonable accommodation” to the mental disability.⁴³

Under the statute, “reasonable accommodation” may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.⁴⁴

The most common accommodations that individuals with psychiatric impairments request are a job transfer, working fewer hours, or administrative leave.⁴⁵ Other examples of reasonable accommodations for psychiatrically disabled employees include self-paced workloads, flexible hours, modifying job responsibilities, allowing leave (paid or unpaid) during periods of hospitalization or incapacity, assigning a supportive and understanding supervisor and allowing the employee to attend appointments with their psychiatrist. Providing easy access to supervision and support in the workplace, frequent guidance and feedback about job performance, moving the employee to a different work location to avoid distraction or altering supervisory methods of communication can also meet the accommodation requirement.⁴⁶

Although an employer is never required to reallocate the essential functions of an employee’s position, nor does it have to change an employee’s supervisor as an accommodation, it may do so if it chooses. Thus, it is always important to keep in mind that just because a particular action is not required, it does not mean that it should not be considered and implemented if it is a good solution to a workplace problem.⁴⁷

E. Exceptions to the Accommodation Requirement

Does the ADA require employers to “accommodate” mentally disabled employees by accepting behavior that it would punish if committed by a nondisabled employee? No, it does not.⁴⁸ The ADA does not require an employer to ignore violations of workplace rules and conduct requirements.⁴⁹ The statute also contains two exceptions to the accommodation requirements that employers should be aware of.⁵⁰

1. Undue Hardship

First, an employer is not required to provide an accommodation if it will impose an “undue hardship” on the operation of its business. Examples of undue hardship are

accommodations that are excessively costly, extensive, substantial, disruptive, or those that would fundamentally alter the nature or operation of the business.⁵¹

In determining whether an accommodation would impose an undue hardship on an employer, the court will consider the nature and cost of the accommodation needed; the number of persons employed at the facility; the effect on expenses and resources, or the impact of the accommodation on the operation of the facility.⁵²

2. Direct Threat

Second, an employer may refuse to employ or accommodate an individual who poses a “direct threat” to the health or safety of him or herself or other employees in the workplace.⁵³

The statute defines a “direct threat” as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.⁵⁴

An individual who poses a direct threat to the health or safety of others, which cannot be eliminated by a reasonable accommodation, is not considered qualified for their employment.⁵⁵ Furthermore, when this issue is raised, it is the employee’s burden to show that he or she is qualified to perform the essential functions of their job without risk of injury to him or herself or others.⁵⁶

Threat Analysis

When determining whether an employee poses a risk of injury to themselves or others, the courts examine 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.⁵⁷

With regard to the risk presented, “[a]n employer . . . is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, *i.e.* a high probability of substantial harm. A speculative or remote risk is insufficient.”⁵⁸

An employer’s evaluation of an employee’s direct-threat risk must include an analysis of the employee’s actual medical condition and the impact, if any, it might have on the employee’s ability to perform their job.⁵⁹ In addition, the risk assessment must be based on “medical or other objective evidence.”⁶⁰ Courts will assess the objective reasonableness of the views of the employer and/or employer’s medical professionals who made the direct threat-decision.⁶¹

F. Conduct That Violates Workplace Standards or Rules

May employers discipline individuals with mental disabilities for misconduct that does not involve physical threats? Yes, provided that the workplace conduct standard which has been violated is job-related and is consistent with business necessity.⁶²

For example, if an employer has a policy against stealing and a mentally disabled employee steals employer property, he or she may be disciplined for this misconduct if the employer would impose the same discipline on an employee who does not have a disability. However, conduct standards which are not job-related for the position in question and are not consistent with business necessity, may violate the ADA if disciplinary actions are imposed for their violation.⁶³

IV. CONCLUSION

The ADA makes it clear that the definition of “disability” is expanded to make it easier for employees and job applicants to seek relief under the ADA. Since its implementation the number of people considered by the courts to have a “disability” has increased. In particular, the statute’s revisions make it easier for people who suffer from episodic impairments due to mental illness to meet the definition of disabled. This means HR professionals must recognize a lower threshold when determining whether an employee or job applicant has a mental disability resulting in a substantial limitation. It should be noted, however, that an employee’s requirement of proving they meet the job’s qualifications remains intact. ¶

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¹ RC Kessler, WT Chiu, O Demler, EE Walters. *Prevalence, severity, and comorbidity of twelve-month DSM-IV disorders in the National Comorbidity Survey Replication (NCS-R)*. *Archives of General Psychiatry*, Jun;62(6):617-27 (2005).

² The World Health Organization. *The global burden of disease: 2004 update*, Table A2: Burden of disease in DALYs by cause, sex and income group in WHO regions, estimates for 2004. Geneva, Switzerland: WHO, 2008. http://www.who.int/healthinfo/global_burden_disease/GBD_report_2004update_AnnexA.pdf.

³ *ADA Charge Data by Impairments/Bases -- Receipts FY 1997 -- FY 2008*, EEOC (2009), <http://archive.eeoc.gov/stats/ada-receipts.html>.

⁴ The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553) See also [29 C.F.R. § 1630.2\(j\)\(1\)\(ii\)](#).

⁵ 42 U.S.C. § 12112(6)&(7); 29 CFR § 1630.2(e)

⁶ 42 U.S.C. § 12111(5)(A) (2006 & Supp. 2009).

⁷ 42 U.S.C. § 12112(a)

⁸ 42 U.S.C. § 1202(1) and ADA Amendments Act of 2008 § 2(b)(5), 122 Stat, at 3554.

⁹ 29 C.F.R. § 1630.2(j)(1)(i)

¹⁰ *Id.* at § 1630.2(j)(1)(vii).

¹¹ 29 C.F.R. § 1630.2(j), [\(k\)](#).

¹² *Id.* at 42 U.S.C. § 12102(3)(B)

¹³ 42 § 12102

- ¹³ *Emory v. AstraZeneca Pharms*, 401 F.3d 174 (3rd Cir. 2005)
- ¹⁴ 29 C.F.R. § 1630.2(h))
- ¹⁵ To satisfy the definition of having a “record of impairment” an individual must have a history of, or have been classified as having, an impairment that substantially limits a major life activity. 42 U.S.C.S. § 12102(2)(B) and 29 C.F.R. § 1630.2(k)
- ¹⁶ 29 U.S.C. § 706 (1976)
- ¹⁷ Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. Balt. L. Rev. 419, 440-442 (Spring, 2011)
- ¹⁸ 42 U.S.C. § 12102(4)
- ¹⁹ Randall I. Goldstein, *Mental Illness in the Workplace after Sutton v. United Airlines*, 86 Cornell L. Rev. 927, 950 (May, 2001)
- ²⁰ The current version is authored by the American Psychiatric Association. *Diagnostic and Statistical Manual on Mental Disorders, fourth edition (DSM-IV)*. Washington, DC: American Psychiatric Press, 1994.
- ²¹ Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html> at ---
- ²² Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html> at note 17.
- ²³ *Id.* at EEOC note 13 and 14.
- ²⁴ *Id.* at note 14.
- ²⁵ *Id.*
- ²⁶ *Id.* at note 2.
- ²⁷ *Id.* at note 1.
- ²⁸ *Id.*
- ²⁹ 29 C.F.R. .1620.3(d) and Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html>
- ³⁰ 42 U.S.C. § 12112(a) (2006 & Supp. 2009)
- ³¹ 42 U.S.C. § 12111(8)
- ³² 29 C.F.R. § 1630.2(m)
- ³³ 42 U.S.C. 12111(8)
- ³⁴ 42 U.S.C. § 12112(2) Also see The Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html> which states that if an applicant asks for reasonable accommodation during the hiring process the employer may ask the applicant for reasonable documentation about his/her disability and may require the applicant to provide documentation demonstrating the disability.
- ³⁵ U.S. Equal Employment Opportunity Commission, U.S. Department of Justice Civil Rights Division, *Americans with Disabilities Act, Questions and Answers*, <http://www.ada.gov/q&aeng02.htm>
- ³⁶ *Id.* and 42 U.S.C. § 12112(6)&(7)
- ³⁷ 42 U.S.C. § 12113(a)
- ³⁸ 29 C.F.R. § 1630.2(2)
- ³⁹ 29 C.F.R. § 1630.2(3)
- ⁴⁰ *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1260 (11th Cir. 2001).
- ⁴¹ *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1229 (11th Cir. 2005).
- ⁴² *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 102 (1st Cir. 2007); *Rocafort v. IBM Corp.*, 334 F.3d 115, 119 (1st Cir. 2003)
- ⁴³ 42 U.S.C. § 12112(b)(5)(A)
- ⁴⁴ 42 U.S.C. § 12111(9)
- ⁴⁵ Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 281-82 (2000); note 125, at 295
- ⁴⁶ Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html>
- ⁴⁷ Captain Miranda W. Turner, *Psychiatric Disabilities in the Federal Workplace: Employment Law Considerations*, *The Air Force Law Review*, 55 A.F. L. Rev. 313, 324 (2004)
- ⁴⁸ See *Breiland v. Advance Circuits*, 976 F. Supp. 858 (1997) The court found that plaintiff’s inability to get along with others was not within the ADA’s purview of a major life activity (at 863). It also stated that the ADA did not require the defendant to ignore the plaintiff’s misconduct. (at 865) See also *Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996)
- ⁴⁹ *Id.*
- ⁵⁰ 42 U.S.C. § 12111(10)

⁵¹ Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 Vand. L. Rev. 391, 402 (March, 1995)

⁵² 42 U.S.C. 12111(10)

⁵³ See also 29 C.F.R. 1630.2(2)(r)

⁵⁴ 42 U.S.C. § 12111(3) Also see the definition of a direct threat in 29 C.F.R. 1630.2(r), which states: 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. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (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.

⁵⁵ 42 U.S.C. § 12111(3)

⁵⁶ Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html> See also See EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) (an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees")

⁵⁷ 29 C.F.R. § 1630.2(r) and *Estate of Mauro v. Borgess Medical Center*, 137 F.3d 398, 402 (6th Cir. 2000)

⁵⁸ *Id.* at 403

⁵⁹ *Holiday v. City of Chattanooga*, 206 F.3d 637, 643 (2000)

⁶⁰ *Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998). See also [29 C.F.R. § 1630.2\(r\)](#)

⁶¹ *Id.* at 650.

⁶² Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997). <http://www.eeoc.gov/policy/docs/psych.html> See also EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees."

⁶³ See EEOC Enforcement Guide at Question 30 and *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* at p. 1 [25-1] at p. 1.