

Employment Practices Liability

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EEOC Issues Publication Informing Job Applicants and Employees with Mental Health Conditions of their Employment Rights

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Executive Summary: In December, the U.S. Equal Employment Opportunity Commission (EEOC) issued a user-friendly resource document aimed at informing applicants and employees with mental health conditions about their workplace rights under the Americans with Disabilities Act of 1990 (ADA). The publication also addresses circumstances regarding workplace privacy rights, such as confidentiality of medical information, and the process for requesting and documenting the need for a reasonable accommodation relating to a mental health condition.

Background: The EEOC, the agency generally charged with enforcing federal laws prohibiting employment discrimination, issued the publication in response to data showing that charges of discrimination based on mental health conditions are on the rise. The EEOC's preliminary data shows that, during fiscal year 2016, the Commission resolved approximately 5,000 charges of discrimination based on mental health conditions. Generally, these individuals were allegedly unlawfully denied employment and reasonable accommodations in connection with their mental health condition. In response, issuance of the resource document aims to raise awareness of the employment rights and protections held by many individuals with common mental health conditions under the ADA. EEOC Chair Jenny R. Yang, stated, "[e]mployers, job applicants, and employees should know that mental health conditions are no different than physical health conditions under the law."

New Publication: The publication, titled "Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights" presents a series of questions and answers, explaining to applicants and employees their workplace rights in an easy to understand format, and highlights the following:

- **Anti-Discrimination Rights:** It is illegal for an employer to discriminate against an individual with a mental health condition, or against an individual who asked for, or who needs, a reasonable accommodation, by firing the individual, rejecting the individual from a job or promotion, or forcing the individual to take leave.

While an employer can refuse to hire an applicant or discharge an employee who cannot perform the job duties or would create a significant safety risk, even with a reasonable accommodation, the employer must base any such decision on objective evidence, *and cannot rely on myths or stereotypes about an individual's mental health condition.*

- **Anti-Harassment Rights:** Individuals are protected from employment-related harassment based on a disability. Individuals experiencing any harassment should report the harassment to the employer, who must then take action to prevent future harassment.
- **Privacy Rights:** Generally, an individual can keep his or her mental health condition private. There are only four situations when an employer is allowed to ask medical questions, including questions about mental health: (1) when an individual asks for a reasonable accommodation; (2) after a job offer, but before employment commences, as long as every individual in the same job category is asked the same question; (3) when the employer is engaging in affirmative action for individuals with disabilities; however, the individual may choose whether to respond; and (4) during employ-

ment if there is objective evidence the individual may be unable to perform the job duties or may pose a safety risk based on the mental health condition.

- **Reasonable Accommodations:** Qualified individuals with disabilities are entitled to a reasonable accommodation to enable them to perform the essential functions of their job. For example, a reasonable accommodation is appropriate for any mental health condition that would, if left untreated, "substantially limit" the individual's "ability to concentrate, interact with others, communicate, eat, sleep, care for yourself, regulate your thoughts or emotions, or do any other 'major life activities.'" A condition may be considered "substantially limiting" even if the individual's symptoms come and go. The following mental health conditions generally qualify: major depression; post-traumatic stress disorder (PTSD); bipolar disorder; schizophrenia; and obsessive compulsive disorder (OCD).

An individual may ask for an accommodation at any time, ideally before any problems occur or become worse, by telling a supervisor, HR manager or other appropriate person that a change is needed because of a medical condition. An employer must provide a reasonable accommodation unless doing so involves significant difficulty or expense, or the employee presents a "direct threat" to himself or others.

For example, if an individual cannot perform all the essential functions "of his or her job and a leave will help that individual become able to perform, unpaid leave may be a reasonable accommodation if the individual has no paid leave available. Likewise, reassignment to a vacant position may be a reasonable accommodation if the individual is permanently unable to do his or her regular job.

An employer may ask that the request be documented in writing and may ask the individual to submit documentation from a health care provider describing the condition and whether a particular accommodation would meet the individual's needs. Individuals can assist their health care providers with the process by providing a copy of the EEOC's publication, "The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work," which can be obtained online at: https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm.

Fact Pattern: In 2013, after the events at Sandy Hook Elementary School, a mentally ill school employee began to exhibit behaviors consistent with his diagnosis of bipolar disorder. Comments were made which led the employer to separate the employee. The employee's mental health condition allegedly played a role in the decision.

The proper analysis of the legality of the termination goes as follows. The employee arguably was a qualified individual with a disability. The individual could perform the essential functions of his or her position with or without a reasonable accommodation. The individual alleged that he/she was terminated not because of being unqualified, but rather because the employer perceived the individual to be a direct threat.

In such a case, the **employer** must establish that the employee poses a significant risk of substantial harm to the health or safety of himself or others, which cannot be eliminated or reduced by a reasonable accommodation. Generally, but not always, such a conclusion is backed by medical evidence supporting the affirmative defense.

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Bottom Line: The new publication highlights the EEOC's efforts to bring awareness to workplace protections and rights held by individuals with mental health conditions. Although aimed towards applicants and employees, the guide is a useful tool for employers, who can utilize the resource to assist individuals seeking assistance related to a mental health condition. It is important to note that the employment rights discussed in the guide are only those under the ADA – individuals with mental health conditions may have additional rights under other laws, such as the Family Medical Leave Act (FMLA). It is also critical to note that generally one cannot bar an employee with a mental health condition from work based on a fear of possible violence. The law requires an assessment of whether the employee can perform the essential functions (with or without a reasonable accommodation) and then a determination of whether the qualified individual presents a direct threat.

That conclusion must be based on more than stereotypes or generalizations.

The guide can be found online at: https://www.eeoc.gov/eeoc/publications/mental_health.cfm.

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