EMPLOYMENT DISCRIMINATION DUE TO AN EMPLOYEE'S MENTAL HEALTH CONDITION

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There have always been employees who suffered from mental health issues. Employers' attention to those issues have not always been sufficient- at least from the employees' perspectives. Nowadays, there are provisions codified in federal and state law that require employers to give much greater attention and, under certain circumstances, help to employees who are experiencing mental health challenges. Additionally, employers who want to retain talented and productive employees have voluntarily chosen to implement policies and programs to help create a supportive and healthy environment.

Mental Health Issues Among American Employees

In a 2022 blog, the U.S. Dept. of Labor stated that the COVID-19 pandemic led to "increased understanding of the need to support each other. By crystalizing the critical link between work and wellbeing, the past two years helped us speak more openly about mental health and the workplace…"[1] - and it's an important conversation to have.

In a 2021 American Psychological Association survey, nearly 3 in 5 employees (59%) said they have experienced negative impacts of work-related stress in the past month, and a vast majority (87%) of employees think actions from their employer would help their mental health.

A mental disorder is characterized by a clinically significant disturbance in an individual's cognition, emotional regulation, or behaviour.[2] It is usually associated with distress or impairment in important areas of functioning. Mental disorders may also be referred to as mental health conditions. The latter is a broader term covering mental disorders, psychosocial disabilities and (other) mental states associated with significant distress, impairment in functioning, or risk of self-harm. Employers who recognize and understand the breadth of employees' mental health conditions are better suited to assist employees and comply with the law.

Summary of Federal Law

Under federal law, the primary protection for employees with disabilities, including those caused by mental health conditions, is the Americans with Disabilities Act (ADA)[3], which became law in 1990. Its purpose was to make America more accessible to people with disabilities. In 2008, the ADA Amendments Act (ADAAA) became law, and it broadened the definition of disability. Although the ADA applies to several categories affecting American life, the focus of this paper is on Employment.

Title I of the ADA requires covered employers to provide reasonable accommodations for applicants and employees with disabilities and prohibits discrimination on the basis of disability in all aspects of employment. Examples of reasonable accommodation include restructuring jobs, providing a modified schedule, making a workstation accessible, modifying policies, providing an interpreter, and modifying policies.

The ADA's protection applies primarily, but not exclusively, to individuals who meet the ADA's definition of disability. Pursuant to the ADA, an individual has a disability if:

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[1] U.S. Dept. of Labor Blog, The Intersection of Work and Wellbeing, for All Workers, Taryn M. Williams, (March 30, 2022), https://blog.dol.gov/2022/03/30/the-intersection-of-work-and-wellbeing-for-all-workers.

[2] World Health Organization Fact Sheet, Mental Disorders, (June 8, 2022), https://www.who.int/news-room/fact-sheets/detail/mental-disorders

[3] Section 501 of the Rehabilitation Act of 1973 (Section 501) is also a federal law that protects people with disabilities, including mental health disabilities, from discrimination at work.

A. He or she has a physical or mental impairment that substantially limits one or more of his/her major life activities;
B. He or she has a record of such an impairment; or
C. He or she is regarded as having such an impairment.[4]

Federal law also requires an employer to provide a reasonable accommodation to an employee or job applicant with a disability if they need it to perform an important job function, unless doing so would cause significant difficulty or expense for the employer.

Survey of Cases Where an Employer is Alleged to Have Violated Federal Law Protecting Employees From Harassment, Discrimination and Retaliation for Mental Health Issues

***Robinson v. Dibble*, 613 Fed. Appx. 9 (2d Cir. 2015)**

Employee argued on appeal that the district court erred in granting summary judgment to former employer and dismissing her Title VII and ADA retaliation claims. Robinson's ADA disparate treatment claim is premised on the fact that she suffers from anxiety, depression, and PTSD. The court initially notes that, aside from her termination, none of the conduct of which Robinson complains rises to the level of an "adverse employment action" sufficient to make out a prima facie case of discriminatory disparate treatment under the ADA. Additionally, the court concluded that Robinson failed to present evidence upon which a reasonable juror could conclude that the legitimate, nondiscriminatory reason proffered by her employer for her termination – that the project on which Robinson was working was reaching completion, and the company was therefore laying off employees due to reduced staffing needs – was pretextual. The court also found that the district court properly dismissed the hostile work environment claim. Robinson did not argue that a single episode of harassment was so severe that it, alone, created a hostile work environment. Thus, her only alternative was to prove that the workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently pervasive to alter the conditions of her employment. Robinson did not meet this burden, as her evidence showed only sporadic- yet offensive and condemnable- comments by her coworkers, which did not rise to the level of creating and abusive and hostile workplace environment.

***Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119 (1st Cir. 2017)**

A former employee (Delgado) of a pharmaceutical company who worked as a sales representative and suffered from depression sued his former employer, alleging age and disability discrimination and a hostile work environment in violation of the ADA. The district court entered summary judgment for the employer. On appeal, the 1st Circuit considered the following pertinent facts: In 2010, Delgado sought treatment for depression and anxiety from a psychiatrist. A year later, she learned she had a small brain tumor. She informed her supervisor of the tumor diagnosis, but she did not disclose her depression or anxiety. Delgado was subsequently awarded short term disability benefits that were periodically extended on several occasions; however, after receiving additional correspondence from Delgado's doctor, AstraZeneca determined that Delgado's short-term benefits had ended and that she should return to work or be considered to have resigned her employment. Delgado did not return to work as requested and she was terminated. In the termination letter AstraZeneca also informed Delgado that there had been a recent reorganization

[4] 42 USCA §12102(1).

in field sales and made an offer of severance to her. AstraZeneca in a subsequent letter informed Delgado that due to a reorganization in field sales, her position was eliminated.

Delgado did not accept the settlement offer and, instead, she filed suit. Focusing on Delgado's ADA claims, the court grouped them into 2 categories: disability discrimination and retaliation. Delgado had the burden to show that she is qualified to perform the essential functions of her job with or without reasonable accommodation. Delgado did not claim that she could perform her job without reasonable accommodation, and the court's inquiry narrowed further to whether Delgado could perform her job with a reasonable accommodation. Delgado asserted that her request for an additional twelve-month leave was reasonable. The court disagreed, concluding that Delgado's request was not a reasonable accommodation because a) there was no indication to the employer that the twelve-month leave would be effective, and b) the requested accommodation was not reasonable on its face.

Delgado claimed on appeal, as she did in district court, that her request for an additional twelve months of leave was protected activity, and it became actionable when AstraZeneca retaliated against her by terminating her employment. AstraZeneca articulated legitimate, nondiscriminatory reasons for Delgado's termination: 1) her position was eliminated and 2) she did not return to work after her short-term disability leave. Delgado was unable to show that these articulated justifications were pretextual. The court affirmed summary judgment in favor of AstraZeneca.

***Valdivia v. Township High School District 214*, 942 F.3d 395 (7th Cir. 2019)**

Former assistant to a high school principal sued the school district for interfering with her rights under the Family and Medical Leave Act (FMLA) by failing to provide her with notice or information about her right to take job-protected leave. A jury entered a verdict in favor of the employee, and the school district filed a motion for judgment as a matter of law, which was denied. The school district then appealed.

For 6 years, Valdivia worked for the District as an assistant to the associate principal for instruction at Elk Grove High School. During her time at Elk Grove, Valdivia received excellent performance evaluations. Her supervisors described her as "extremely dependable" and an "invaluable resource," and they said that her work was "immaculate" and "free from error." Valdivia was never disciplined and rarely took sick days.

After learning about a new opening within the District, Valdivia applied for and received a promotion to assistant to the principal at Wheeling High School, Angela Sisi. Valdivia and Sisi had not worked together previously, but they had been acquainted for several years. Valdivia had worked as an assistant to Sisi's mother for several months, and Sisi's mother told Sisi that Valdivia was the "best assistant [she] ever had."

Shortly after she started at Wheeling, Valdivia's mental state began to deteriorate. She had trouble sleeping, eating, and getting out of bed, and she lacked energy. Her symptoms worsened: she experienced insomnia, weight loss, uncontrollable crying, racing thoughts, an inability to concentrate, and exhaustion. Valdivia began going into work late because she could not drag herself out of bed, and she started leaving work early because she could not control her crying. She applied for other jobs, thinking a different position might help her.

Valdivia met with Sisi and told Sisi that she was feeling overwhelmed, had lost weight, was not able to sleep, and was not hungry. She also mentioned that she had received an offer for a

different job but said that she would probably remain at Wheeling. During this conversation, Sisi tried giving Valdivia a work assignment, but Valdivia pleaded, "[N]o, don't do this to me right now." Later, Valdivia asked Sisi to give her a ten-month position, instead of her twelve-month job, because she thought that time away from the workplace might help. Sisi declined the request, prompting Valdivia to say that she might accept the other job offer.

Valdivia had a third conversation with Sisi, and Sisi told Valdivia that she needed to decide whether she was staying or leaving. Valdivia started crying, and the encounter ended inconclusively. Valdivia sought out Sisi four or five more times after that conversation to discuss whether she should accept the other job offer. A few times, Valdivia went home early after one of those conversations, again because of uncontrollable crying. At one point in early August, Valdivia told Sisi that she was considering leaving "for medical reasons," and she again asked for a ten-month job.

Feeling pressure from Sisi to decide whether she was staying at Wheeling or leaving, Valdivia submitted a letter of resignation. Her employment with the District ended on August 11, 2016. That same day, Valdivia scheduled an appointment with her primary care physician. That doctor's records note that Valdivia had been suffering from depression, difficulty falling asleep, difficulty concentrating, loss of appetite, anxiety, and restlessness for several weeks. Valdivia was prescribed Xanax. The next day, Valdivia began her new job, but she was able to work for only four days before quitting.

Valdivia ultimately was admitted to a hospital for four days and given medication for anxiety and severe major depressive disorder. Valdivia consulted a psychiatrist, and he too diagnosed her with major depressive disorder, single episode, severe, and generalized anxiety disorder. The psychiatrist testified that it would be "difficult for anybody to work" with her symptoms.

To prevail on an FMLA interference claim, an employee must establish the following: (1) she was eligible for the FMLA's protections, (2) her employer was covered by the FMLA, (3) she was entitled to leave under the FMLA, (4) she provided sufficient notice of her intent to take leave, and (5) her employer denied her FMLA benefits to which she was entitled. *Burnett v. LFW Inc.*, 472 F.3d 471, 477 (7th Cir. 2006). The District argues that the district court erred in denying its motion for judgment as a matter of law because, in its view, no reasonable juror could find that (a) Valdivia was entitled to leave under the FMLA or (b) Valdivia provided the District with adequate notice.

An employee is entitled to FMLA leave if (1) she is afflicted with a "serious health condition," and (2) that condition makes her unable to perform the essential functions of her position. *Guzman v. Brown Cnty.*, 884 F.3d 633, 638 (7th Cir. 2018). An employee has a "serious health condition" within the meaning of the FMLA when she has "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). And the court concluded that the evidence in the record was sufficient to support the jury's finding that Valdivia had a serious health condition.

The Court also found that a reasonable jury could also conclude, as this jury did, that because of her serious health condition, Valdivia was unable to perform the functions of her job. Valdivia testified that she often arrived late to work or left work early, had difficulty concentrating,

and struggled to complete tasks. The psychiatrist testified that Valdivia's symptoms would make it "difficult for anybody to work."

The District also contended that the notice Valdivia provided was insufficient as a matter of law. However, the record before the jury in Valdivia's case included more than danger-signs from the employee's behavior. Valdivia met with Sisi on several occasions to report her deteriorating mental health. She asked for the accommodation of a ten-month position rather than a twelve-month position, even though she did not expressly mention the FMLA when she made the request. She said that she was incapable of accepting a new work assignment. These conversations take her case out of the pure constructive-notice model. The jury was entitled to conclude that this was timely and actual notice to the employer. Additionally, Valdivia's behavior also came directly to Sisi's attention.

For these reasons, the court affirmed the judgment of the district court.

***EEOC v. Ranew's Mgmt Co.*, Civil Action No. 5:21-CV-00443-MTT (M.D. Ga. 2022).**

The EEOC reached a 6-figure resolution of an ADA lawsuit against a provider of fabrication, coating, and assembly products in which an employee, diagnosed with severe depression, was terminated. The employee had requested and been granted time off to recuperate, per his doctor's recommendation. When the employee tried to return to work and presented a doctor's release, he was fired by the company's CEO and told he couldn't be trusted to perform his job. In addition to monetary relief, the employer agreed to take steps to implement and distribute an ADA policy, train its executives, managers, and employees on the ADA's obligations, and post a notice.

***EEOC v. Hollingsworth Richards, LLC*, Civil Action No. 2:20-CV-02511 (E.D. La. 2020)**

The employer, a vehicle and equipment dealership operator, agreed to pay a 6-figure amount to settle an ADA lawsuit in which an employee, who disclosed she had Attention Deficit Hyperactivity Disorder (ADHD) and was taking medication under the supervision of a healthcare provider, was discharged. An operations manager told the employee to stop taking medication and ordered her to take a drug test; the employee was then discharged before confirmed test results were received. In addition to monetary relief, the employer agreed to conduct training, revise policies, provide regular reports to the EEOC, and post a notice that affirms its obligations under the ADA and states that employees can report violations to the EEOC.

EEOC v. Kaiser Foundation Health Plan of Georgia, Inc., Civil Action No. 1:19-CV-5484-AT (N.D. Ga. 2021)

An employer managed health care provider agreed to pay 6 figures to settle an ADA lawsuit in which an employee, whose disabilities made it traumatic for her to access her workplace through revolving doors, had requested to use the available non-revolving doors as a reasonable accommodation. The employer refused and forced the employee to use the revolving doors. Notably, the court held that a reasonable accommodation need not relate to the performance of an essential function of the job; employees with disabilities are also entitled to accommodations to access the workplace and to enjoy the same benefits and privileges of employment as other employees. In addition to monetary relief, the employer agreed to train its employees on the ADA, make changes to its employment forms, and allow the EEOC to monitor how it handles future requests for accommodation under the ADA.

***EEOC v. Lonza America LLC*, Civil Action No. 1:20-CV-00311 (E.D. Tn. 2021)**

A pharmaceutical and medicine manufacturing company agreed to pay 6 figures to settle an ADA lawsuit in which a 14-year employee, a recovering opioid addict, was terminated after twice testing positive for a legally controlled substance. The employer later learned the employee was a recovering opioid addict participating in a medication-assisted treatment program with a legal prescription for an opioid medication but forced him into counseling with a clinical psychologist and conditioned his return to work on discontinued use of the legally prescribed medication. In addition to monetary relief, the employer agreed to provide ADA-related training.

***EEOC v. Party City Corporation*, Civil Action No. 1:18-CV-00838-PB (D.N.H. 2019)**

The employer, a national retailer, agreed to pay 6 figures to settle this ADA failure to hire lawsuit. The job applicant, a qualified individual with a disability (on the autism spectrum, severe anxiety) required a job coach as a reasonable accommodation for her disabilities. During the applicant's job interview, the hiring manager made disparaging comments and told the job coach present at the interview that the employer had previously had bad experiences hiring applicants who required job coaches. The job applicant and job coach explained to the hiring manager that the job applicant had been successful shadowing others in previous retail jobs, but the hiring manager was unmoved. The hiring manager tried to cut the interview short by telling the job coach in a patronizing tone, "Thank you for bringing her here," while the applicant was still in the room. The hiring manager also stated, in the applicant's presence, that the employee who had encouraged the applicant to apply would hire anyone, "even hire an ant." In addition to monetary relief, the employer is enjoined from discriminating against qualified applicants with job coaches in the future; is required to revise and improve its reasonable accommodation policy and train human resource employees on the new policy and distribute it to all employees; report to the EEOC on all denials of employment to applicants with job coaches; and provide a notice regarding the decree to employees within the region where the store is located.

***EEOC v. Mine Rite Technologies, LLC*, Case No. 2:17-CV-00063-SWS (D.Wy. 2018)**

In a 2017 matter in the U.S. District Court for the District of Wyoming, a manufacturing company, agreed to pay five figures to settle this ADA lawsuit in which an employee, a veteran with post-traumatic stress disorder (PTSD), was harassed by his supervisor, who referred to the employee as a "psycho" to his coworkers and made comments about "Psycho Thursday" because this was the day of the week that the employee attended therapy sessions for his PTSD. When the harassment became intolerable, the employee was forced to quit to avoid further abuse. In addition to monetary relief, the consent decree includes an injunction against future discrimination based on disability and a requirement that the employer create and implement EEO policies. The employer is also required to train its employees and to provide a letter of apology and a letter of recommendation for the employee.

Steps Employers Are Taking to Address Employee Mental Health

Workplace mental health has been an ongoing issue for decades. However, the COVID-19 pandemic created an increased awareness of the many mental health issues that exist inside and outside of the workplace. While employers are now responding with initiatives such as mental

health days, four-day workweeks, and enhanced counseling benefits, changing a toxic work environment takes work.[5]

1. Company Policies That Support Mental Health.

Progressive companies made a conscious effort to support the mental health of employees long before the rise of COVID-19. Existing mental health policies of various employers can act as a model for other workplaces.

Google

Google has emphasized employee well-being through progressive mental health related policies. Google allows employees to establish long-term remote work plans and offers periodic off-days, known as reset days.[6] During the COVID-19 pandemic, Google gave a $1,000 allowance to all employees who were working from home, offered flexible working hours, and offered 24/7 counseling services.[7] After the COVID-19 pandemic, the company created hybrid work schedules and asked employees for their input on how to aid in an easier transition to hybrid work.[8]

Google has also expanded existing programs related to resilience training and crisis response efforts.[9] Google's existing resilience training programs offered counseling and resource groups.[10] However, a series of videos were added to the program that focus on a variety of topics such as sleep, breathing, parenting, and anxiety.[11] Accordingly, in less than a month, 30,000 Google employees chose to watch these videos as they were made available to the entire Google workforce, including temporary workers and contractors.[12] Google further addresses mental health through T.E.A. (Thoughts, Energy, Attention) check-ins. T.E.A. check-ins are a part of employee training and seek to address common symptoms of burnout among employees.[13] Managers may optimize such check-ins to create a positive environment for employees.

The National Football League

In 2019, the NFL began to increase mental health resources available to players and staff.[14] Through their insurance, players can receive up to 8 counseling sessions at no cost. Furthermore, players have constant access to the NFL Life Line, which provides resources for suicide prevention, crisis management, and problem solving.[15] Recently, the players' union created a

[5] Kelly Greenwood and Julia Anas, *It's a New Era for Mental Health at Work,* Harvard Business Review (2021), https://hbr.org/2021/10/its-a-new-era-for-mental-health-at-work.

[6] Jennifer Elias, *Google is Tackling Mental Health Challenges Among Employees Through 'Resilience Training' Videos,* CNBC (2020), https://www.cnbc.com/2020/11/27/google-tackling-mental-health-among-staff-with-resilience-training.html.

[7] Tien Viet Nguyen, *Google and its Employee Wellbeing Focused Approach During COVID-19*, Grove (last visited May 3, 2023), https://blog.grovehr.com/google-employee-wellbeing.

[8] *Id.*

[9] Jennifer Elias, *Google is Tackling Mental Health Challenges Among Employees Through 'Resilience Training' Videos*, CNBC (2020), https://www.cnbc.com/2020/11/27/google-tackling-mental-health-among-staff-with-resilience-training.html.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Rob Maaddi, *NFL Players Working to Ease Stigma Around Mental Health Help,* AP News (2022), https://apnews.com/article/nfl-mental-health-stigma-2053303f3f97fdee7f0923c63202165c.

[15] *Id.*

clinician directory where players can locate nearby health professionals including psychiatrists, psychologists, social workers, and counselors.[16] The players' union additionally created a comprehensive mental health and wellness committee that intends to provide resources and reduce negative stigmas related to mental health.[17] NFL teams are further required to have both a licensed behavioral health clinician and pain management specialist on staff.[18] While the NFL provides many resources for current players, former players have an abundance of mental health resources as well. Former players have access to outpatient psychiatry, counseling services, and wellness resources.[19] Ultimately, the NFL seeks to "create a culture in which health and well-being is valued, protected, and prioritized."[20]

Apple

While many companies have taken drastic measures to accommodate mental health resources for employees, others have made subtle, but valuable policy changes. Essentially Apple, combatted the mental health crisis by increasing benefits for mental health care. In 2019, Apple expanded mental wellness benefits by doubling the amount of free counseling sessions available to employees every year.[21] Furthermore telemedicine options are available for increased flexibility.[22] On Apple's major campuses, there are onsite doctors, nurses, and wellness centers that collaborate with dietitians, acupuncturists, and fitness centers.[23] Apple employees have the option workout and/or have soothing meditation sessions on Apple campuses.[24]

2. Forming A Framework For Your/Your Client's Company

The DOL's Office of Disability Employment Policy has an employer policy framework called the "4 A's of a Mental Health Friendly Workplace."[25] The "4 A's" include building awareness and a supportive culture, providing accommodations to employees, offering employee assistance, and ensuring access to treatment.[26] Other employers can easily adopt this framework to create a pro-mental health workplace environment. Employers can also use resources such as The Campaign for Disability Employment's workplace guide, entitled "Mental Health at Work: What Can I Do?" This resource provides explanations of the best practices followed by

[16] *Id.*

[17] Dan Graziano, *NFL, NFLPA Announce Mental Health Initiative*, ESPN (2019), https://www.espn.com/nfl/story/_/id/26788730/nfl-nflpa-announce-mental-health-initiative.

[18] Rob Maaddi, *NFL Players Working to Ease Stigma Around Mental Health Help,* AP News (2022), https://apnews.com/article/nfl-mental-health-stigma-2053303f3f97fdee7f0923c63202165c.

[19] *Id.*

[20] *Who We Are*, National Football League (last visited May 3, 2023), https://totalwellness.nfl.com/who-we-are/

[21] Chance Miller, *Apple Expands Employee Benefits for New Parents and Mental Health*, More, AAPL Company (2019), https://9to5mac.com/2019/11/06/apple-benefits-new-parents-more/.

[22] *Id.*

[23] *Careers at Apple*, Apple (last visited May 3, 2023), https://www.apple.com/careers/us/benefits.html.

[24] *Id.*

[25] Secretary Marty Walsh, *Mental Health at Work: We All Have a Role to Play*, U.S. Department of Labor (2022), https://blog.dol.gov/2022/03/30/mental-health-at-work-we-all-have-a-role-to-play#:~:text=Through%20the%20experiences%20of%20real%20people%2C%20it%20brings,offering%20employee%20assistance%20and%20ensuring%20access%20to%20treatment.

[26] *Id.*

company leaders, managers, and employees.[27] Additionally, the Campaign for Disability Employment has a "Mental Health Toolkit" that is available to the public. Employers can act by training managers to promote well-being, increasing flexible work options, reexamining health insurance policies, listening to feedback from employees, and reexamining diversity, equity, and inclusion policies.[28]

Conclusion

Workplaces across the country are realizing and understanding the importance of supporting employee mental health. Employees with high levels of stress and mental strain are more likely to miss work, be unproductive, or lack commitment at work, which can negatively affect business and lead to litigation.[29] The American Psychiatric Association found that mental health conditions can be exacerbated by stress-inducing or unsupportive work environments.[30] However, positive and supportive workplaces can boost company morale, improve psychological health, and prevent high employee turnover.[31] Through the lens of various company policies related to mental health, employers can adopt certain practices to improve their own policies and create supportive work environments.

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[27] *The "Mental Health at Work: What Can I Do" PSA Campaign*, The Campaign for Disability Employment (last visited May 3, 2023), https://www.whatcanyoudocampaign.org/psa-campaigns/mental-health-psa/.

[28] *5 Ways to Improve Employee Mental Health*, The American Psychological Association (last visited May 3, 2023), https://www.apa.org/topics/healthy-workplaces/improve-employee-mental-health#:~:text=5%20ways%20to%20improve%20employee%20mental%20health%201,critical%20look%20at%20equity%2C%20diversity%2C%20and%20inclusion%20policies.

[29] *Id.*

[30] *Id.*

[31] *Id.*