Accommodating Employees with Mental Health-Related Disabilities

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Presented By:

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I. Introduction: Employees with disabilities particular to mental health present unique challenges in the workplace, for employers and co-workers alike. While employers have a legal duty to reasonably accommodate disabilities under federal and state law, mental-impairment disabilities are not always readily apparent. Employers must learn their obligations in detecting and accommodating these disabilities, as well as all other qualifying disabilities under the law.

a. Law:

- The federal Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against qualified employees and applicants for employment because of a known physical or mental disability.
- The federal Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in federally funded programs.
- The Iowa Civil Rights Act (“ICRA”) prohibits an employer from discriminating against a qualified person with a disability because of the person’s disability.

b. Definitions:

- “Disability”: The term “disability” means, with respect to an individual—
  o a physical or mental impairment that substantially limits one or more major life activities of such individual;
  o a record of such an impairment; or
  o being regarded as having such an impairment.

1 Please note that this outline is intended for informational purposes only and provides a generalized overview of the law. This outline is intended to provide general statements from federal law, state law, and agency guidance. While federal and Iowa state law on disability discrimination and reasonable accommodations is largely consistent, this outline attempts to identify the particular source of law for areas that may differ. However, for all individual inquiries, you should consult with an attorney.
“Impairment” that “substantially limits”:
- The EEOC has stated that the term “substantially limits” should be construed broadly in favor of expansive coverage of individuals within the protections of the ADA.
- An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
- Determination will require a fact-specific individualized inquiry.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Mitigating Measures/Medications:
  - Under federal law, the determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures such as—
    1. Medication, medical supplies, equipment, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids, mobility devices, or oxygen therapy equipment and supplies, etc.
  - Under Iowa law, a fact finder may not consider the mitigating effects of medication or assistive devices in determining the existence of an impairment, but the mitigating effects of medication or other assistive devices may be considered in determining whether the impairment substantially limits a major life activity.

“Major life activities” include, but are not limited to:
- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- The operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Mental Impairments:
- ADA rule defines “mental impairment” as: “[a]ny mental or psychological disorder, such as . . . emotional or mental illness.”
- The following mental impairments are or can qualify as “disabilities”:
  - Post-Traumatic Stress Disorder
  - Major/Chronic Depressive Disorder
  - Anxiety/Depressive Disorders
  - Bipolar Disorder
  - Obsessive Compulsive Disorder
  - Schizophrenia
  - Other disorders or conditions affecting personality and mental capacity
- Potential signs of mental impairment:
  - Working slowly or missing deadlines
- Erratic, uncharacteristic, or unexplained behavior
- Increasing absenteeism and calling in sick
- Irritability and anger with co-workers and supervisor
- Difficulty concentrating
- Appearing numb or emotionless
- Withdrawing from work activity
- Overworking
- Forgetting directives, procedures and requests
- Having difficulty with work transitions, changes in routines, or making decisions

  o **Employers and co-workers should avoid trying to diagnose an employee’s condition or mental impairment.** Such diagnoses should be left to appropriate health care professionals.

- **“Regarded as having such an impairment”:** An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to a discriminatory action because of an *actual or perceived physical or mental impairment* whether or not the impairment limits or is perceived to limit a major life activity.

- **“Qualified Individual”:**
  - To be a “qualified” individual with a disability under the ADA and ICRA, a disabled person must be “qualified,” or able to perform the *essential functions* of their position.
    - Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desire, with or without a reasonable accommodation.

**II. “Reasonable” Accommodations**

**a. When?**
- The law requires an employer to provide “reasonable accommodations” to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer (“undue hardship”).
- Iowa jurisdictions prefer individualized assessments of individuals with impairments; they discourage “blanket” exclusions of workers with certain conditions from a given job.

**b. Why?**
- Reasonable accommodations are intended to remove workplace barriers for individuals with disabilities.
- These barriers include physical obstacles (such as inaccessible facilities or equipment) and procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed).
• The goal is equal employment opportunity. This is an area in which we are required to treat the protected class members “differently”; in most area of discrimination law we are required to treat members of the protected class the same as those outside the protected class in order to afford an equal employment opportunity.

c. Who?
• Reasonable accommodations are available to qualified applicants and employees with disabilities.
• Employee’s Obligations:
  o Generally, the individual with a disability must inform the employer that an accommodation is needed. However, the “magic words” of “reasonable accommodation” or “ADA” are not required.
• Co-Worker’s Obligations:
  o Co-workers may/should report to an appropriate supervisor or administrator behaviors or performance issues which affect the workplace environment or create a threat to the health and safety of the employee or others.
• Employer’s Obligations:
  o Generally, an employer should not act until the employee informs the employer of the disability and need for an accommodation.
  o Exceptions:
    ▪ If the employer becomes aware of a disability and need for an accommodation, the employer may need to initiate an informal, “interactive process” to determine if the employee suffers from a legally protected disability and to identify the precise limitations resulting from the disability and need for reasonable accommodations.
      - Case law under the ADA indicates that if the disability and need for an accommodation are obvious, the employer is “on notice” of the disability and should start the process:
        • “[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say ‘I want a reasonable accommodation,’ particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.” Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996).
    ▪ As discussed below, the employer also may act if there is observable behavior which creates a direct threat to health and safety of the employee or others (see below).
    ▪ Overall, an employer should be cautious not to approach an employee about a suspected mental impairment unless there is an observable difference in performance or direct risk to health and safety.
d. What?

- In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.
- An accommodation must both be *reasonable* and *effective* in meeting the needs of the individual. This means that a reasonable accommodation enables the individual to perform the essential functions of the position.
- Examples of *Reasonable* Accommodations:
  - Making existing facilities accessible
  - Job restructuring:
    - Marginal functions (not essential functions) can be redistributed or eliminated;
    - An employee could be permitted to work from home as a reasonable accommodation *if* the essential functions of the position can be performed at home.
  - Part-time or modified work schedules
    - Employers can assess whether modifying hours can significantly disrupt operation (cause undue hardship), or prevent an employee from performing their essential functions;
    - If another employee must be hired or paid to replace the employee during their absences (for example, a substitute teacher must be hired to perform duties), this may not be a reasonable accommodation.
  - Acquiring or modifying equipment
  - Changing tests, training materials, or policies
  - Providing qualified readers or interpreters
  - Reassignment to a vacant position
    - The employee has to be qualified to perform the vacant position and a position must be available;
    - An employer does not have to create a new position or train an employee for a position when they would not ordinarily provide training to other employees;
    - *Generally*, an employer would not be required to violate the rules of a seniority system or collective bargaining system to promote or change an employee’s position.
  - Leave
    - EEOC guidance suggests leave can be a reasonable accommodation
    - This depends on the circumstances; excessive absences from work or indefinite leaves of absence may negate an employee’s ability to perform an essential function of their job.
    - Providing leave may overlap/interplay with leave under the Family and Medical Leave Act (“FMLA”).
- Examples of *Unreasonable* Accommodations:
  - An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position.
An employer does not have to lower production standards -- whether qualitative or quantitative -- that are applied uniformly to employees with and without disabilities.

An employer does not have to provide personal use items needed in accomplishing daily activities both on and off the job. Meaning, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job.

An employer does not have to provide the exact accommodation the employee or job applicant wants.

If more than one accommodation is reasonable, the employer may choose which one to provide based on cost, burden, or other factors.

**“Undue Hardship”:** An employer does not need to provide accommodations creating an “undue burden” on the employer:

- Factors under Iowa regulations include:
  - The overall size of the employer’s program with respect to number of employees, number and type of facilities, and size of budget;
  - The type of the employer’s operation, including the composition and structure of the employer’s workforce; and
  - The nature and cost of the accommodation needed.

However, an employer may not refuse to provide an accommodation just because it involves some cost.

An employer cannot require a qualified individual with a disability to accept an accommodation.

If, however, an employee needs a reasonable accommodation and refuses to accept an effective accommodation, the employee may not be qualified to remain in the job.

III. Special Issues

a. **Documentation and Medical Exams – When Can an Employer Request It?**

**Application and Interview Stage:**

- The law places strict limits on employers when it comes to asking job applicants to answer medical questions, take a medical exam, or identify a disability.
- An employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer.
- An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability).
- An employer may ask job applicants whether they can perform the job, with or without reasonable accommodations.
- If an applicant has an obvious impairment, an employer may ask how he/she would perform the job, with or without a reasonable accommodation.
- *Note that asking an applicant to perform a drug test is not a “medical exam” or “medical inquiry” prohibited by the ADA.*
• After Job Offer:
  o The law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if:
    ▪ all new employees in the same type of job have to answer the questions or take the exam;
    ▪ an applicant is only rejected based on results that are job-related and consistent with business necessity (or where a direct threat exists).

• During Employment:
  o An employer generally can ask medical questions or require a medical exam:
    ▪ If the employer needs medical documentation to support an employee’s request for an accommodation; or
    ▪ If the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.
  o If the employee does not provide sufficient information, an employer can require the employee to go to a physician of the employer’s choice and at the employer’s expense.
    ▪ Under the ADA, a medical examination conducted by the employer’s health professional must be “job-related and consistent with business necessity.”
      i. “Job-related”: Measure one’s ability to perform the job;
      ii. “Business Necessity” Relate to the essential functions of the job.
  o The employer must be careful to request documentation/medical exams that pertain to the disability and accommodation - broad requests for medical information are not permitted.

b. Workplace Misconduct/Discipline
  • The status of the law in Iowa jurisdictions is not fully clear regarding discipline for “disability-caused misconduct” in the workplace.
    o Federal guidance under the ADA indicates that generally, an employer does not have to excuse misconduct violating a uniform rule (such as violence, threats, stealing, destruction of property) due to a disability.
    o However, some case law indicates the employer might first need to determine if reasonable accommodations can alleviate the disability:
      ▪ “[T]he language of the ADA, its statutory structure, and the pertinent case law, suggest that an employer should normally consider whether a mentally disabled employee’s purported misconduct could be remedied through a reasonable accommodation. If so, then the employer should attempt the accommodation. If not, the employer may discipline the disabled employee only if one of the affirmative defenses articulated [under federal statute] applies. Otherwise, the employer must tolerate eccentric or unusual conduct caused by the employee’s mental disability, so long as the employee can
satisfactorily perform the essential functions of his job.” *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997).

- Iowa state courts have not specifically addressed this “disability” versus “disability caused misconduct” dichotomy.
- Overall, an employer should first consider (even in cases of misconduct) if the employee can still perform the essential functions of their job with an accommodation.
  - If yes, the employer should work to provide the accommodation.
  - If no, the employer may be justified in disciplining/terminating the employee.

### c. Direct Threat to Health or Safety:

- Regulations under the ADA permit employers to deny employment benefits to “individual[s who] pose a direct threat to the health or safety of other individuals in the workplace.”
  - Iowa case law also recently addressed this standard as part of the “essential function” analysis, i.e., if an employee is a “direct threat,” they may not be able to perform an essential function of the job.
- “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 is 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 include:
  - The duration of the risk;
  - The nature and severity of the potential harm;
  - The likelihood that the potential harm will occur; and
  - The imminence of the potential harm.
- The employer may be justified in requesting medical information or a medical exam.
- Again, an employer should first consider (even in cases of direct threat) if the employee can still perform the essential functions of their job with a reasonable accommodation.
  - If yes, the employer should work to provide the accommodation.
  - If no, the employer may be justified in disciplining/terminating the employee.

### IV. Role of the District’s Board of Education

The Board should review its EEO policies regularly to ensure that they remain compliant with the law. Policies and procedures relating to discrimination and harassment, including procedures for making a complaint of discrimination or harassment, should be publicized to students, staff, and parents, and parents.
Board members should ensure that District administration is receiving and providing to their staff adequate periodic training in federal and state laws as well as Board policies and procedures governing discrimination and harassment.

Because the Board may be called upon to serve as an impartial decision-maker in an employee termination hearing, it is important for Board members to remain neutral in matters relating to specific employee situations. In the event that a Board member does not believe that he or she can act as an impartial decisionmaker in a termination hearing for a particular employee, he or she should determine whether to self-recuse from any proceedings relating to that hearing, including deliberations.

V. Conclusion

Determinations regarding employees with actual or suspected mental impairments should be made on a case-by-case basis, in consultation with the appropriate While this Outline is not intended to provide exhaustive information on the issues underlying federal and state law on accommodating disabilities, including mental impairment disabilities, we hope it provides insight into many of the issues employers face. Please feel free to contact us with further thoughts or questions, or regarding specific issues.