



MANAGING EMPLOYEE MENTAL HEALTH ISSUES PROACTIVELY

Presented by:

Lori Armstrong Halber, Partner, Fisher Phillips LLP

Michelle Hammel, Counsel & Chief Ethics Officer
Delaware River and Bay Authority

Amy Sutter, Senior Counsel, Comcast

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April 24, 2019 In-House Counsel Conference

Presenters:

- Lori Armstrong Halber, Partner, Fisher Phillips LLP
- Michelle Hammel, Counsel & Chief Ethics Officer
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Overview

- Mental health statistics
- Application of the Americans with Disabilities Act to mental conditions
 - Non-discrimination (including non-harassment)
 - Reasonable accommodation
- FMLA implications
- Mental Health Parity and Addition Equity Act
- Recent cases
- Best practices for addressing both known and suspected mental health conditions
- Workplace safety
- Substance Abuse Issues

Overview

- The term “mental health” itself is not a legal definition but refers to a continuum that includes emotional well-being, mental health conditions and mental illnesses.
- Mental health, like physical health, can fluctuate but everyone’s experience of mental health is different and unique to them.

Important Statistics

- According to one recent survey, half of all workers have experienced a mental health problem in their current job.
- According to the World Health Organization, 300 million people worldwide suffer from depression and mental health issues cost the global economy \$1 trillion in lost productivity.
- The WHO found that over the next 14 years, given current mental health treatment trends, depression and anxiety will be responsible for a loss of 50 million years of work time. In financial terms, this adds up to an annual loss of \$925 billion to the global economy.
- More than 18% of adults in the United States suffer from an anxiety disorder, which represents about one-third of the \$148 billion Americans pay each year for mental health care.

Statistics for Adults in the U.S.

- 1 in 5 (18.5%) experiences mental illness in a given year
- 2.6% live with bipolar disorder
- 6.9% had at least one major depressive episode in the past year
- 18.1% have experienced an anxiety disorder
- Depression is among the top 5 reasons for absenteeism and productivity loss in the workplace
- People with depression are 2.5 times more likely to sustain an on-the-job injury

More Statistics ...

- 74% of people with a mental health problem for more than a year are out of work
- 55% of those with depression or anxiety for more than a year are out of work
- 49% of workers would not be comfortable disclosing a mental health issue at work
- In 2015, 18 million days were lost to sickness absence caused by mental health conditions
- Those with a severe and enduring mental illness are exposed to premature mortality rates of up to 15-20 years

Relevant Laws

- Family Medical Leave Act
- The Americans With Disabilities and ADA Amendments Act of 2008
- Workers' compensation
- Occupational Safety and Health Act
- Health Insurance Portability and Accountability Act
- Mental Health Parity and Addition Equity Act

Discrimination Charge Statistics

- Increased scrutiny/enforcement efforts
 - “Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights”
- >5,000 EEOC charges in 2016 alleging discrimination based on mental health conditions
 - >\$20m obtained for charging parties

Relevant Considerations

- Health and welfare of the employee
- Impact on productivity/morale of co-workers
- Maintenance of a safe work environment (workplace violence issues)
- Protection of confidential medical information

Challenges Unique to Mental Health Conditions

- Stigma
- Avoidance of treatment/mitigating measures
- Not obvious
- Different people, different experiences
- Lack of front-line training

Common Scenarios

- Long-term employee, dependable performer, exhibits unusual behavior
- New hire tells supervisor she suffers from anxiety and depression
- Poor performer raises condition for first time when counseled for performance issues

Issues Employers (and Courts) Struggle With

- Is the employee “disabled”?
- When is the interactive process obligation triggered?
- What are the “essential” job functions?
- Can we discipline/terminate an employee with a known mental disability?

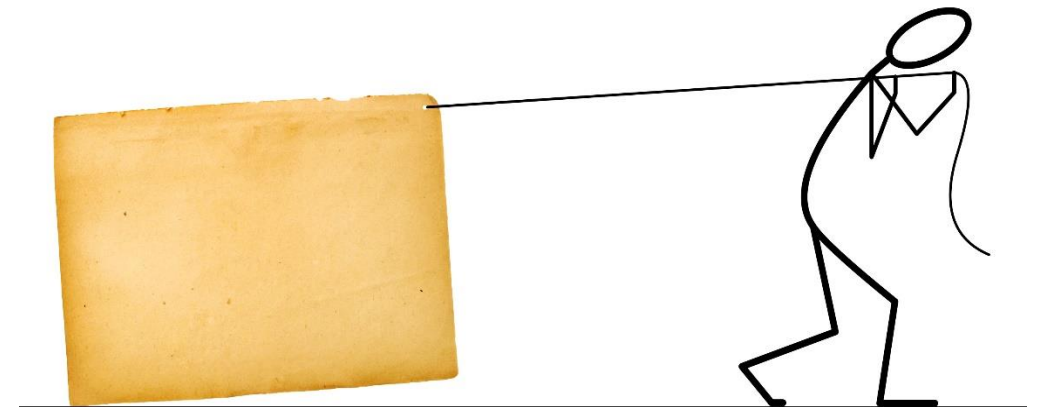
ADA EEO
FMLA HUMAN OSHA

RESOURCES

Best Practices Workers Com.
Hiring/Firing FLSA

Mental Impairment

- A mental illness severe enough to warrant hospitalization is virtually always a **serious health condition** under FMLA. Many mental illnesses that do not require hospitalization are serious health conditions.
- Any physiological or mental disorder, including intellectual, emotional, and learning disabilities



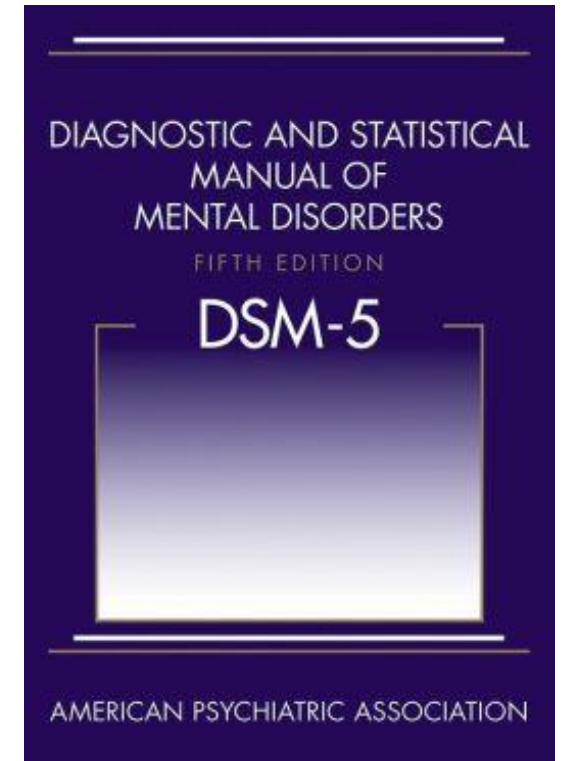
Case Study: Infrequent Impairment

Lucy suffers from schizophrenia, but her condition is controlled by medication so her co-workers have no idea. On occasion, her symptoms recur and she has to take time off.

- Is Lucy “disabled”?

DSM-5: What Is It?

- Used by psychiatrists, psychologists and other mental health professionals worldwide to diagnose mental illness
- Inclusion of a diagnosis in the DSM is often required for treatment to be covered by health insurance



DSM-5 And The ADA

- Must a mental “impairment” be listed in DSM-5 in order to qualify under the ADA?
- Legislative history of the ADA suggests that it must
- EEOC’s position is that inclusion in the DSM is “relevant” for determining whether a mental disorder is covered by the ADA
- If it’s in DSM-5 it will likely qualify, except...

What is Covered?

- Traits and Behaviors vs. Impairments
- “Traits or behaviors are not, in themselves, mental impairments. For example, stress, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.”
 - EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

DSM-5 and The ADA

- Some mental disorders are not covered by the ADA even though they are in DSM-5:
 - Exhibitionism
 - Voyeurism
 - Pedophilia
 - Transvestism
 - Pyromania
 - Kleptomania
 - Compulsive gambling

DSM-5 and The ADA

- What Types of Mental Disorders Are Likely to Be Presented in the Workplace:
 - Narcissistic Personality Disorder
 - Depression
 - Bipolar Disorder
 - Substance Use Disorder
 - Anxiety Disorder
 - Post-traumatic Stress Disorder
 - Obsessive-Compulsive Disorder
 - Panic Disorder
 - Asperger's Syndrome

ADA Definition of “Qualified”

- Education/experience/skills standards
- Able to perform essential functions
- With or without reasonable “accommodation”

What Are “Essential Functions”?

- Fundamental to the position
 - Not marginal
- How about
 - Attendance?
 - Ability to work in stressful environment?
 - Ability to work peacefully with co-workers?
 - Punctuality?
- Essential Functions v. Qualifications

The Basic Rule

- You must **reasonably accommodate** a **disabled** employee or applicant unless doing so is an **undue hardship** or creates a **direct threat** to health or safety.



Don't Forget About the FMLA

- Unusual behavior may be (and probably is) sufficient notice of a potential “serious health condition”
- Err on the side of caution:
- Provide FMLA notices
- Ask “How can I help?”

Reasonable Accommodations

- Provide equal opportunity for individual to be considered for the job he or she **holds** or **desires**
- Enable employee to perform essential functions of job employee holds or desires
- Provide equal opportunity for individual to enjoy equivalent benefits and privileges

Reasonable Accommodations

- Focus on the job restrictions, not on the diagnosis
- Not every diagnosis will impact an employee's ability to work
- If limitations on employee's ability to work are not clear, obtain medical certification
- Never assume that an employee's problems are the product of a mental condition

The Interactive Process

- A timely good-faith exchange of information between employer and a disabled employee or applicant to explore both:
 - Necessity for accommodation
 - Accommodation options

When To Start The Interactive Process

- Initiate the interactive process when the employee's disability is **known** or **apparent**. For example, when:
 - Employee requests an accommodation
 - Employee presents doctor's note with work restrictions
 - Employee exhausts FMLA leave
 - Employer otherwise becomes aware of need for accommodation through third party or observation

Requesting Medical Information

- Employers are entitled to know:
 - Healthcare provider's qualifications
 - Nature and duration of restrictions but not necessarily entitled to know diagnosis
 - Employee's limitations
 - Need for reasonable accommodation
 - Suggested accommodation(s)
- May request medical documentation and information
- Be clear on what you are seeking so that employee and physician know the request is narrowly tailored to the restriction or concern at issue
- Use ADA questionnaire or letter to healthcare provider
- If information is unclear, consider requiring Independent Medical Examination (IME)

Requesting Medical Information

- If medical information provided still unclear, may require Independent Medical Examination (IME):
 - Inquiries must be limited to employee's limitations that require accommodation
 - Employer pays cost of the examination



Documentation

- You must thoroughly document:
 - All meetings and communications with the employee
 - All accommodations considered
 - Search for alternate positions
 - Employee's failure to cooperate

Interactive Process: **Step 1**

- Determine the “essential functions” of the position:
 - Position exists to perform function
 - Time spent performing
 - Job description
- Obtain employee’s agreement regarding essential job functions:
 - Review list of essential job functions at first meeting
 - Have the employee sign job description or a statement of essential job functions

Interactive Process: **Step 2**

- Consult with disabled employee regarding limitations:
 - Ascertain job-related limitations
 - Determine impact of limitations on ability to perform essential functions
 - Discuss how limitations can be overcome

Interactive Process: **Step 3**

- Identify potential accommodations:
 - Ask employee and/or healthcare provider for proposed accommodations
 - Determine if other reasonable accommodations exist
 - Assess the effectiveness of proposed accommodations
 - If no accommodation possible in position held, are any vacant positions available?
 - Is employee qualified for position?

Interactive Process: **Step 4**

- Select and implement accommodation that enables employee to perform essential job functions:
 - Employee's preference does not control
 - Provide written explanation as to why employer selected a different accommodation

What If It Doesn't Work?

- Interactive process extends beyond the first attempt
- Determine whether other reasonable accommodations are available
- Document reason first accommodation failed (*i.e.*, employee unable to do job)

Mental Health Parity and Addiction Equity Act

- The Mental Health Parity Act of 1996 prohibits group health plans from placing lifetime or annual limits on mental health benefits that did not apply to substantially all medical/surgical benefits.
- The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (the “Act”) passed in 2008 and was intended to provide parity for treatment limits and financial requirements.
- The Act was effective January 1, 2010 for calendar year plans (prior to the issuance of regulations).

MHPAEA Financial Requirements

- The Act requires that financial requirements that apply to mental health or substance use disorder benefits be “no more restrictive than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the plan.”
 - Financial requirements include deductibles, copayments, coinsurance and out-of-pocket maximums
 - A plan may not (without passing the parity tests) treat all mental health/substance abuse disorder providers as specialists and automatically apply a higher copayment than for primary care physicians for medical/surgical

MHPAEA

- Quantitative treatment limitations – expressed numerically
 - Examples are day and visit limits
 - Same predominant and substantially all test as financial requirements
 - Quantitative treatment limits cannot accumulate separately
- Non-quantitative Treatment Limits
 - Non-quantitative treatment limitations are limitations that affect the scope or duration of benefits under the plan that is not expressed numerically.
 - Any processes, strategies, evidentiary standards or other factors used in applying the non-quantitative treatment limitation to mental health/substance use disorder benefits must be comparable to and applied no more stringently than the processes, strategies, evidentiary standards or other factors used in applying the limitation with respect to medical/surgical benefits in the same “classification.”

When Are You Done?

- Accommodation no longer needed
- Accommodation successful
- No reasonable accommodation exists
- Employee fails to cooperate
- Accommodation is an undue hardship
- Direct threat with or without accommodation

Accommodations Might Include...

Job Restructuring

- Reallocation of **nonessential** job functions or when/how they are performed:
 - Change start time
 - Reduced or part-time schedule

Work At Home

- Reasonable when the essential functions can be performed at home
- Not reasonable when the job requires close supervision, or the essential functions of the job involve teamwork and coordination with others at workplace



Modification Of Work Policies

- Consider policy modification or waiver if employer policy normally includes:
 - No work at home
 - No transfer allowed if employee has a recent write-up
 - 100% healed policy
 - Automatic termination upon finding of permanent disability
 - Inflexible leave policies
 - Inflexible attendance policies

Misconduct

- Employer need not rescind nor forego discipline for prior rule violations but must consider whether a reasonable accommodation would enable employee to comply with rule in the future
- Need not permit employee to violate rules that protect health or safety, or where violation creates disruption to the operation of the business

Transfer To A Vacant Position

- Only if cannot accommodate in current position
- Case law trend and EEOC position: give qualified disabled employee preference over **more** qualified applicants
- Need not create a new position
- Need not violate seniority unless exceptions are commonly made
- May pay the rate for the position even if it is lower than rate paid for current position

Leave Of Absence

- Unpaid leave for employee to seek treatment or to recover may be required if employee **is expected to return following the leave**
- Additional leave after expiration of FMLA
- Indefinite leave is not required
- Tolerating erratic attendance is not required

Return To Work Strategies: Planning and Support

- Keep in touch during leave
- Ask the employee how he/she would like information shared with co-workers
- Create individualized return-to-work plans:
 - Written
 - Discussed with and signed by employee
- Fitness for duty test
- Consider training/retraining
- Periodically check in following return

Accommodations That Are Not Reasonable

- Lowering a quality or quantity standard
- Eliminate essential job function
- Excusing misconduct
- Creating new job
- Giving a new supervisor
- Indefinite leave



Undue Hardship/Direct Threat/Workplace
Safety Considerations

Undue Hardship

- Significant loss in productivity
- Decrease in customer responsiveness
- Deferred projects
- Lost sales
- Increased burden on management
- Temporary employees or overtired/overworked co-workers
- Complexity of employee's job, size of the facility, and other factors all relevant

Fitness For Duty/Direct Threat

- CDC – 25% of American adults suffering from a mental illness
- ***Vast majority of people who are violent do not suffer from a mental illness*** (American Psychiatric Association)
- No shortage of workplace violence:
 - Germanwings co-pilot intentionally crashed a plane
 - Workplace shootings
- Weigh risks of ADA claim with catastrophic loss
- Consider whether a reasonable accommodation will permit the employee to perform the essential functions, and do so without posing a direct threat to safety

Workplace Violence Considerations – Common High Risk Behaviors

- Has a fascination with weapons
- Past history of violence, trouble with the law, alcoholism, substance abuse
- Files multiple unreasonable grievances, openly voices threats
- Carries a grudge, a belief that revenge is justified
- History of antisocial behavior
- Blames others for own problems
- The general tendency to react angrily to most situations (versus a temporary emotional state)

Workplace Violence Considerations – Risk Factors

Related to Work

- Unsatisfied by treatment from supervisor
- Feels picked on, isolated by supervisors
- Downsizing, “right-sizing,” reductions in force
- Treated unfairly or particularly inhumanely at termination

Unrelated to Work

- Divorce or personal stressors
- Love relationship gone sour, lover seeks revenge
- Terrorist message

Direct Threat

- A significant risk of substantial harm to the health or safety of that employee or others, which cannot be eliminated by reasonable accommodation
- An individual is not qualified if they constitute a direct threat
- Factors to consider:
 - Nature of risk
 - Duration of risk
 - Severity of potential harm
 - How imminent is the harm

Direct Threat

- Direct threat psychiatric inquiry or exam:
 - Threat of harm
 - Cannot safely perform job
 - Objective and current medical evidence
 - Tough standard for employer to meet
- Utilize Wellness programs
- Utilize EAPs

Fitness for Duty

- Focus on performance
- What's causing the performance issue?
- Do not ask questions about health condition
- Only if the employee volunteers medical issue is it appropriate to make fitness for duty inquiry
- Fitness for Duty inquiry:
 - Reasonable belief
 - Objective evidence
 - Employee's ability to perform essential function is impaired by psychiatric condition



Case Studies and Hypotheticals

The Employer's Challenge

How do I accommodate...

The socially awkward employee
with Social (Pragmatic) Communication
Disorder?



The Employer's Challenge

How do I accommodate...

The dishonest employee with
Antisocial Personality Disorder?



Hypothetical

- Employee with bipolar disorder fails to take her medication at times
- Coworkers and her supervisor have complained
- Can we require her to take her medication?

Hypothetical

- For weeks, you have been telling Fred that his attendance needs to improve. You've finally done a write-up and presented it to Fred. He says that he is really sorry but his anxiety has been flaring up and he has been afraid to leave his house in the morning.

Can you still give Fred the write-up?

Do you need to do anything else?

Hypothetical

- Jonny graduated from UNC – Chapel Hill, earned his Master's degree from USC and was recently hired as a Clinical Manager.
- Jonny tells his supervisor, "FYI: I just wanted you to know that I have a learning disability. It takes me a good while to read things sometimes. I just wanted you to know."

Is Jonny disabled?

What, if anything, should his supervisor do?

Hypothetical

Suzy is an administrative assistant at Acme Corp. She is diagnosed with ADD and takes Ritalin. There has been some turnover at Acme and her new supervisor has a more strict style of management. The new management style caused Suzy a lot of stress and anxiety which exacerbated her ADD. Plaintiff requests a transfer and her manager denies it. Thereafter, she requests accommodations including clarifying assignments in writing, allowing her to decide how long a task should take and avoiding early morning meetings. Her requests were denied. Suzy is directed to take minutes at an 8:00 am practice group meeting and fails to show up for the meeting. She is terminated.

Is she disabled?

What should her supervisor have done?

Hypothetical

- Lindsay has been employed for four months. Her co-workers have been reporting strange behavior by her in the workplace. For example, she was observed practicing penalty kicks in the conference room and talking and wildly gesturing while alone in the break room. Her behavior makes them nervous.
- You pull Lindsay's production numbers and see no issues with her productivity or attendance.

What, if anything, do you do?

Hypothetical

- You met with Lindsay and she disclosed that she struggles with some mental health related problems. She said that she feels like they are getting worse and she wants to take a leave of absence for a couple months in order to seek intensive treatment.
- Her supervisor believes Lindsay is a disruption in the workplace and a liability. He also says that his department has already laid off two people in the last two years so he can't do without Lindsay's position for any extended period of time.

How do you handle Lindsay's request?

Hypothetical

- Alan has always been a little odd and struggled to fit in with his co-workers. One day last week, however, he came to work looking very flustered and disheveled. His supervisor asked him if he was alright and he responded that he was “fine, just stressed out.”
- Later that day, Alan was observed and co-workers noticed it didn’t appear like he could focus his eyes and he was staring blankly at the wall. Several minutes later, he started screaming that “it was happening again.” Ultimately, 911 was called and Alan began a leave of absence for treatment.
- His co-workers have been asking what was wrong with Alan and if they need to be worried.

How should you handle their questions?

What should you think about as you prepare for Alan to return to work?



Closing Thoughts

Best Practices

- Regularly update job descriptions
- Implement/review policies/process for handling accommodation requests
- Train your front line***
 - “How can I help?” v. “You seemed depressed.”
- Be alert to signals for accommodation need
- Gather necessary information
- Keep medical information confidential

Best Practices

- Don't pretend to be a doctor
- Be the last man standing in the interactive process
- Make decisions based on facts, not stereotypes
- Assess each request for accommodation individually
- Implement a return-to-work plan

Best Practices

- Introduce a dedicated counselling service or helpline for mental health issues
- Train on mental health issues including mental health first aid
- Use positive language – avoid stigmatizing
- Foster a culture of support and openness so that those needing help feel reassured to seek help without any stigma being attached to them

A reminder about the benefits of ACC membership...

- Free CLE, like the one you're attending right now
- Roundtables
- Networking meetings
- Special events
 - Spring Fling, Fall Gala, Diversity Summer Program, Golf Outing, Pro Bono clinics, Charity Softball Game & Family Fun Day, and more!
- Access to ACC resources, including:
 - ACC Newsstand (customizable updates on more than 40 practice area)
 - ACC Docket Magazine
 - InfoPAKs
 - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at ChrisStewart@ACCglobal.com.**

