



MANAGING MENTAL HEALTH DISABILITIES IN THE WORKPLACE

How to Fulfill Your Accommodation Obligation Under the ADA and Oklahoma Law

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Recent studies reveal an alarming number of Americans—about 61.5 million or one in four adults—suffer a mental health impairment. The Equal Employment Opportunity Commission (EEOC), the agency that enforces the Americans with Disabilities Act (ADA), reports a surge in the number of charges of mental health disability discrimination. In 2016 alone, the EEOC recovered about \$20 million from employers for people with mental health conditions who claimed they were denied employment or job accommodations in violation of the ADA. In response to this trend, the EEOC issued guidance in December 2016 on the rights of applicants and employees with mental health impairments. Employers must therefore be diligent in educating managers how to comply with the ADA, especially the key steps they must take to fulfill the legal duty to engage in the interactive job accommodation process in good faith when an employee with a mental health impairment asks for help.

The ADA Covers Mental Health Impairments

The ADA defines a “disability” as any physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12102(1). Mental impairments include psychological disorders, intellectual disabilities, organic brain syndrome, emotional or mental illness, and certain learning disorders. 29 C.F.R. § 1630.2(h)(2). Covered mental disabilities almost always include major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. 29 C.F.R. § 1630.2(j)(3)(iii). Even a mental “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D). Major life activities include such things as the ability to concentrate, communicate, interact with others, eat, sleep, care for yourself, or regulate your thoughts or emotions. 42 U.S.C. § 12102(2).

The ADA Outlaws Health-Related Inquiries with Limited Exceptions

In most situations, employees may keep their health private. The ADA makes it unlawful to ask health-related questions except in specifically allowed situations. 42 U.S.C. §12112(d). Four common situations when health-related inquiries can be made include:

- After a conditional job offer has been made but before employment begins.
- When engaging in affirmative action for people with disabilities.
- When an employee requests a reasonable accommodation for an impairment.
- When there is objective evidence the employee may be unable to perform the essential functions of the job or may pose a direct threat to the health or safety of themselves or others due to an impairment.

29 C.F.R. §1630.14.

The Interactive Accommodation Process

Employers must grant reasonable accommodations for mental disabilities unless it would impose an undue hardship. 29 C.F.R. § 1630.9(a). An employer should begin the process when (1) an employee discloses a mental impairment and requests an accommodation, (2) an employer knows or is given a reason to know an employee is disabled and requires an accommodation (even if the employee does not request it), or (3) when an employer has a reasonable belief based on objective evidence that an employee’s inability to perform an essential job function is due to a mental condition. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, Question 40* (Oct. 17, 2002). An employee does not have to use magic words such as

“disability,” “accommodation,” or “interactive process” to trigger the duty to engage in the interactive process. For example, in *Huffsmith v. Yellow Transp., Inc.*, 2007 WL 2371977 (M.D. Pa. 2006), the court held an employee triggered the process by telling a supervisor: “I am stressed and cannot perform my duties in a proper and safe manner right now. I need to leave. I’m under a doctor’s case—it’s on file in HR.”

Reasonable Accommodations

The accommodation process often requires an evaluation of the reasonableness of a requested accommodation. A proper evaluation includes an individualized assessment of the situation. Some examples of possible reasonable accommodations include altered break and work schedules (e.g., scheduling work around therapy or other appointments), quiet office space or devices that create a quiet work environment, changes in supervisory methods (e.g., written instructions from a supervisor who usually does not provide them), altering shift assignments, and permission to work from home. *EEOC Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights*, EEOC (Dec. 12, 2016). While employers are required to engage in the interactive process and explore possible accommodations, they are not required to alter or eliminate any of the functions of the job that are truly essential. Nor must employers create a new position for the employee.

STEPS TO TAKE

- **Review and Update Your Disability Accommodation and Discrimination Policies**
 - Ensure you have an adequate disability accommodation policy that clearly explains the rights and responsibilities of employees and managers when dealing with potential disabilities.
 - Make sure you can prove all of your employees have received the policies.
- **Regularly Train All Your Employees Regarding Your Policies and Procedures**
 - Well written policies are not enough to minimize risk and avoid liability.
 - Train managers to be alert to potential issues and to understand their responsibilities.
 - Educate employees about their rights and responsibilities as a key to your defense.
 - Make plans for your leaders to join GableGotwals’ free webinar on this topic on September 19, 2017 from 12:00 to 1:00 pm and document the participation as a key to your defense.
- **Engage Counsel to Audit Your Prevention Practices and Assist with Your Training**
 - Having counsel audit your policies and practices helps minimize risk of costly claims.
 - GableGotwals has a team of experienced employment lawyers who are ready to assist.

*Chris Thrutchley and Lauren Oldham are attorneys of GableGotwals who advise and defend clients in the area of Labor and Employment Law, ERISA and general litigation. For help auditing and updating your employment policies and practices contact **GableGotwals**. We will be glad to assist you.*



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