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TALKING POINTS ON THE EEOC'S ENFORCEMENT GUIDANCE  
ON THE ADA AND PSYCHIATRIC DISABILITIES

The ADA covers psychiatric as well as physical disabilities. Based on hundreds of questions it has been asked by employers and their representatives about the applicability of the ADA to psychiatric disabilities, the EEOC issued an enforcement guidance on the ADA and Psychiatric Disabilities on March 25, 1997. The Guidance was designed to provide practical guidance about employers' and employees' rights and responsibilities under the law. The following addresses some of the questions which have been raised about the Guidance.

Q.: What types of workplace rules can employers expect workers with psychiatric disabilities to follow without having to worry about violating the ADA?

A.: Employers may maintain workplace conduct rules that are job-related and consistent with business necessity and may discipline employees with psychiatric disabilities if they violate these rules, so long as the employer uniformly enforces the rules. Employers do not have to tolerate conduct such as violence, threats of violence, theft, or destruction of property even from an employee who claims that he or she engaged in such conduct because of a psychiatric disability.

Q.: Doesn't the guidance suggest that employers may have to tolerate rude or anti-social behavior and sloppy dress to accommodate employees with psychiatric disabilities?

A.: The guidance contains one example of a situation in which application of a dress code and rules requiring employees to be courteous to one another might discriminate against an employee with a psychiatric disability. In the example, the employee works in a warehouse, has very little contact with members of the public and other employees, and is performing his job adequately. Due to his psychiatric disability, the employee's dress and manner have deteriorated over a period of time. The example assumes that the employer's dress code and rules governing employee courtesy are not job-related and consistent with business necessity as applied to the warehouse worker, and therefore concludes that rigid application of the rules to this employee would violate the ADA. This is not equivalent to saying that employers have to tolerate sloppy dress, rudeness, or anti-social behavior. Clearly, there will be many instances in which standards governing dress and employee courtesy will be job-related and consistent with business necessity, such as when employees have regular contact with one another and with members of the public. The Commission is certainly not telling employers that they cannot maintain and enforce dress codes and employee courtesy rules in these situations.

Q.: What types of reasonable accommodations does an employer have to make for an employee with a disability?

A.: Of course, the particular type of reasonable accommodation will depend upon the employee, the nature of his or her psychiatric disability, and the employer's resources. However, possible accommodations include:

Making simple physical modifications to the workplace such as, for example, putting up room dividers or partitions, to minimize visual or audible distractions for a person whose psychiatric disability makes concentration difficult; )

Relocating an employee with a psychiatric disability to a quieter part of the workplace; )

Modifying workplace policies, which might mean, for example, making an exception to a rule prohibiting beverages in the workplace for an employee whose psychiatric medication causes dry mouth;

Modifying supervisory procedures to allow an individual with a psychiatric disability to meet performance standards and/or to perform the essential functions of a job; )

Granting leave to an employee with a psychiatric disability so that the employee can obtain treatment; )

Modifying a work schedule by, for example, allowing an employee to work different hours if the nature of a psychiatric disability necessitates such modification; or )

Providing a job coach on a temporary basis.

Employers are not, however, required to do any of the following:

Take any measures that the employer can demonstrate would result in an undue hardship, that is, significant difficulty or cost; )

Eliminate any of a job's essential functions or lower performance standards to which all employees are held; or )

Excuse violations of conduct standards that are job-related and consistent with business necessity that all employees are required to meet; )

Q.: Do you think that the guidance is overly inclusive in terms of the types of people it would cover?

A.: The guidance only covers individuals who have impairments that substantially limit a major life activity; thus, it is perfectly consistent with the ADA's definition of the term "disability." The guidance would not cover people who are depressed due to the death of a family member or friend, people who experience the normal level of stress associated with a heavy workload, people who occasionally become distracted during meetings, or people who simply have quick tempers.

Q.: Is an employer obligated to provide a reasonable accommodation based solely on an employee's assertion that he or she has a psychiatric disability?

A.: When the need for a reasonable accommodation is not obvious, an employer may certainly request reasonable documentation of the existence of a psychiatric disability and the need for the accommodation.

Q.: Couldn't any employee prove the existence of a psychiatric disability under the guidance, since documentation of the disability does not have to come from a psychiatrist?

A.: Though documentation from a psychiatrist may not be necessary in order to establish the existence of a psychiatric disability, an employer may require reasonable documentation of the disability from another health care professional, such as a primary care physician. The guidance recognizes that psychiatric disabilities, their manifestations, and their treatment are different from one employee to another, and that many employees who have psychiatric disabilities are not and do not need to be treated by psychiatrists.

People such as psychologists, social workers, ~~family members, and friends~~ may also in a position to provide valuable additional information about the existence of an employee's psychiatric disability, how it affects the employee's major life activities, and the appropriateness of certain types of reasonable accommodations.

The request for documentation of a psychiatric disability must be reasonable, but the documentation offered must give the employer adequate information about the disability and the need for an accommodation. An employer is not required to accept every piece of documentation offered by an employee. A note from a family member merely stating that an employee has a psychiatric disability and needs an accommodation will not by itself demonstrate the existence of the disability.

Moreover, if the employee does not provide sufficient documentation, the employer may require the employee to be examined by its own health care professional, provided the employer bears the cost of the examination.

**NEWS ARTICLES ON PSYCHIATRIC DISABILITY GUIDANCE**

**APRIL 30 - MAY 6, 1997**

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## LAW

## Firms Have Rights Under Disability Rules

By ANN DAVIS

Staff Reporter of THE WALL STREET JOURNAL

Just because more workers today say they're stressed and depressed, employers shouldn't panic.

Lawyers and management consultants, who have been flooded with questions about new federal guidelines calling for broad accommodations for mentally ill employees, say supervisors can take steps to minimize their costs and liability under the Americans with Disabilities Act.



Determining whether a claim of mental illness is legitimate should be the manager's first move, say experts. Don't dismiss it out of hand, but don't take it at face value. "If an employee says, 'I've got X medical condition and I need you to do Y,' say to them, 'Great! Let's look into it,'" says Christopher Bell, a workplace attorney with Jackson, Lewis, Schnitzler & Krupman in Minneapolis.

Mr. Bell suggests asking an employee whose doctor has provided a note diagnosing mental illness, such as depression, to submit medical records for review by a doctor selected by the company. "Say to an employee, 'Gee, you're asking us to treat you differently from your co-workers. We need more information than a doctor's note,'" Mr. Bell advises.

But don't push too hard: Depending on what state you are in, asking for too much medical detail could violate state privacy laws or even other federal laws. And the new guidelines, issued by the Equal Employment Opportunity Commission, say credible testimony from family members and co-workers may be enough to put the employer on notice that there's a problem, lawyers say.

Lawyers say the likelihood of an independent doctor confirming the diagnosis is high. But they note that employers aren't obligated to make accommodations for workers who hide their disability. And they say employers don't have to give mentally ill workers every accommodation they seek.

The EEOC guidelines suggest that some workers distracted by noise may be entitled to soundproof offices, and others on medication that makes them groggy in the

morning may get to start work later. The agency also suggests employers may have to provide job coaches to mentally ill workers with performance problems. But lawyers say courts may not fully embrace every item in the guidelines as "reasonable accommodations" under the disabilities law.

"I think what we are seeing at the court level is a relatively conservative interpretation of what is reasonable," says Garry Mathiason, an employment attorney with Littler, Mendelson, Fastiff, Tichy & Mathiason in San Francisco.

For example, Mr. Mathiason recommends being flexible about requests for leaves of absence. But he says courts that have heard cases since the Americans with Disabilities Act went into effect in 1992 have found it unreasonable for some employees to demand a job transfer.

Michael J. Lotito, a lawyer in the San Francisco office of Jackson Lewis, says companies should also be able to order a person to work overtime if extra hours qualify under the law as an "essential function" of the job. He gave as examples "jobs that are seasonal," such as when a retailer is readying for a holiday rush to move goods from warehouses to stores, or when an accounting firm needs employees to meet deadlines in the weeks before April 15.

But, even if a company views a worker's request as unreasonable, Mr. Lotito advises making a sincere effort to investigate what's feasible. If an employee wants his workspace walled off and the company says no, for example, supervisors should be able to document that they asked, "How much is that going to cost us? What's the inconvenience to other employees?" he says.

Bosses also shouldn't assume every accommodation is prohibitively expensive. Showing flexibility with someone briefly on medication may make the worker more productive, say occupational psychiatrists. And sometimes, state and federal vocational rehabilitation programs, as well as nonprofit mental health centers, offer funding for temporary job coaches to help people get back on their feet, says Susan Meisinger, senior vice president of the Society for Human Resource Management in Alexandria, Va.

The EEOC insists the guidelines aren't meant to cripple management. "An employer does not have to tolerate violence or

threats of violence, chronic tardiness, stealing or property destruction," says Peggy Mastroianni, associate legal counsel for the agency.

Indeed, lawyers say courts may not be sympathetic to employees who say their stress—or depression—was triggered by a boss's negative job evaluations. And Jay W. Waks, a lawyer at New York's Kaye, Scholer, Fierman, Hays & Handler, says stress caused by traumatic personal experiences might not rise to the level of a disability either. "A terrible divorce? I don't think that would qualify," he says. He adds that sadness over a death in the family is more likely to be considered temporary unhappiness rather than a disability under the law.

FRIDAY, MAY 2, 1997

THE NEW YORK TIMES

## Corrections

An article on Wednesday about new Federal guidelines that prohibit employer discrimination against qualified workers with mental illness misstated the date they were issued. It was March 25, not this week.

# The Mentally Ill Deserve Job Protection

By Peter D. Kramer

PROVIDENCE, R.I.

Some years ago, I was referred a patient for an unusual reason. The company Jill worked for was about to fire her, and the new owner was concerned that Jill might commit suicide. She had been a competent middle manager. But the new C.E.O. favored an upbeat style of management-by-consensus. Jill's dour deliberateness was out of place.

Jill was deeply and chronically depressed. She considered suicide every day of her adult life and was pushed to the brink by the layoff. She also had an incisive mind, and in the midst of her despair she told me exactly how the company was going to fail. Eighteen months later, the business entered bankruptcy. In her current job, Jill is underemployed — her gruffness and lack of drive cause her to be passed over — but any number of decision-makers in the company use her as an internal consultant when there are decisions to be made.

I thought of Jill when I heard the griping over the new directive by the Equal Employment Opportunity Commission that employers must make accommodations for workers with mental illnesses. The document gives employers detailed guidance about how to apply a policy, already in place, that explicitly includes mental illness in the scope of the Americans With Disabilities Act. Rather than fire a mentally ill employee, the employer must make efforts to modify the job for the worker.

The objections are numerous: Employers will be unable to get rid

of slackers. Using mental illness as an excuse, underproductive employees will demand concessions over the very shortcomings — tardiness, irritability, poor judgment — they should be striving to correct. And what is not a mental illness, when millions of Americans take Prozac or Ritalin?

Some of these objections seem ge-

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Some of my  
sicker patients  
work scrupulously  
at tasks  
others avoid.

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neric. Doubtless the disability act will be abused by some workers. That's the American way; you will know the act is ineffectual if it does not lead business groups to publicize some case where it was applied absurdly. And, yes, the act may lead some employers to institute subtle screens to prevent the hiring of the mentally ill, who will now be difficult to fire. Laws to protect the vulnerable always have unintended consequences of this sort; but surely on the whole the act will protect employment for the mentally ill.

Other objections have more merit. The mental health professions have been reluctant to delineate the boundary between health and illness. Scientifically, the task is hard one. Brain scans and chemical tests are beginning to yield objective markers of mental illnesses, but the definition of minor degrees of disability will remain social. And the line between character traits and symptoms can be fuzzy: When are we dealing with a

lack of motivation grounded in mental illness and when with garden-variety laziness? Is Jill's prickliness a result of depression, or is she "just not a team player"? Perhaps the professions should be open in saying that we are in terra incognita, involved in a social experiment that will demand the development of new definitions and measures for purposes of public policy.

But it is a worthy experiment. Work, important for all of us, is crucial for the mentally ill, whose well-being may depend on the schedule, the clarity of tasks and the enforced contact with others. The director of a community mental health center where I trained used to say he would trade any doctor for a good employment counselor.

Society will pay in other ways if employers are not encouraged to accommodate the mentally ill. The E.E.O.C. policy should have any number of side benefits. It will allow mental illness to be discussed openly. But its most important benefit may be in the arena where worries are greatest: productivity.

Those who suffer mental illness include the most productive members of society. Abraham Lincoln, recurrently depressed, is often mentioned, but mental illness is so common that examples are numberless. Among more humble workers, the mentally ill are often, like Jill, over-qualified.

Some of my sicker patients are workers of extraordinary dedication who, for reasons related to their illness — compulsiveness and obsessional guilt — work scrupulously at tasks others avoid; smart employers do accommodate their needs. There is nothing magical about mental illness; it is mostly just a handicap. But, as the preponderance of manic-depressive illness among artists seems to indicate, the mentally ill may bring special perspectives to bear.

James Fallows, in "More Like Us," made the case that the route to success for America is the mobilization of a diverse work force. The disability act asks that business extend that effort to a new reservoir of talents.

We have passed so fully from knee-jerk liberalism to knee-jerk conservatism that any new delineation of civil rights in the workplace evokes automatic sympathy for employers: How will they deal with this new infringement? But a fuller expression of the capitalist ideal includes insuring that each of society's members have the chance to lead a productive life. Justice is sometimes expensive. But, as the example of Jill indicates, discrimination has its own costs, and making space for the mentally ill will have incidental benefits. □

Peter D. Kramer, a psychiatrist, is the author of "Listening to Prozac" and the forthcoming "Should You Leave?"

# Safeguards for mentally ill issued

by Rose DeWolff

Daily News Staff Writer

Attention, workers: Don't think you can get away with showing up late for work or goofing off just by saying "my mental state made me do it."

The U.S. Equal Employment Opportunity Commission yesterday issued guidelines to employers on making reasonable accommodations to workers with mental ill-

ness, as required by the Americans with Disabilities Act.

But it doesn't allow just any kind of conduct. The federal law requires employers to ask employees what they need to enable them to continue to be a produc-

tive employee — and if the request is reasonable to do something about it. The guidelines on mental illness and the workplace say employers may have to allow some time off from work, shift schedules, forgive lateness, re-

consider assignments — even alter physical surroundings — if such remedies can reasonably enable a worker to perform on the job.

Moreover, employers are not allowed to ask at a job interview if a job candidate has a history of mental illness. And they may not

refuse to hire an applicant on grounds of mental illness — unless the person clearly would be unable to do job functions. That is no different from what the law requires employers to do to accommodate those with physical disabilities, experts say.

"The key word is reasonable," says Joseph Rogers, deputy executive director of the Mental Health Association of Southeastern Pennsylvania. Rogers, who has been hospitalized for manic depression, served on task forces that helped to draft the ADA and the recently issued guidelines.

If a record of lateness disrupts an assembly line because other workers cannot begin until everyone is present, an employer is not obliged to accept it, Rogers said. But if the employee could start a few minutes later and still get the job done, the employer would have to consider adjusting the time, he said.

Perry Block, president of the Philadelphia regional chapter of the Society for Human Resources Management, said the EEOC is not requiring anything new.

"Mental illness has always been covered by the ADA," he said.

"A person who, because of illness, is rude and argumentative won't succeed in sales, but might have no problem at all sitting in an office adding up numbers all day," he said.

"I was recently told a story about a company which was hiring a plant manager," Block added. "One of the candidates had suffered from manic depression and was immediately excluded from consideration. That would be illegal — and has been illegal since the ADA was passed."

Attorney Stephen Gold, a veteran plaintiff's lawyer in disability discrimination lawsuits, welcomed the new guidelines.

Gold says hospitalization for mental illness carries a stigma even when such treatment enables a person to recover quickly.

"But if you have leg problem or are hit on the head and need a week or two in the hospital, no one thinks twice," he said. ■

# EDITORIALS

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A GANNETT NEWSPAPER

## Fairness for the mentally ill

The 1990 Americans With Disabilities Act requires that employers make a "reasonable accommodation" for employees with mental as well as physical disabilities.

But the problems that people with mental illness face are not always readily apparent. And those who suffer from such illnesses are often reluctant to discuss the problems with their supervisors.

The Equal Employment Opportunity Commission has now issued guidelines that not only spell out what's "reasonable" but should also encourage a more open discussion between employees and employers.

**THE FACT** that during the past four years, 9,216 complaints filed with the EEOC — almost 13 percent of the total — alleged discrimination related to psychological problems shows that greater guidance is needed for implementing the law.

Employers are not expected to tolerate disruptive behavior or lower performance standards.

But the guidelines give examples of the kind of accommodations considered reasonable, such as scheduling breaks so that workers with mental illnesses can take their prescriptions.

As EEOC Associate Legal Counsel Peggy R. Mastrolanni put it, "We try to give some common sense answers to frequently asked questions."

**A LITTLE FLEXIBILITY** can go a long way in helping people with even severe mental illness stay on the job.

Sensibly, the guidelines also set forth procedures for how employers should respond to claims of mental disability.

What's more, the guidelines should make employees more comfortable seeking accommodations for their mental illness. The emphasis should be on working out acceptable arrangements — based on open discussion, instead of relying on preconceptions or fears.

Under these guidelines, employees with mental illness are more likely to get the fair shake in the workplace that the 1990 legislation promised.

TITLE: DEALING WITH MENTAL ILLNESSES  
COLUMN: Frank Rich  
BYLINE: Bu FRANK RICH  
DATE: 05/04/97  
SOURCE: The New Orleans Times-Picayune; NOTP  
(Copyright 1997)

If William Styron's memoir of battling depression, "Darkness Visible," were retold by a plain-spoken baseball player out of a Ring Lardner story, the voice might sound a little like this:

"I felt very withdrawn. I felt very much to myself. The sleeping problem was back from the previous week, and there was a lot of anxiety. . . . I wasn't eating anything. I had a lot of things going together."

These words are not fiction, however, but were actually spoken recently by Pete Harnisch, a pitcher for the New York Mets, as he told reporters why he had joined his team's disabled list. For a month, Harnisch had been battling a mystery ailment that had disrupted his sleep, eating patterns and game.

When he gave up three back-to-back home runs on opening day after having pitched five scoreless innings, he linked his abrupt exhaustion to nicotine withdrawal; he'd just quit smokeless tobacco. But resuming tobacco chewing didn't stop his symptoms, which were then variously attributed to a thyroid condition and Lyme disease.

Finally a psychological examination cleared up the mystery, and Harnisch went public. "I'd just like to let everybody know I've been diagnosed with depression," he said last Friday, in a press conference by speakerphone from his home, adding: "I never really thought I'm a different person than normal. I never considered that. . . . It's hard to pinpoint exactly why it happened."

Harnisch's poignant description of his symptoms and their hard-to-penetrate cause will surprise no one familiar with the dense, incapacitating fogs of clinical depression. What is surprising is to hear such candor from a professional athlete.

Though we're used to sports stars detailing their substance-and-spousal-abuse problems, and though other pro athletes (notably in the NBA) have been sidelined by depression, Harnisch's forthright articulation of his ailment is unusual in American public life, period. Irreproachable figures like Styron, Mike

Wallace and Alma Powell talk publicly about their battles with depression - but not middling 30-year-old major leaguers with careers on the line.

"It's brave, it's courageous, it's right," says the psychiatrist Dr. Allan Lans of Harnisch's honesty. "His problem is ubiquitous; talking about it is rare." Lans, best known for his counseling of Dwight Gooden in the '80s, is the director of the Mets' employee assistance program.

"It's understandable for an athlete to get a physical injury but not a mental injury," he explains. "If a player should get depressed, the sense is he should do it in the off-season." The stigma attached to mental illness is still so great that "even the simple act of going to see a psychiatrist" for a consultation is difficult for many.

And not just for ballplayers; Lans could be describing Vincent Foster, the country's most famous recent casualty of untreated depression, along with millions of others. The Journal of the American Medical Association reported in January that clinical depression, which strikes roughly a fifth of Americans at some point in their lives, still goes mostly undiagnosed or misdiagnosed.

For all the advances in treatment, including the Prozac generation of anti-depressant drugs, only 27 percent of all cases get adequate care. The national cost in medical expenses, absenteeism, lost productivity and suicides is estimated at \$43 billion per year.

Last week the Equal Employment Opportunity Commission, acting under the Americans With Disabilities Act, at last issued guidelines designed to stop workplace discrimination against those with depression and other mental illnesses. But that won't end the discrimination in corporate health plans whose second-class treatment of psychotherapy also deters many of the sick from seeking help.

For Harnisch, at least, medical costs will not be a problem. But the professional cost could be high if the revelation of his illness sows doubts, however clandestine, about his reliability when he returns to work.

Whatever happens then, his clear description of his diagnosis and its treatment is bound to encourage others in and out of

baseball, in Lans' words, "to understand depression better and treat it more quickly and preserve their careers." Though the season is still young, it's hard to imagine how any pitcher could rack up a bigger win.

Frank Rich is a syndicated columnist.

1997, The New York Times News Service

**TITLE:** Mental illness guidelines questioned  
Some experts and lawyers for employers say the federal rules under the disabilities act remain unclear and vague.  
**BYLINE:** Onell R. Soto  
**CREDIT:** The Press-Enterprise  
**DATE:** 05/03/97  
**SOURCE:** The Press-Enterprise Riverside, CA; RVSD  
(Copyright 1997)

While civil rights advocates say government guidelines explaining how employers must deal with mentally ill workers are helping to clear up the law, lawyers who work for employers aren't so sure.

The guidelines, issued a few weeks ago by the federal Equal Employment Opportunity Commission, are presented in a question-and-answer format in an effort to explain how the 1990 Americans with Disabilities Act affects workers with mental illnesses.

The disabilities act requires employers with 15 or more workers to provide "reasonable accommodation" to disabled workers. An example might be providing a partition at the workstation of a mentally ill employee who is easily distracted. The principle is the same as accommodations for physically disabled workers, such as building a ramp for someone who uses a wheelchair.

"The ADA has always included everybody," said Nick Swinehart, a job developer with the Casa Colina Career Development Center in Pomona and Riverside. However, he said, mental health traditionally has been low on the priority list, with physical disabilities getting the most attention. "It's almost as if people with mental health (problems) are an afterthought."

Swinehart said many solutions for the mentally disabled are simple and inexpensive. As an example, he described a computer store's remedy for a schizophrenic stocker.

The worker heard voices and hallucinated, and he needed to respond. He was a good worker, but his episodes scared other workers and customers.

To deal with the problem, managers gave the worker permission to go to a bathroom in the back of the stockroom, close the door, and address the voices.

"Usually it doesn't cost the employer anything," Swinehart said.

"Usually it's logistical."

The law doesn't require employers to lower work standards or hire people who can't perform the essential tasks of a job. It doesn't protect a mentally ill lawyer who wants to work on simple cases because of depression and a severe personality disorder.

Also, employers don't have to hire or retain workers who may harm themselves or others. Specifically excluded from protection are people with sexual behavior disorders, compulsive gamblers, kleptomaniacs, pyromaniacs, and drug abusers.

But some experts say the guidelines haven't cleared up everything.

Privacy laws don't allow employers to disclose information about mental illness to other workers, so those employees may not know why a person is getting what appears to be preferential treatment.

Also, employers may not realize a worker has a mental disability, and even if they do, they can't ask about it unless the worker says something first.

In addition, the law doesn't clearly define "reasonable accommodation," meaning that it will be interpreted on a case-by-case basis.

"What is unreasonable for a small medical clinic down the block might not be unreasonable" to a large hospital, said Barbara Lee Crouch, a Riverside-based consultant with the Employers Group, a statewide business organization.

The guidelines are vague, said Arthur Silbergeld, a Los Angeles employment lawyer. As a result, he said, "almost every type or condition of illness or injury that an employee may suffer" is potentially covered by the disability law.

And he pointed to potentially problematic situations, such as an employer interviewing a prospective worker who was fired from another company for sleeping on the job.

To avoid allegations of discrimination, the employer needs to know whether the sleeping incident was caused by a psychiatric disability. But the employer can't ask about it because doing so would violate the worker's privacy, Silbergeld said.

"Before the ADA you would have simply concluded, 'I'm not going to hire this person,' " Silbergeld said. "Now you've got to find out what the nature of the disorder is."

About 13 percent of the discrimination complaints made to the EEOC under the disability act in the last four years concern mental illness.

Claudia Center, a civil rights attorney with the Employment Law Center in San Francisco, said the guidelines aren't new rules. She said employers who already follow the law won't have to change the way they do business.

At Rohr Inc.'s Riverside plant personnel director Bryan Ramsey said the company deals with disability act claims on a case-by-case basis. He couldn't recall when an employee had asked for a mental health accommodation.

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#### Where to get advice

o New guidelines on dealing with mentally disabled workers are available on the Internet at [www.eeoc.gov/publicat.html](http://www.eeoc.gov/publicat.html); by calling (800) 669-3362; or writing the EEOC's Office of Communications and Legislative Affairs, 1801 L Street, N.W., Washington, D.C. 20507.

o Advice on how to accommodate a worker who is disabled physically or psychiatrically is available from the Job Accommodation Network at (800) 232-9675 or the ADA Implementation Unit of the California Department of Rehabilitation at (916) 322-0251.

**TITLE:** Mentally ill face fears of employers  
**BYLINE:** Helen O'Neill  
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**SOURCE:** The San Diego Union-Tribune; SDU  
(Copyright 1997)

Jane Moore trembled before the interview, her mind racing with doubts and fear: Would she get the job if she told them? Would she keep it if she didn't?

She was eminently qualified, a talented lawyer who understood the intricacies of the Americans with Disabilities Act with an intimacy that far outshone other candidates.

But how could she tell prospective employers about the voices that echo in her head, the sudden sobbing fits, the drugs that make her drowsy in the morning, the fact she might need days or weeks off for treatment? How could she announce in a job interview that she was mentally ill?

"I wanted them to know why I would be good at the job," says Moore, who still worries that her condition might one day cost her the position she got 3 1/2 years ago. "If they didn't want to know, then I didn't want to work for them."

Today, Moore works in the affirmative action office of the University of Illinois at Chicago. She's 37 and has battled a form of schizophrenia for about 17 years. Her boss knows about her illness -- the hospitalizations, the medications, the string of other jobs she's held and lost.

But the university does make allowances, giving Moore time off when she needs it, reworking her schedule to accommodate doctors' visits, allowing her the occasional half-hour just to close the door and block out the world.

The allowances are relatively simple and inexpensive. They are similar to those spelled out by the federal government in a recently issued guidance statement about how employers must accommodate workers with psychiatric disabilities.

The guidance, prepared by the Equal Employment Opportunity

Commission, emphasizes that employers do not have to lower performance expectations for workers with mental illness. But, under the Americans with Disabilities Act, they are required to make "reasonable accommodations" for workers suffering from such illnesses as depression, schizophrenia and bipolar disorder, commonly called manic depression.

"There was some feeling that you couldn't apply normal workplace rules to people with mental disabilities," says Peggy Mastroianni, associate legal counsel for the EEOC. "We are saying you can."

Employers are less sure. They agonize over the definition of "reasonable." They fret about odd behavior and the fragility of workers with mental problems. They worry they will provoke bouts of illness if they appear insensitive -- and resentment among co-workers if they appear to be granting special privileges. Most of all, they worry about being legally and politically correct.

"Does accommodation mean an employee can be rude? Does it mean a CPA can ask for a leave of absence at the height of the tax season?" asks Susan Meisinger, senior vice president of the Society for Human Resource Management in Alexandria, Va., which represents personnel directors around the country.

"These are the kinds of questions we are hearing. The EEOC guidance actually provides very little guidance at all."

Advocates for the mentally ill say such questions stem from ignorance and fear. Employers have learned to accommodate workers with broken legs and cancer, they say. They can be equally tolerant of the millions of workers suffering from illnesses that are more difficult to document and discuss.

"The fact that my brain doesn't do what it's supposed to do without medication . . . why should that be any worse than if I had Parkinson's disease or diabetes?" asks Lori Rivera, a public relations professional in Washington, D.C., who suffers from bipolar disorder.

Rivera, 36, was first diagnosed five years ago, after being hospitalized for severe depression. She had spent 12 hours under her desk crying inconsolably because she couldn't write a single paragraph.

Today, she understands the symptoms, knows how to control them, knows

when to ask for help. Her employers juggle schedules and assignments to accommodate her.

"There is a real fear in the workplace about saying to your boss 'I have this problem,' " Rivera says. "After ending up in a psychiatric hospital, I felt an obligation to explain."

Richard Oppel AAS

Paragraph 1 → shock value gets people to think  
stupid garbage

~~That instance~~ ⊕

~~to~~



① Worried about nerds hiding behind ADA  
→ Dr. Certification, Dr. Certification, Dr. Certification

NO Paragraph 6 → depressed and stressed

① Can get on

Argument

~~Put~~

Says stressed + It's a sign of mental dis. = Put on alert

disability here has very strict definition

Everybody uses phrase + phrase sign of disability = Everybody will be protected under ADA

Lawsuits are costly, ...

Why → if they don't tell you they have mental disorder then not liable.

Force Company to shut down → No, because that counts as "harm to the company"

Main Complaint → Stressed & depressed

→ too quick.

have to link to work & have to show it's linked to a disability.

Example of rude dismembered ~~code~~ only allowable because he worked where there was robots around. This part of code not necessary for business. {But do we want to sue mentally ill for the dangers??}

① Consistency → why some accommodated & some not  
Practically → if use exact wording in bill other workers will know code for → "he's disabled"  
P.C →

## Key Words

→ Equal enforcement

→ i.e. if ~~one~~ dis. is hitting people can be  
fired because you'd fire others who  
hit people

3/25/97

Title I → Combat against discrimination of  
psychiatric disabled, and myths fears and stereotypes

Guidance → facilitate ADA enforcement

→ respond to questions from psych dis

→ respond to employers questions

Def. Psychiatric disability → mental impairment

seek treatment → Problem w/ spouse or child

impairment → Depression,

disability → bi-polar disorders

I → Use DSM-IV as general guide

BUT → some things Congress explicitly says aren't covered

AND → must "substantially limit"

Def. impairment → limits one or more major life activities

re. learning, thinking, caring for oneself

{ doesn't necessarily just work, a/c, etc }

If doesn't have one, but has treat as if so... are covered.

mla -> major life activity

Substantial limitation = severity + length of time  
individual specific not condition general

Severe -> prevents (mla)

significantly restricts w.r.t. avg. population  
! = mild limits

{ Medication does not mean person isn't ill }

time -> more than several months

→ 9 ← MAY ATTACK  
9

Problems interacting w/ others -> hostility, withdrawal,  
failure to communicate

## Disclosure

→ Employers may not ask questions on job app.  
Application → only if applicant asks for accommodation during  
hiring process or tells the employer  
i.e. he has reason to believe

After Offer → Medical exam (including psych) if all  
offerors are subject. (not necess. job related)

During Job → Job related? consistency/business  
evidence that -> ability to perform is impaired  
-> poses a direct threat  
→ else -> follow up to request for reasonable  
accommodation

What is a reasonable Accommodation

employer must RA unless can prove would cause undue hardship → Burden of proof to Emp

To request → has to link work to Mental Condition

When need for accommodation is not obvious employer may ask for reasonable documentation

(57)

31

→ Loophole what about if knew about disability before??

I think:

Direct Threat

Unfavorable News

April 30 - MGC

Rock Mountain News

-NO - did you read:

NIH says 1 in 10 Americans suffers

some disability from diagnosable mental illness

Are they all entitled to allowance Are salary

No... Specifically says in guidelines

1) Recurring, severely limiting, may have minor diagnosis

2) Safety in workplace

(\*)

Do smokers get regularly scheduled breaks? Can they smoke if

not permitted... {Nicotine dependence is classified as psychiatric disorder...}

human probably can survive, but doubt will win.

What

At what pt. does need to make accommodation get in the way of productivity

you can ask for prod... ~~data~~ {drawing phobias}

NYT - week, in review

Same Article

TITLE: EMPLOYERS ADJUST TO MENTAL ILLNESSES -- NEW DOCUMENT  
OFFERS ADVICE ON  
DISABILITIES LAW  
COLUMN: CLOSE-UP  
CREDIT: AP: KNIGHT-RIDDER NEWSPAPERS  
DATE: 05/03/97  
SOURCE: The Seattle Times; SETL  
ORIGIN: WASHINGTON  
(Copyright 1997)

WASHINGTON - Six months ago, Glenn Kennington hired a man to bus tables at the upscale restaurant he manages in suburban Washington.

The man's psychiatric disability didn't bode well for contact with customers, so he was assigned to dishwashing. That job proved too stressful, so Kennington switched him to scrubbing pots and pans.

"He's in his own work area. There are no breakables. It's just labor. He's found some success there," Kennington said.

Mental-health advocates hope new federal rules will encourage more employers like Kennington to hire people with psychiatric disabilities and accommodate their conditions. But company personnel directors say that while the guidelines are a good first step, they leave many questions unanswered.

A federal law, the 1990 Americans With Disabilities Act, requires employers to make a "reasonable accommodation" for workers with mental as well as physical disabilities.

New guidance on 1990 law

The federal Equal Employment Opportunity Commission recently issued "guidance" on how the disabilities act applies to employees with psychiatric problems. The document provides practical information and case studies for commission investigators, employers and advocates for the disabled.

"Often, all that's needed are things like a schedule change so someone can go to an appointment or take medication during a break," said Laura Mancuso, a Santa Barbara, Calif., consultant who helps resolve workplace disputes about the legal rights of employees with psychiatric problems.

"Some of these changes are things companies have done for a long

time in response to child care or elder-care needs."

But Mancuso said the powerful social stigma attached to mental illness remains an obstacle for employers. "I've had so many employers tell me, 'If I need to build a (wheelchair) ramp, I know how to do that,' " Mancuso said. "But they need assistance in dealing with people who have psychiatric disabilities."

#### Some see a conflict

But personnel directors say some of the advice is confusing and appears to conflict with other laws.

It has been illegal for several years for employers to ask job applicants about their mental histories. But Ronald Honberg, director of legal affairs for the National Alliance for the Mentally Ill, says companies have been slow to stop the practice because they falsely assume these applicants will miss work, be violent or not be able to handle any stress.

While he emphasizes that the majority of mentally ill people are not violent, Honberg says the guidelines do make it clear that if a person legitimately poses a threat to the health and safety of other employees, an employer can let the worker go.

#### What the law says

The disabilities act forbids employers from discriminating against an otherwise qualified worker because of physical or mental disability. Companies with more than 15 employees are required to make a "reasonable accommodation" for a disabled employee unless it would create an "undue hardship."

But the law does not require affirmative action for the mentally ill, nor are employers expected to tolerate drug abuse or disruptive behavior. Conditions like kleptomania, pyromania - and sexual-behavior disorders such as pedophilia - are excluded from protection.

#### Results so far

Honberg says only 10 percent to 15 percent of people with mental

illnesses have jobs. And the act has not significantly reduced unemployment among the disabled, one of its original goals. But it has improved physical access to businesses and public facilities, and established rights for people with health problems who are already working. Surveys of executives show that it's largely accepted in the business community.

Because such terms as "reasonable accommodation" and "undue hardship" are subjective, applying the law to mentally ill people is an ongoing process. Things could change with the development of new treatments, shifts in attitude or court decisions.

Peter Blanck, a lawyer and psychologist at the University of Iowa, studied Sears' efforts to comply with the disabilities law and found that it cost the company an average of \$45 per case. (Broader surveys of executives put the cost at \$200 per case.) "The accommodations are typically quite commonsensical," Blanck said.

#### A job for Michael Epstein

Michael Epstein, 45, works as a grocery clerk for Giant supermarkets in Maryland's Washington suburbs. Epstein suffers from a severe speech impediment and major depression.

Giant lets him schedule his hours so he can make regular doctor appointments. When Epstein started, the company allowed him the help of a job coach from St. Luke's House, a center for people with mental disabilities.

Epstein said learning how many items to put in a grocery bag was hard, but he hasn't been written up for any problems on the job. "I like meeting the public," he said.

If it wasn't for the disabilities law, "I might not get a job," Epstein said.

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#### Do's and don'ts the EEOC recommended

**Medications:** Employers should try to schedule breaks so workers with mental illnesses can take their prescriptions, but a company should not assume the role of monitoring whether medicines are taken. New drugs have made it much easier to control such illnesses as schizophrenia.

**Environment:** Employers should consider accommodations such as partitions or quiet space for workers who have trouble concentrating, or allow them to listen to music on a personal stereo, if practical. Dress codes should not be rigidly enforced for workers who don't come into contact with customers.

**Supervision:** Employers should consider switching a worker's supervisor to alleviate a personality clash, designating a "job coach" for a worker, or allowing an outside volunteer to help.

**Medical information:** If a worker claims a mental disability, employers can ask for medical documentation or ask the employee to have an examination. But employers cannot ask about mental illness on job applications. Questions about mental illness are permitted in a pre-employment physical, only if asked of all new workers. Medical information must be kept strictly confidential.

**Knight-Ridder News Services**

TITLE: Mental Health Advocates Support Rule  
CREDIT: AP  
DATE: 05/02/97  
SOURCE: Tulsa World; TUL  
(Copyright 1997)

WASHINGTON (AP) -- Six months ago, Glenn Kennington hired a man to bus tables at the upscale restaurant he manages in suburban Washington.

The man's psychiatric disability didn't bode well for contact with customers, so he was assigned to dish washing. That job proved too stressful, so Kennington switched him to scrubbing pots and pans.

"He's in his own work area. There are no breakables. It's just labor. He's found some success there," said Kennington, the general manager of Shelly's Woodroast in Rockville, Md.

Mental health advocates hope new federal rules will encourage more employers like Kennington to hire people with psychiatric disabilities and accommodate their conditions. But company personnel directors say that although the guidelines are a good first step, they leave many questions unanswered.

The 38 pages of guidelines were issued March 25 by the Equal Employment Opportunity Commission, which wants to make it clear that the Americans with Disabilities Act covers people with mental disabilities -- such as manic depression, anxiety disorders and schizophrenia -- as well as those with physical impairments.

Mental health experts say the EEOC guidelines give employers practical answers to questions like "When can employers legally ask about a psychiatric disability?" or "How far do employers need to go in accommodating these employees?"

But, although happy to receive some direction on this often tight-lipped subject, personnel directors say some of the advice is confusing and appears to conflict with other laws.

The guidelines say employers do not have to accept less from workers with psychiatric disabilities, but might be required, for example, to change work hours for employees on medication, erect cubicles around employees who have trouble concentrating, or let workers wear earphones to block noise.

Ronald Honberg, the director of legal affairs for the National Alliance for the Mentally Ill, says only 10 percent to 15 percent of people with mental illnesses have jobs.

It has been illegal for several years for employers to ask job applicants about their mental histories. But Honberg says companies have been slow to stop the practice because they falsely assume these applicants will miss work, be violent or not be able to handle any stress on the job.

While he emphasizes that the majority of mentally ill people are not violent, Honberg says the guidelines do make it clear that if a person legitimately poses a threat to the health and safety of other employees, an employer can let the worker go.

Michael Lotito, counsel to the Society for Human Resource Management, which represents more than 80,000 company personnel directors, says the guidelines are not that clear and also are not easily reconciled with other federal laws, such as the Family and Medical Leave Act.

For instance, when and what employers may ask about why leave is needed and the paperwork required can differ depending on whether disability or family and medical leave rules are followed.

# BUSINESS

## Recognizing Rights of Mentally Disabled

By **STUART SILVERSTEIN**  
TIMES STAFF WRITER

**A**fter Michael L. Keller started receiving medical treatment for manic depression, he asked his longtime employer for an adjustment in his work routine. He sought a switch from his rotating schedule as a lab technician, regularly flipping between day shifts and night shifts, to working days only.

Even though the request was based on his doctor's opinion that he needed a regular sleeping pattern, Keller was turned down. And soon afterward, in October 1992, he was fired.

# Q & A

"I was totally flabbergasted," said Keller, now 48. He said he couldn't believe that his former employer, a Union Carbide chemical plant in Louisiana, "would do something like this" to him. "They said they would work with me," he said.

Thanks to a lawsuit filed by federal authorities under the Americans With Disabilities Act, last year Keller won a private financial settlement said by sources familiar with the case to exceed \$100,000. The company, which employed Keller for 14 years, declined to comment.

Meanwhile, though, thousands of other people with mental disorders claim they face discrimination in the workplace because of their disabilities. And employers have continued to wonder about their responsibilities in such situations ever since the ADA, as the landmark disabilities act is known, took effect in the American workplace in 1992.

Please see **DISABILITY, B6**

### Disability Claims

Since the Americans With Disabilities Act took effect in U.S. workplaces in July 1992, the second most common type of job discrimination under the law has been bias tied to emotional or psychiatric impairments. Some experts believe these claims will increase now that the U.S. Equal Employment Opportunity Commission has issued workplace guidelines for psychiatric disabilities. Of the 72,687 claims from July 26, 1992, to Sept. 30, 1996, these disabilities were most often cited:

Impairment	Claims	Percent of total*
Back	13,243	18.2%
Emotional/psychiatric	9,216	12.7
Neurological	8,201	11.3
Extremities	6,562	9.0
Heart	3,003	4.1
Diabetes	2,605	3.6
Substance abuse	2,437	3.3
Hearing	2,094	2.9
Vision	1,911	2.6
Blood disorders (including HIV)	1,883	2.6
Cancer	1,706	2.3
Asthma	1,266	1.7

\*Note: Numbers do not add up to 100 percent because additional categories are not listed.  
Source: Equal Employment Opportunity Commission

# DISABILITY: Dealing With Employees With Mental Disorders

Continued from B3

To clear up some of that confusion, officials of the U.S. Equal Employment Opportunity Commission last month issued guidelines for applying the ADA in psychiatric disability cases. Although courts are not bound by such guidelines, they often influence judges' decisions. They also provide employers with paths they can follow to try to avoid costly litigation—even though, management lawyers contend, legal disputes will remain a big problem even with the guidelines.

Some of the EEOC's guidance is basic and in line with the ADA requirements for workers with physical disabilities. For instance, employers are required to provide "reasonable accommodations" for workers with psychiatric or physical disabilities unless such measures would "impose an undue hardship" on the employer.

In addition, companies almost always are barred from asking job applicants who have not yet been offered employment about whether they suffer from mental or physical disorders.

Here are some of the key points raised by the new guidelines:

**Q** What is a psychiatric disability under the ADA?

**A** It is any mental impairment that substantially limits one or

more "major life activities" of an individual. These impairments can be mental or psychological disorders including schizophrenia, major depression and bipolar disorder, as well as panic, obsessive compulsive or post-traumatic stress disorders. Not covered by the law, however, is behavior stemming from the illegal use of drugs. Neither is stress, unless it is shown to be tied to a specific mental impairment.

**Q:** What are examples of reasonable accommodations that employers might provide?

**A:** The guidelines call for accommodations to be determined on a case-by-case basis. They can include physical changes in the workplace such as setting up room dividers or other types of sound-proofing to help workers who have problems maintaining their concentration.

Accommodations also include scheduling changes such as allowing an employee to start work later in the day or providing extra unpaid time off. The guidelines point out that some medications for psychiatric disabilities cause extreme grogginess and lack of concentration in the morning. In Keller's case, he found that he could not sleep well when he worked long night shifts once he started taking lithium for his manic depression.

Other options include providing a temporary job coach or modifying workplace procedures to, say,

provide employees with written comments if they can't follow oral instructions.

**Q:** Can employers discipline workers with psychiatric disabilities if their misconduct stems from a disability?

**A:** Yes, if the offending action by the disabled employee also would

the dress code and courtesy rules are not significant to the job. Consequently, if the warehouse employee's work performance has not suffered and the

offensive conduct is linked to a psychiatric disability, the worker should be given some leeway and "rigid application" of discipline

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**Although courts are not bound by them, the U.S. Equal Employment Opportunity Commission guidelines often influence judges' decisions. They also help employers avoid costly litigation.**

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call for discipline if someone else did it. For example, if an employee steals money from the company, that worker can be fired or otherwise disciplined just as any other employee would.

On the other hand, the EEOC guidelines cite the hypothetical example of an employee with a psychiatric disability who works in a warehouse and has no contact with customers and little contact with other employees. It also assumes that this employee has been coming to work looking increasingly disheveled and acting increasingly rudely toward co-workers, in violation of company rules. In such a case, the EEOC says

should be waived.

**Q:** When can an employer refuse to hire someone based on the person's history of violence?

**A:** Employers can reject job applicants who pose a "direct threat" to themselves or others at work. Employers have to be able to specify the behavior that poses the threat, however. As an example of a job applicant who could be turned down on those grounds, the guidelines cite the example of a worker involved in three months of escalating incidents on the job who then received medical treatment but still couldn't control his temper. Finally, two weeks ago, that hypothetical worker was fired after telling a

co-worker that he would find a gun and "get his supervisor if he tries anything again." The EEOC says that worker poses a direct threat, among other reasons, because of his past overt acts, the failure of medical treatment to curb his violent behavior and the short amount of time since he was fired.

On the other hand, an employee who has attempted suicide is not considered a direct threat. If someone attempts suicide but then receives medical care and is said by a doctor to be able to safely return to work, there is no justification to bar the employee.

**Q:** What problems do critics see with the ADA guidelines?

**A:** Some management lawyers believe the law and the guidelines are impractical and will lead to even more costly litigation. Christopher G. Bell, a management lawyer in Minneapolis and an authority on the ADA, worries that the guidelines open the door for employees who simply don't get along well with co-workers to hunt for doctors who can declare them psychiatrically disabled.

"It's very difficult when you're talking about a mental impairment or disorder to determine whether we're talking about fact or fiction," Bell said.

"Is the person just a jerk and trying to cover for it by getting a note from the doctor? Or do they have a legitimate, serious mental disorder

which has to be dealt with in the workplace?"

Management lawyers also fret that employers will be caught between conflicting requirements to accommodate workers with mental disorders while maintaining confidentiality about their conditions. And they say that at a time when the economy demands an increasing amount of teamwork, employees will resist collaborating with co-workers regarded as antisocial.

Advocates for the mentally disabled, however, say the broad protection promised by the ADA has been unfulfilled because of the narrow way that judges and employers have interpreted the law.

"There's still a tremendous stigma attached to people with mental disabilities," said Jim Preis, executive director of Mental Health Advocacy Services Inc., a nonprofit public interest law firm based in Los Angeles. "Even though the ADA is clear and these guidelines are even clearer . . . it's still commonplace that a person with a psychiatric disability, just because of that disability, will not be offered a job."

Until now, "disability under the ADA has come to mean physical disability," said Paul Steven Miller, an EEOC commissioner. By zeroing in on psychiatric disabilities, he added, "this moves us a giant leap forward."

**NEWS ARTICLES ON PSYCHIATRIC DISABILITY GUIDANCE**

**APRIL 30 - MAY 19, 1997**

**VOLUME II**

Issued May 16, 1997  
EEOC/OCLA

**FAVORABLE/NEUTRAL**

# Dealing With Mental Disability

By Leigh Rivenbark  
Federal Times Staff Writer

The usually reliable warehouse worker shows up one morning in torn, dirty clothes. He sometimes yells at co-workers while he loads boxes onto pallets.

The changes persist, and the supervisor prepares to discipline the man. Workplace policy says employees must dress neatly and treat co-workers courteously.

Then the worker tells the supervisor that his doctor diagnosed him as depressed and that the depression made him stop taking care of himself and start lashing out at others. He's started taking medication and wants another chance.

The man is asking for accommodation for a psychiatric illness, and according to the Equal Employment Opportunity Commission's new guidelines, the supervisor must accommodate him.

The guidelines, apply to federal agencies under the 1973 Rehabilitation Act, according to EEOC.

"The federal government has done over the years a fairly good job of providing jobs to disabled employees, including people with mental disabilities," said Ronald Honberg, legal affairs director of the

## F.Y.I.

The EEOC guidelines, published March 25, are available by calling:

(800) 669-3362

National Alliance for the Mentally Ill. "It shouldn't be too hard for agencies to meet these standards."

Psychiatric disabilities can include depression, manic depression, anxiety disorders such as post-traumatic stress disorder, schizophrenia and personality disorders.

Employers can discipline mentally disabled workers for conduct violations stemming from their disabilities, but only if the violation breaks a standard that is job-related.

For example, if an employee steals money and then blames the theft on a mental disability, the employer still could discipline him. The prohibition against employee theft is job-related and necessary to business, EEOC said.

But the warehouse worker who arrived disheveled and was rude for a few days should get a break.

The policies mandating tidiness and courtesy are not directly related to his job of moving boxes.

A manager who knows about an employee's psychiatric disability cannot disclose any information about that disability. Privacy laws make such disclosures illegal.

Accommodation for a psychiatric disability may include physical changes, such as giving the employee barriers like partitions to screen out distracting movements.

Accommodation can also extend to changing policies. For example, in a workplace where employees are not allowed to have drinks at their work stations, the employer might permit an employee to keep drinks handy because dry mouth is a side effect of medication.

Supervisors might also need to adjust their methods, according to EEOC.

An employee whose disability limits concentration may need more daily guidance and feedback from supervisors.

EEOC said reassignment to another job must be considered a reasonable accommodation when the present job "would cause undue hardship or would not be possible" for the disabled worker.

TIME 1/2  
MAY 13, 1997

SOCIETY

# MENTAL ADJUSTMENT

## How far should employers go to help someone with a psychiatric illness stay on the job?



By ELIZABETH GLEICK

**R**ENE WOZNY, 40, IS AN ATTORNEY FOR the Maryland Department of Assessments and Taxation in Baltimore. She is fortunate enough to have found work she enjoys, but every so often she gets derailed by chronic major depression, a mental illness that can cause a loss of self-esteem, an inability to concentrate and a negative outlook on life. Wozny has been troubled by the disease for as long as she can remember. Last year she learned of an experimental program for depression run by the National Institute of Mental Health, but in order to participate, she needed to arrive at work an hour or two late every day for a month. She and her supervisor struck a deal: she would make up the lost time at the end of each day. "It's the first time I've had a boss who is understanding about this kind of thing," Wozny says.

The path to such enlightenment, though, is never easy—and most employers need some clear road markers along the way. Although the Americans with Disabilities Act of 1990 specifically prohibits any employer with 15 or more workers from discriminating against employees with mental or physical impairments, many managers have been quicker to install wheelchair ramps than to offer the kind of flexibility Wozny's boss did. That is why in March the Equal Employment Opportunity Commission issued guidelines to help employers navigate the fuzzy, sometimes unquantifiable arena of mental illness in the workplace. The guidelines, addressing recent case law, explain how employers should attempt to accommodate mental disabilities that don't directly compromise a worker's qualifications for the job.

Given that 1 in 10 Americans is likely to suffer from a diagnosable mental illness during the year, the stakes for employers are potentially enormous. Although the

### FOUR SCENARIOS

Examples used by the Equal Employment Opportunity Commission in new guidelines on psychiatric disabilities

#### 1 ESTABLISHING DISABILITY

"An employee asks for time off because he is 'depressed and stressed.' This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations."

PHOTO-ILLUSTRATION BY MATTHEW WELCH—MONTAGE

2/2

## 2 LONG-OR SHORT-TERM CONDITIONS

"An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was most distressed for about a month during and immediately after the breakup. He sought counseling, and his mood improved within weeks. His counselor gave him a diagnosis of 'adjustment disorder' and stated that he was not expected to experience any long-term problems associated with this event. This employee does not have a disability for purposes of the Americans with Disabilities Act."

guidelines do not have any legal force under the law, refusing to follow them can be risky. The courts often look to the EEOC's analysis when ruling in discrimination lawsuits. So far, nearly 13% of all EEOC complaints under the disabilities law have involved mental illness, though some experts feel this number is leveling off. In a TIME/CNN poll last week, 62% said they believe employers should accommodate mental impairments.

But what worries employers, especially small-business owners without human-resources departments or staff attorneys, is that one worker's run-of-the-mill bad attitude may be another's debilitating schizophrenia. "This is fraught with undesirable pitfalls," says Don Livingston, a Washington lawyer who is former general counsel at the EEOC. "It calls on employers to make

## 3 CONCENTRATION IMPAIRMENT

"An employee states that he has trouble concentrating when he is tired or during long meetings. He attributes this to his chronic depression. Although his ability to concentrate may be slightly limited because of depression (a mental impairment), it is not significantly restricted as compared to the average person's in the general population. Many people in the general population have difficulty concentrating when they are tired or during long meetings."

enigmatic distinctions between personality traits and personality disorders. Mental-health professionals often find this an impossible task, and now it's being put before factory supervisors." Henry Saveth, an attorney at Foster Higgins, which represents leading corporations in employment disputes, is concerned that traits such as chronic lateness or poor judgment may be linked to psychological impairment. Says Saveth: "Employers are going to face the issue: How much special treatment do they have to give to their poor performers?" This question, he says, "is going to lead to endless litigation."

That particular anxiety, though, may be overblown—and heightened by the scare tactics of some attorneys advertising expensive disabilities-law training seminars for business owners. The wave of publicity surrounding the guidelines may cer-

tainly give people new ideas about suing, and there will always be the occasional surprising decision. Two years ago, for instance, a severely depressed attorney who worked for the San Francisco utility Pacific Gas & Electric asked for shorter work weeks and a transfer to a more understanding supervisor. According to the employee's lawyer, he filed suit when the company refused, and talks broke down over the plaintiff's request for positive evaluations should the company rehire him. A court-appointed arbitrator ordered the utility to pay \$1.1 million to the plaintiff. (Federal law limits awards to \$50,000 for an employee in a company of 100 or fewer and \$300,000 for a company of 500 or more, as well as money for back pay and legal fees.) "It was a wacky decision," says PG&E lawyer Kenneth Yang, yet he acknowledges that the law has not caused the company any "undue hardship."

"The hype around the guidelines reminds me of the hype when the law was passed," says Lia Shigemura, director of Affirmative Action, Equal Employment and Diversity at PG&E. "Companies feared that busloads of disabled people were going to beat down the walls seeking employment. It was not the case. What happened was that existing employees sought accommodations." And this a key point: there is already a lot of mental disability in the workplace. The ADA's goal is

to remove the stigma of talking about it and coping with it. "Ideally, if you are an employer and you try to use this guidance for problem solving, you are going to avoid litigation most of the time," says Gary Phelan, the co-chairman of the disability-rights committee of the National Employment Lawyer's Association.

Unlike such capital-intensive alterations as installing ramps or

lowering drinking fountains, accommodating the mentally ill in fact often requires little more than an attitude adjustment. The Sears, Roebuck 1996 Work Force report showed that the average cost to the company for such accommodation in 1993-95 was zero. Employees with a learning disability were permitted to work at a slower pace; those with mental illness were offered shorter shifts, lower-stress duties or flexible work hours. According to studies conducted by the Matrix Research Insti-

tute in Philadelphia, which specializes in mental-health disorders, the majority of accommodations cost less than \$500 per affected worker—significantly less than it costs to replace a worker.

Thanks in great part to new medications, "substantially more of these people can get back into competitive employment—real jobs in integrated settings for regular wages—than we had expected," says Robert Drake, a psychiatrist at Dartmouth University, who has hired several seriously disabled people to work in his research laboratory. "The job seems to be a

## 4 REASONABLE ACCOMMODATIONS

"A retail employer does not allow individuals working as cashiers to drink beverages at check-out stations. The retailer also limits cashiers to two 15-min. breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in order to combat dry mouth, a side-effect of his psychiatric medication. This individual requests reasonable accommodation. In this example, the employer should consider modifying its policies."

structuring activity that is actually quite helpful." Drake's chief interviewer had been hospitalized for manic depression more than 20 times before coming to work for him. Catherine Durette, who runs a cleaning business in Manchester, N.H., hires people referred to her by a local mental-health center—people whose ailments range from schizophrenia to obsessive-compulsive disorder. "They are all on meds," she says. "If I feel someone is having an off day or seems out of character, I call the center. It may not be anything. You and I have off days."

In general, though, "it is true that employers would prefer not to deal with mental illness—just like they would prefer not to deal with child care," says Laura Mancuso, whose firm, the Conflict Management Institute, helps mediate disabilities-law conflicts in the workplace. Kay Redfield Jamison, a professor of psychiatry at the Johns Hopkins medical school, who wrote *An Unquiet Mind* about her own manic-depression, notes, "One of the net effects of discrimination is that people go underground with these illnesses and do not get treated." That can end up costing their employers a lot more.

—Reported by Ann Blackman/Washington, William Dowell/New York and Margot Hornblower/Los Angeles



# Money

TUESDAY, MAY 13, 1997

## MONEYLINE

A QUICK READ ON THE TOP MONEY NEWS OF THE DAY

WorkUSA.com



An e-mail/fax forum on workplace issues

Should workers with mental illness get the same accommodation in the workplace as those with physical disabilities? The law says yes. The Equal Opportunity Employment Commission recently issued guidelines for employers. But critics say employers are saddled with a complex law and are often stuck with disruptive employees. What do you think? How should mental illness be handled in the workplace? Send us your comments. By e-mail: [money@usatoday.com](mailto:money@usatoday.com) By fax: 1-800-242-4595. Survey results and selected responses will appear in WorkUSA.com, Money's workplace column. Please include your name and a daytime phone number.

*Tipper Gore*

# Razing Workplace Barriers

In 1990 Congress clearly sought to eradicate employment discrimination against people with mental, as well as physical disabilities, when it passed the Americans with Disabilities Act (ADA). Although thousands of people with psychiatric disabilities are working successfully in a variety of jobs in this country, many more are denied employment opportunities because of myths, fears and stereotypes. These barriers of attitude often exclude qualified candidates from being considered for a job, and they keep people with mental disabilities from leading productive lives.

Recently, the Equal Employment Opportunity Commission (EEOC) published policy guidance to explain to private employers how they can comply with the ADA's requirements. Like the ADA itself, the EEOC's policy guidance recognizes both the rights of people with psychiatric disabilities to be free from discrimination in the workplace and the legitimate concerns of businesses that are trying to comply with the law.

Unfortunately, the reaction of some in the business community to these guidelines makes it clear that the battle against the stigma associated with mental illness has not yet been won. Given that one in four American families is affected by a mental illness, this is disturbing.

Contrary to reports, EEOC's guide does not require that employers give special treatment to people with psychiatric disabilities. Rather, the EEOC and the ADA require employers to do for employees with psychiatric disabilities what they must do for employees with physical disabilities—make reasonable accommodations that will enable such employees to do their jobs.

Many employees with psychiatric disabilities are now working successfully without any accommodations. Others require accommodations that

are relatively inexpensive and easy to provide. The ADA even provides employers a defense—"undue hardship"—when making an accommodation proves too difficult or too expensive.

Let's be clear. As I understand the rules, the ADA requires that an employee who wants to be accommodated because of his or her psychiatric disability must show that he or she falls within the legal definition of the term "disability." That employee must demonstrate to the employer—with documentation—that he or she has a disability that substantially limits one or more major life activities.

Essentially, the employee must have a serious, definable mental illness. Of course, even then, the employee is not entitled to be excused from relevant standards of conduct or from job performance standards. This is simply an issue of equality for people with mental and physical disabilities.

This guidance also reminds employers that the ADA applies to all people with disabilities, not just those with physical disabilities. Eliminating stigma and reducing stereotypes takes a long time.

Every time a person with a disability is able to obtain and keep a good job, we're making progress. Encouraging those who can work to work helps all of us because our nation can't afford to waste the talents of anyone. Employers will be better served by familiarizing themselves with the guidance and treating with dignity and respect employees with psychiatric disabilities who request reasonable accommodations. Not only is it degrading to the principles of America to reinforce outdated myths, fears and stereotypes, it against our national interest to undervalue any individual.

*The writer, the vice president's wife, is an adviser on mental health policy to the president.*

## Mentally Ill Needn't Make Workplace Inefficient

To the Editor:

Guidelines by the Equal Employment Opportunity Commission for workplace accommodation to psychiatrically disabled employees are long overdue (front page, April 30). However, implementation requires that the employee assume some responsibility. In acute phases of illness the ability to think, learn, reason, judge and otherwise function mentally can be impaired. In order to sustain employment, people with these disabilities must come to understand their condition and learn to

recognize signals that an acute episode is imminent.

While studies have claimed that some psychiatric patients can emerge from an illness without intervention, a person seeking employment cannot take the chance that he or she belongs to that group. The need to limit the duration of an episode requires willingness to accept treatment and to come to terms with the possibility that it may have to continue for many years.

Mental illness, if managed, should not compromise productivity in the

workplace. And for the person suffering from a psychiatric condition, satisfying employment can itself contribute to the healing process, providing the additional benefit of cutting the costs of treating mental illness.

INGEBORG OPPENHEIMER

Yonkers, April 30, 1997

The writer is a clinical social worker.

### Open-Ended Program

To the Editor:

Your April 30 front-page article "Employers Told to Accommodate the Mentally Ill" illustrates the outrageous results of the Americans With Disabilities Act of 1990. Thanks to that vaguely worded, open-ended (but nice-sounding) entitlement program, virtually any negative, anti-social or unproductive behavior that an employee engages in is now categorized by the Government as a "disability," and therefore a protected activity.

STEVE FEINBERG

Brooklyn, May 1, 1997

### Corporate Cooperation

To the Editor:

Despite the advances made in educating the public and policy makers about mental illness, some of the responses by business interests noted in your article illustrate that there is work to do (front page, April 30).

Instead of decrying guidelines that ban discrimination against people with mental health needs, enlightened corporate leaders are moving in a different direction. Companies like Digital Equipment, BellSouth and Conoco are reaching out to workers who have depression and other mental disorders. These companies then link their employees with treatment through health insurance plans.

A 1990 Massachusetts Institute of Technology study showed that the cost of depression in lost productivity and absenteeism was \$23.8 billion annually. Resisting fair consideration for people with mental disorders in the workplace actually works against the interests of American business.

MICHAEL M. FAENZA

President and Chief Executive  
National Mental Health Association  
Alexandria, Va., April 2, 1997

### Excluded Disabilities

To the Editor:

"Breaks for Mental Illness: Just What the Government Ordered" (Week in Review, May 4) suggests that the "sex addict," "sadist," "voyeur" and "peeping Tom" employee might be particularly problematic for an unsuspecting employer to accommodate. In fact, the Americans With Disabilities Act explicitly excludes such disabilities from coverage.

MARY GILBERTI  
Staff Attorney, Bazelon Center  
for Mental Health Law  
Washington, May 5, 1997

### Depression's Realities

To the Editor:

Thank you, Pete Harnisch and Frank Rich, for bringing out in the open once again the realities of someone suffering from clinical depression ("Harnisch's Perfect Pitch," column, May 1). I felt as if I was "coming out of the closet" when I began to admit to friends and co-workers that I was clinically depressed.

From the stigma in the workplace to the odd looks one receives from friends who do not understand, this experience is never easy. Medical treatment, a supportive family and a fair employer have helped me to begin to live a life I never thought possible. Now, if only medical insurance companies could see the bigger picture.

PAMELA A. BEELITZ  
Cranford, N.J., May 1, 1997

# Safeguards for mentally ill issued

by Rose DeWitt

Daily News Staff Writer

Attention, workers: Don't think you can get away with showing up late for work or goofing off just by saying "my mental state made me do it."

The U.S. Equal Employment Opportunity Commission yesterday issued guidelines to employers on making reasonable accommodations to workers with mental ill-

ness, as required by the Americans with Disabilities Act.

But it doesn't allow just any kind of conduct. The federal law requires employers to ask employees what they need to enable them to continue to be a produc-

tive employee — and if the request is reasonable to do something about it. The guidelines on mental illness and the workplace say employers may have to allow some time off from work, shift schedules, forgive lateness, re-

consider assignments — even alter physical surroundings — if such remedies can reasonably enable a worker to perform on the job.

Moreover, employers are not allowed to ask at a job interview if a job candidate has a history of mental illness. And they may not

refuse to hire an applicant on grounds of mental illness — unless the person clearly would be unable to do job functions. That is no different from what the law requires employers to do to accommodate those with physical disabilities, experts say.

"The key word is reasonable," says Joseph Rogers, deputy executive director of the Mental Health Association of Southeastern Pennsylvania. Rogers, who has been hospitalized for manic depression, served on task forces that helped to draft the ADA and the recently issued guidelines.

If a record of lateness disrupts an assembly line because other workers cannot begin until everyone is present, an employer is not obliged to accept it, Rogers said. But if the employee could start a few minutes later and still get the job done, the employer would have to consider adjusting the time, he said.

Perry Block, president of the Philadelphia regional chapter of the Society for Human Resources Management, said the EEOC is not requiring anything new.

"Mental illness has always been covered by the ADA," he said.

"A person who, because of illness, is rude and argumentative won't succeed in sales, but might have no problem at all sitting in an office adding up numbers all day, he said.

"I was recently told a story about a company which was hiring a plant manager," Block added. "One of the candidates had suffered from manic depression and was immediately excluded from consideration. That would be illegal — and has been illegal since the ADA was passed."

Attorney Stephen Gold, a veteran plaintiff's lawyer in disability discrimination lawsuits, welcomed the new guidelines.

Gold says hospitalization for mental illness carries a stigma even when such treatment enables a person to recover quickly.

"But if you have leg problem or are hit on the head and need a week or two in the hospital, no one thinks twice," he said. ■

Nashville Tennessee

5-6-97

page 12A. E.L.

## Work and mental illness

THE federal government took an important step forward last week by outlining rules for employers regarding workers with mental illness.

It should prove to be a significant victory for those employees.

The rules are new, but the law that backs them up is not. The Americans with Disabilities Act became law in 1990. Previously, it had generally been applied only to workers with physical disabilities. But the Equal Employment Opportunity Commission last week sent a clear message that the law also applies to workers with mental disabilities.

The EEOC specified that workers with maladies such as depression, obsessive-compulsive disorder, schizophrenia and other conditions must be granted "reasonable accommodation" at the workplace in order to do their jobs. It also stipulates that employers may have to allow workers time off or adjust work schedules.

Fortunately, many employers already understand the nature of mental illness and treat workers accordingly. But some do not, which is why the government's protective step is necessary.

The guidelines are intended as practical

instructions. But in broader terms, they will serve as a reminder about the unfair stigmas that often accompany mental illness.

If a worker suffers from a physical impairment, that disability can be easily seen and understood. But when mental illness interferes with a worker's ability to do a job, it may not be so easy for employers and fellow employees to recognize.

Recent figures show that in a given year, 13% of the complaints filed with the EEOC are related to mental illness, second only to back problems. Much of the public may be surprised by those figures, which is why the stand about mental illness is so vital.

The Americans with Disabilities Act has proved to be breakthrough legislation. Former President George Bush, on whose watch the law was enacted, has rightfully expressed pride and satisfaction with its impact. Now, it is time to let this relatively new law have an even more defined role. Mental illness must be addressed with fairness and understanding by all employers. The EEOC guidelines meet that most important need. ■

Worthy after school idea

# EDITORIALS

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A GANNETT NEWSPAPER

## Fairness for the mentally ill

The 1990 Americans With Disabilities Act requires that employers make a "reasonable accommodation" for employees with mental as well as physical disabilities.

But the problems that people with mental illness face are not always readily apparent. And those who suffer from such illnesses are often reluctant to discuss the problems with their supervisors.

The Equal Employment Opportunity Commission has now issued guidelines that not only spell out what's "reasonable" but should also encourage a more open discussion between employees and employers.

**THE FACT** that during the past four years, 9,216 complaints filed with the EEOC — almost 13 percent of the total — alleged discrimination related to psychological problems shows that greater guidance is needed for implementing the law.

Employers are not expected to tolerate disruptive behavior or lower performance standards.

But the guidelines give examples of the kind of accommodations considered reasonable, such as scheduling breaks so that workers with mental illnesses can take their prescriptions.

As EEOC Associate Legal Counsel Peggy R. Mastroianni put it, "We try to give some common sense answers to frequently asked questions."

**A LITTLE FLEXIBILITY** can go a long way in helping people with even severe mental illness stay on the job.

Sensibly, the guidelines also set forth procedures for how employers should respond to claims of mental disability.

What's more, the guidelines should make employees more comfortable seeking accommodations for their mental illness. The emphasis should be on working out acceptable arrangements — based on open discussion, instead of relying on preconceptions or fears.

Under these guidelines, employees with mental illness are more likely to get the fair shake in the workplace that the 1990 legislation promised.

PHILADELPHIA DAILY NEWS

APRIL 30, 1997

**In Our Opinion**

# On the job, the issue is fairness

New guidelines on psychiatric disabilities released recently by the U.S. Equal Employment Opportunity Commission confirm just how much has changed over the last decade.

The Americans with Disabilities Act requires employers to make "reasonable adjustments" not just for employees with physical disabilities, but also for employees whose psychiatric disorders "substantially limit . . . a major life activity."

So a qualified computer programmer with an anxiety disorder, like one who uses a wheelchair, can't be denied employment just because of the disability — and may even have a right to reasonable adjustments in the workplace.

But so much stigma has been attached to people with mental illness that even employers committed to complying with the 1990 law have questions. Many worry they'll have to suffer violent or rude employees or keep people who can't do the job, for fear of being sued.

Psychiatric problems represent 12.7 percent of the charges of discrimination under the Americans with Disabilities Act in the last four years.

Among the many misconceptions about psychiatric disorders is that they don't really exist — but are ways to excuse character flaws or get special privileges.

So even people with enlightened attitudes worry about the potential for clever employees avoiding responsibility for poor job performance through bogus claims of mental illness.

The real world described in the EEOC guidelines should reduce those fears.

A man in a bad mood over breaking up with his girlfriend is not disabled and doesn't have a license to miss project deadlines.

Violations of conduct codes — like stealing or destroying property — may be punished, even if the employee has a psychiatric disability that may have contributed to the violation.

Someone who claims a psychiatric disability may be required to provide documentation from a doctor.

At the same time, those with psychiatric disabilities may be entitled to changes in schedules or exceptions from company policies to help them do their jobs adequately — if they don't cause undue hardship to the company.

For example, a company with a policy against cashiers drinking beverages while working might be asked to allow an exception for an employee with bipolar disorder, since the medication he takes has a side effect of dry mouth.

Another suggested that an employee who was having difficulty maintaining focus on projects could be helped by establishing more regular meetings with a supervisor.

If it works the way it is supposed to, the employee with the disability gets to keep the job and perform it better; the employer keeps a qualified worker, without having to lower standards.

Attitudes towards mental illness have been transformed in the last decade. The Americans with Disabilities Act, whatever its flaws, partly deserves credit for that.

The difference these guidelines represent is nothing short of profound for

some people with serious mental illness.

In the past, they were blocked from proving themselves because potential employers rejected them simply because of their illnesses. Some lost jobs when their psychiatric problems caused them to miss work or be late — and they were unable to reclaim them when they got better.

Now many more have the opportunity to show what they can do, to work hard and not be dependent on others — which is all most ever wanted. ■

MAY 7, 1997  
CLIPS



Elena Kagan  
05/15/97 10:10:19 AM

Record Type: Record

To: Diana Fortuna/OPD/EOP  
cc: Bruce N. Reed/OPD/EOP  
Subject: eeoc guidelines

Podesta says the President has expressed some skepticism about the new EEOC guidelines on accommodating workers with mental/psychological disabilities. Podesta says this is somewhat sensitive because Mrs. Gore has come out publicly in favor of the guidelines. Podesta suggested that we write a memo to him (not directly to the President) laying out the situation -- what the guidelines do, what the process was for issuing them, what is likely to happen now, and whatever else you think appropriate. Thanks much. By the way, in case you haven't dealt with the EEOC before, I've always found ellen vargas, the general counsel there, to be fairly helpful.

NP  
WST  
NYTimes  
-----  
EEOC - guidelines  
- process  
-



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

May 19, 1997

Dianna Fortuna  
Assistant Director for Welfare  
Old Executive Office Building  
Room 212 Left  
17th & G Streets, NW  
The White House  
Washington, D.C. 20502

Dear Dianna:

I've enclosed a package of information on the Commission's Guidance on the ADA and Psychiatric Disabilities. Please feel very free to call on me if I can be of any further assistance.

Sincerely

A handwritten signature in cursive script, appearing to read "Ellen".

Ellen J. Vargyas  
Legal Counsel

Enclosures

**UNFAVORABLE**

## Think Your Co-Workers Are Crazy? They Are.

*"No other technique for the conduct of life attaches the individual so firmly to reality as laying emphasis on work; for his work at least gives him a secure place in a portion of reality, in the human community."*

SIGMUND FREUD  
"CIVILIZATION AND ITS DISCONTENTS"

Undoubtedly people cause a lot of suffering to themselves and others with their personalities, but the world of work is anything but unwelcoming to troubled souls.

There is a place for manic depressives. We call these people "management," and harness their search for equilibrium to the general good with stock options. Politics affords a profession for the homely narcissist.

### Business World

By Holman W. Jenkins Jr.

Agoraphobes telecommute. And while normally you have to have a brain before you can have a personality, let alone a personality disorder, there always seems to be work for commentators.

On first pass, the new guidelines from the Equal Employment Opportunity Commission on applying the Americans With Disabilities Act to mental illness wouldn't seem to undermine the therapeutic value of work.

Apparently the commission believes companies go to the trouble and expense of hiring workers just to fire them. It suggests they try instead to "accommodate" the idiosyncrasies of their workers. Duh. Since cavepersons formed the first consortium to hunt the mammoth, organizational man has understood you have to work with the material at hand.

But the agency would still permit non-performers to be fired, so aside from expanding the residuum of lawsuits, what's new here?

The world was really hanging on the

agency's definition of "mental disability."

Freud broke neuroses into two categories, transference—phobias, obsessions, etc.—and narcissism, what most people would see as the tendency to be a jerk. In the latter category we find our friends who are grandiose, insensitive, ambitious and self-pitying.

He considered such folks virtually unreachable through psychoanalysis, and hoped science might someday help them with drugs or surgery. In the meantime, he noticed that these personalities are often the ones most responsible for driving the economy forward.

They correspond roughly to the "personality disorders" listed in the diagnostic manual of the American Psychiatric Association. And a lot of corporate counsels and trade associations were wondering if, for the purposes of the Americans With Disabilities Act, such conditions were covered.

And there it is: On page 10 of the EEOC guidelines, the "ability to interact with others" is deemed "a major life activity," and anyone may be eligible who displays "consistently high levels of hostility, social withdrawal or failure to communicate when necessary."

Half of Corporate America now qualifies as mentally disabled, and most of Wall Street.

One looks in vain for the problem this was meant to solve. Far from extruding the mentally ill, companies are already spending billions to treat the quirks and discontents of their employees. And companies have always bent over backward for their top performers, so what has the government done for the rest of us?

Whatever problems the emotionally troubled were already having at work, they can only be made worse by introducing more paranoia and caginess into the litigious workplace. Yet the guidelines consist largely of paranoid dos and don'ts for employers:

Don't ask a visibly disturbed and failing employee if he needs accommodation.

Wait for him to speak up—never mind that a disturbed person is usually the last to recognize his problem.

Don't level with co-workers. Fob them off with lawyer-drafted phrases about "business necessity" and "compliance with federal laws." This sounds like just what the attorney ordered, but a troubled employee might be better off having her co-workers' understanding and support of the drooling, sobbing wreck she has become.

In fact, companies need their employees, and are naturally inclined to succor them. A few years back the magazine *Per-*

*The law stacks the incentives in favor of employees allowing themselves to be warehoused when they might be happier elsewhere.*

sonnel Journal posed the hypothetical case of an emotionally unstable employee with a known gun mania who made his co-workers nervous. The almost knee-jerk reaction of its readership was: You don't fire the guy; you try to help him.

But a shift in tone has been noticeable since then. Whereas the literature once focused on how to motivate the troubled employee, the subject has become how to avoid hiring him—or failing that, how to get rid of him without running afoul of some judge.

This is a shame, because work works for people. It brings them up against the needs of others. It acquaints them with the workings of the reality principle. It teaches them about their own limitations and about the importance of domesticating their personalities to make themselves tolerable to others.

Having dragged the mentally troubled

under the aegis of the disabilities law, Washington seems bent on undermining the therapeutic benefits of work. Once locked into a job, employees can give free romp to their worst traits, and expect only indulgence. A company would have to be crazy to give anyone a chance under these circumstances, and lawyers are indeed taking over the personnel offices.

At the same time, the law stacks the incentives in favor of companies warehousing lost souls, and in favor of individuals allowing themselves to be warehoused when they might be happier and more successful elsewhere.

It's bad enough that people crank themselves into these vises out of their own disordered expectations. We ran a story Friday about a woman who rose quickly through the ranks of Duquesne Light, landed a top job, but quit and killed herself after a series of difficulties. Psychoanalyst Manfred Kets de Vries has written about executives who, after decades of dutiful corporate ascent, disintegrate upon reaching the top job. Luby's new CEO killed himself after one bad quarter.

The market sorts imperfectly, but the more diverse and flexible the market, the better the chances that people will end up finding their places. Jack Welch assures us that today's stock-optioned CEO is on the "lunatic fringe" compared to his predecessor of yesteryear. (He means in a good way.) CEOhood may not be everyone's cup of Prozac, but everyone can appreciate that the neurotic activities of our business elite throw off a lot of social wealth. In turn, somewhere somebody's Alzheimered grandmother can be indulged to soak up a lot of GDP rather than being left out for the wolves.

Trying to impose rules on this may be insane. The essence of a troubled personality is maladaptive rigidity: doing the same thing over and over and expecting a different result. So when will Washington get over believing it can regulate away all the friction of life?

TITLE: Risky Business // Accommodating Mental Illness On the Job  
COLUMN: Joan Beck  
BYLINE: Joan Beck  
CREDIT: Chicago Tribune.  
DATE: 05/11/97  
SOURCE: Tulsa World; TUL  
(Copyright 1997)

If an employee claims he has a phobia about rush-hour traffic, must he be given shorter work hours? If he says his poor performance review aggravated his depression, must his boss toss it out? If he is often late for work because he is hung over, must his boss accommodate his disability due to alcohol dependence?

You're trying to run a small business. One of your employees has been coming in late day after day, holding up other workers who are griping to you. When you confront the tardy employee he tells you he is taking medication for depression that makes him groggy in the mornings and it's too hard for him to make it to work on time.

Suddenly you're standing in the middle of a new regulatory minefield with only a sketchy map.

You are now required to consider your employee as disabled and entitled to reasonable accommodations on the job, according to new guidelines announced last week by the Equal Employment Opportunity Commission. You may have to give him more time off, put up with his coming in late, change his duties or cut him other kinds of slack.

The intent of the new regulations is to bring mental illness into parity with physical handicaps under the Americans with Disabilities Act of 1990. Who can fault that?

It's another victory for those who pushed a law through Congress last year requiring that, starting Jan. 1, health insurers must use the same annual and lifetime reimbursement caps for mental illnesses as for physical illnesses. That's fair -- and overdue.

But how far must employers now go to accommodate mental illness on the job? The answer isn't clear, especially when it's sometimes difficult even to diagnose mental illness or to distinguish it from other emotional distress.

An employer can install a ramp and enlarge a bathroom for a worker in a wheelchair or add amplification equipment to a phone for someone who is hearing-impaired. But what does he do when an

employee says he must have a private, isolated office because he has attention deficit disorder and is easily distracted or complains that his supervisor increases his level of stress?

How can an employer, or a manager, distinguish between laziness and mental disability in every case? Or know whether he can tell a worker with a bad attitude to shape up or must instead make reasonable accommodations for his behavior because it is caused by mental illness?

The EEOC's new guidelines are well-intended, presumably. Mental illness does need to be treated with the same level of help and understanding as physical illness. Accommodations in the workplace can keep many qualified people in their jobs, despite mental disabilities. The guidelines say employers don't have to lower their job performance standards.

But the EEOC has laid a new burden on employers and opened the way for lawsuits from workers who can claim that the reason they were fired, or not promoted, was because they were mentally disabled, not because they were rude, non-productive, hostile, couldn't get along with others or goofed off.

Employers can't ask job applicants if they have ever been mentally ill, says the EEOC. If a company orders a prospective employee to get a medical exam that includes a psychiatric evaluation, it must do the same for all new hires in the same job category and it can't turn down the applicant unless it can prove that the reason is job-related.

There are some mitigating words in the EEOC's guidelines. "Reasonable accommodations," for example, must be made unless they impose "undue hardship" on an employer or fellow workers. Among the accommodations the EEOC suggests are a sound-proof office, a later start on the job, a change in supervisors, a job coach to help with performance problems, a flexible work schedule, leaves of absence.

But many questions are still unanswered. If smoking, for example, is classified as nicotine dependence and a psychiatric disorder, must an employer provide a worker a time and place to smoke on demand -- because he is mentally disabled?

It's even trickier because, as the EEOC notes, a mentally ill person may not be able to tell his boss what kind of special accommodations he needs, although that doesn't let the employer off

the hook.

An employer can ask for a written diagnosis from the employee's doctor, but must be careful not to violate privacy laws. He must keep all psychiatric information confidential. And he can't tell a worker's colleagues that he is getting special treatment because he is mentally disabled, although he can say the company is "acting for legitimate business reasons or in compliance with federal law."

The EEOC is right to try to expand the protections and help of the Americans with Disabilities Act to give better coverage to those with mental illness. They have always been ignored, stigmatized, discriminated against and shortchanged in research, treatment, health benefits and job opportunities.

But the new rules, however good their intentions, are going to be a major pain for many employers. The definitions of mental illness are still too fuzzy and the lines sometimes too indistinct between what is genuine disability and what is bad attitude or lack of effort on the job or emotional reactions to ordinary stresses and disappointments in life.

Employers are going to find it more difficult to screen out problem workers before they are hired and harder to deal with them once they are on the payroll. More lawsuits are inevitable. Court decisions may or may not match EEOC guidelines. And more time and effort will have to go into complying with the new rules. It could be a major mess.

# When Work Is The Cure

By Sally L. Satel

**A**fter the Equal Employment Opportunity Commission recently announced that employers had to make special accommodations for mentally ill workers, the loudest protests, understandably, came from business. The ruling could mean that mentally disabled workers who feel "stressed" can demand time off. Those who are irritable, erratic or depressed can expect bosses and co-workers to tolerate their behavior.

## Job protection may hurt the mentally ill.

But the main victims in exempting mentally ill workers from accepted behavioral standards may be those workers themselves.

Mental health professionals have always regarded work as ideal therapy. It rewards discipline, responsibility and interpersonal skills. But the new Federal guidelines extend an invitation to people with personality disorders — those who are manipulative, emotionally needy and in poor control of anger and impulses — to engage their employers in power plays and then hide behind their disabilities.

My patients want to fit into society, to act and feel "normal," to be free of destructive patterns. This is the basis of their therapy. When they can't (or won't) conform to social norms, bending the rules of the workplace or the courtroom or the classroom doesn't solve their problems; it's likely to make them worse. With its ruling, the E.E.O.C. is committing the occupational equivalent of malpractice.

THE NEW YORK TIMES **OP-ED** SATURDAY, MAY 10, 1997

One of my former patients was a 28-year-old woman diagnosed with "borderline personality disorder" that manifested itself in a vicious temper. She threw things and was hostile to people who, she told me, "don't understand my needs." She was clearly too fragile for a normal job, but she entered a program sponsored by the Easter Seal Society that gave her a job coach, and she worked in a factory with other similarly supervised women.

My patient's goal was to get a "real" job, and this became the main goal of our therapy. We concentrated on helping her manage her temper and deal with other social situations, and she gradually improved. The day she got a regular job at aircraft assembly factory was one of the proudest of her life and marked a breakthrough in her treatment.

Her therapy was successful only because she had worked hard to deserve a real job. It would have been disastrous if, when she was still very demanding and unruly, she had been able to work in a regular office. She'd have learned nothing about self-control, and our therapy would have been undermined.

Sending dysfunctional people the message that the world — or in this case the workplace — revolves around them is the last thing they

*Sally L. Satel is a psychiatrist and a lecturer at Yale's School of Medicine.*

need. No competent clinician tolerates a patient's ritual lateness or verbal abuse. Ideally, the patients will internalize the psychiatrist's "limits," as my patient did. And in the end, the patient is usually grateful that the therapist held the line. How else is one to change unless compelled to face the consequences of one's actions?

The new guidelines might also lead

incompetent workers to think they are good at their jobs. Not even therapists who see self-esteem as the key to improvement could applaud that.

Missing this clinical point, mental health advocates have been quick to defend the new Federal guidelines, saying that compliance will be inexpensive — no new ramps to build, no equipment to buy. But the cost could be enormous. We can expect waves

of backlash discrimination as employers become skittish about hiring a class of people they'll never be able to fire. Co-workers' resentment will build as the stereotypical behaviors of the mentally ill go unchecked.

The new guidelines are a cruel ploy. By underestimating the ability of people to improve themselves, the Government is giving them every reason not to. □

# MENTAL ILLNESS

## *New guidelines on employee disabilities create confusion in the workplace*

If an employee claims he has a phobia about rush-hour traffic, must he be given shorter work hours? If she says her poor performance review aggravated her depression, must her boss toss it out? If he is often late for work because he is hung over, must his boss accommodate his disability due to alcohol dependence?

**JOAN BECK**



You're trying to run a small business. One of your employees has been coming in late day after day, holding up other workers who are griping to you. When you confront the tardy employee, he tells you he is taking medication for depression that makes him groggy in the mornings, and it's too hard for him to make it to work on time.

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You are now required to consider your employee as disabled and entitled to reasonable accommodations on the job, according to new guidelines announced last week by the U.S. Equal Employment Opportunity Commission. You may have to give him more time off, put up with his coming in late, change his duties or cut him other kinds of slack.

The intent of the new regulations is to bring mental illness into parity with physical handicaps under the Americans with Disabilities Act of 1990. Who can fault that?

It's another victory for those who pushed a law through Congress last year requiring health insurers to use the same annual and lifetime reimbursement caps for mental illnesses that they use for physical illnesses. That's fair — and overdue.

But how far must employers now go to accommodate mental illness on the job? The answer isn't clear, especially when it's sometimes difficult even to diagnose mental illness or to distinguish it from other emotional distress.

An employer can install a ramp and enlarge a bathroom for a worker in a wheelchair or add amplification equipment to a phone for someone who is hearing-impaired. But what does the boss do when an employee says she must

have a private, isolated office because she has attention deficit disorder and is easily distracted, or complains that her supervisor increases her level of stress?

How can an employer, or a manager, distinguish between laziness and mental disability in every case? Or know whether she can tell a worker with a bad attitude to shape up or must instead make reasonable accommodations for his behavior because it is caused by mental illness?

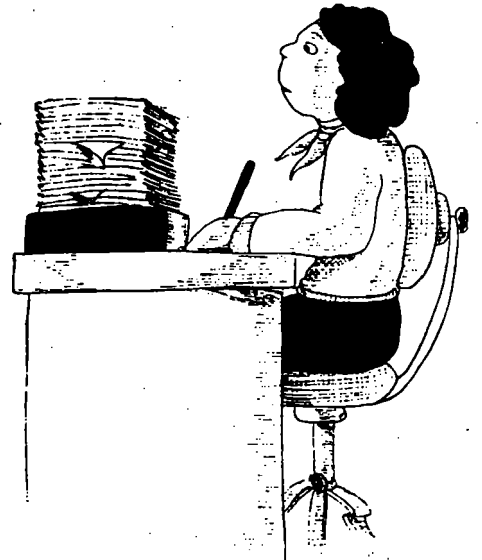
The EEOC's new guidelines are well-intended. Mental illness does need to be treated with the same level of help and understanding as physical illness. Accommodations in the workplace can keep many qualified people in their jobs, despite mental disabilities. The guidelines say employers don't have to lower their job performance standards.

### *The intent of the new regulations is to bring mental illness into parity with physical handicaps under the Americans with Disabilities Act.*

But the EEOC has laid a new burden on employers and opened the way for lawsuits from workers who can claim that the reason they were fired or not promoted was that they were mentally disabled, not that they were rude, nonproductive or hostile, couldn't get along with others or goofed off.

Employers can't ask job applicants if they have ever been mentally ill, says the EEOC. If a company orders a prospective employee to get a medical exam that includes a psychiatric evaluation, it must do the same for all new hires in the same job category, and it can't turn down the applicant unless it can prove that the reason is job-related.

There are some mitigating words in the EEOC's guidelines. "Reasonable accommodations," for example, must be made unless they impose "undue hardship" on an employer or fellow workers. Among the accommodations the EEOC suggests are a soundproof office, a later start time, a change in supervisors, a job



MARGARET SCOTT/Special to the Free Press

coach to help with performance problems, a flexible work schedule and leaves of absence.

But many questions are still unanswered. If smoking, for example, is classified as nicotine dependence and a psychiatric disorder, must an employer provide a worker a time and place to smoke on demand — because she is mentally disabled?

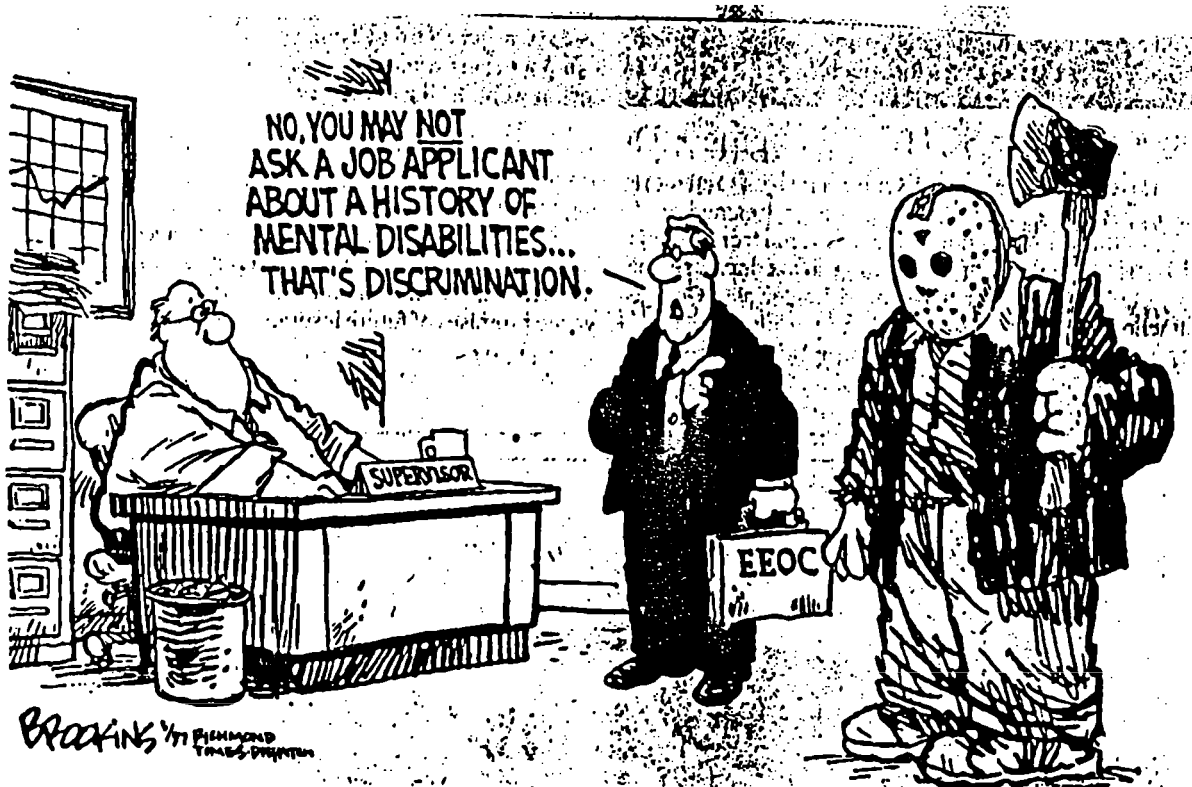
It's even trickier because, as the EEOC notes, a mentally ill person may not be able to tell his boss what kind of special accommodations he needs, although that doesn't let the employer off the hook.

An employer can ask for a written diagnosis from the employee's doctor but must be careful not to violate privacy laws. The boss must keep all psychiatric information confidential. And he can't tell a worker's colleagues that she is getting special treatment because she is mentally disabled, although he can say the company is "acting for legitimate business reasons or in compliance with federal law."

The EEOC is right to try to expand the protections and help of the Americans with Disabilities Act to give better coverage to those with mental illness. They have always been ignored, stigmatized, discriminated against and shortchanged in research, treatment, health benefits and job opportunities.

But the new rules are going to be a major pain for many employers, however good their intentions. The definitions of mental illness are still too fuzzy and the lines sometimes too indistinct between what is genuine disability and what is bad attitude or lack of effort on the job or emotional reactions to ordinary stresses and disappointments in life.

Employers are going to find it more difficult to screen out problem workers before they are hired, and harder to deal with them once they are on the payroll. More lawsuits are inevitable. Court decisions may or may not match EEOC guidelines. And more time and effort will have to go into complying with the new rules. It could be a major mess.



TITLE: Going too far with ADA and phony disabilities  
COLUMN: Joseph Perkins  
BYLINE: Joseph Perkins  
CREDIT: THE SAN DIEGO UNION-TRIBUNE  
DATE: 05/09/97  
SOURCE: The San Diego Union-Tribune; SDU  
CATEGORY: OP ED COLUMN;  
(Copyright 1997)

I was on the South Lawn of the White House in 1990 when George Bush signed the Americans with Disabilities Act, proclaiming "a new era of equality" for "our fellow citizens with disabilities." I cheered the new law like everyone else.

Seven years later, I see its manifestations.

They dug up the front lawn of the building where I work to triple the number of handicap parking spaces. And though the spaces have never been close to fully occupied, I nonetheless think it was a good thing to do.

The elevator in the building where I work was retrofitted not so long ago. Among other things, they lowered the elevator buttons below waist level and affixed braille numerals beside them. And though 99 percent of my co-workers neither use a wheelchair or are blind, I think that, too, was a good thing to do.

But even those of us who support the spirit of the ADA, who think it is a good thing to reasonably accommodate the special needs of competent, qualified disabled Americans, have to be troubled by some of the law's unintended consequences.

Indeed, when President Bush proudly affixed his signature to the disabled-rights legislation, he hardly could have imagined that of all the discrimination complaints filed under the law most have come not from Americans who are blind or deaf or those who use wheelchairs, but from folk claiming back problems (that's right).

Nor could he have imagined that the definition of disability under the law ("a physical or mental impairment that substantially limits one or more of life's activities") would be so broadly interpreted as to include drug and alcohol abusers.

That brings me to the guidelines issued by the Clinton Equal Employment Opportunity Commission last week that specify how employers are to accommodate workers with mental disabilities. In a fell swoop, the EEOC has all but guaranteed an explosion of discrimination lawsuits by workers claiming all manner of mental health problems.

It would be fine if the government had specified the mental illnesses covered by the ADA. Many, if not most, mental health experts can agree with five -- schizophrenia, manic depression, severe depression, obsessive-compulsive disorder and generalized anxiety disorder.

All are legitimate, diagnosable mental disorders that can be treated sufficiently to enable an individual to lead a productive work life.

But the EEOC has placed no limitation whatsoever on what may be considered a mental disability. A worker can, for instance, claim a "narcissistic personality disorder," the disability from which court-martialed Army drill instructor Delmar Simpson purportedly suffers.

Or he can claim a "sex addiction," like Michael Kennedy, who found himself unable to keep his hands off a 14-year-old baby-sitter.

### Exotic conditions

If workers can get some shrink or another to verify that they suffer from exotic mental condition or another, then employers are required under the EEOC's dictate to make every effort to accommodate them.

So a worker with a narcissistic personality disorder could be entitled to a mirrored office where he can admire himself all day. Or a worker addicted to sex could be entitled to watch porn films during coffee breaks. The EEOC may dismiss these scenarios as absurd or farfetched, but the agency's new rules bring them into the realm of possibility.

Indeed, in its guidelines, the EEOC says an employer may, for instance, have to "provide room dividers, partitions or other soundproofing or visual barriers between work spaces" for workers who have problems concentrating because of a mental condition.

It also advises that employers should be understanding of workers who

are chronically late, who exercise poor judgment or who display hostility to the boss or fellow workers because those traits "may be linked to mental impairments."

These mandates are not reasonable. They do not merely provide workplace equality for our fellow citizens with mental disabilities.

They give the mentally disabled workplace rights that are far above those of not only non-disabled workers, but physically disabled workers as well.

The ADA is a well-intentioned law that has yielded results that neither Congress nor President Bush envisioned in 1990. Even supporters of the law, like yours truly, recognize that the definition of disability has proven overly broad and that the workplace requirements imposed upon employers have become increasingly unreasonable.

# Late for work? Plead insanity

**H**ere's a quiz of your knowledge of the New World Rules:

Say you're a businessman who has a warehouse worker whose clothing is disheveled and tattered and whose behavior toward fellow employees is rude and abrupt. This clearly violates your company's employee handbook, which requires that workers must be neatly attired and that their interaction with fellow workers must be courteous. So you:

A. Refuse to let him treat your hard workers like crud. You fire him.

B. Prove your compassion and enlightenment by giving him fair warning that his conduct needs improvement. You offer to provide the necessary counseling, but warn him that in all fairness if he doesn't behave better, you'll fire him.

C. You inquire whether he's nuts, and if he is, you keep him around, trying to make sure he's happy. That may mean changing his work schedule to accommodate his "special needs" or keeping other employees out of his way. You don't fire him, because the government doesn't let you.

This being the '90s, I'm sure you picked the correct answer: C. Honest, I didn't make this up; this is an example cited by the U.S. Equal Employment Opportunity Commission in its new "policy guidance" (isn't government doublespeak grand?) for how employers, under the Americans With Disabilities Act, must handle workers who are crazy, er, mentally ill.



■ *With its guidelines on mentally ill workers, the EEOC is creating yet another protected class of people.*

**By Dennis Byrne**

The short of it is that employers may not discriminate against "qualified" mentally ill workers. That means that employers, in a job interview, cannot ask whether the applicant has a history of mental illness, including hospitalization. But once a mentally ill person is employed, you must take reasonable steps to "accommodate" him. That might mean special working hours, or extra time off. Or special work areas for those who bug their co-workers.

Any co-worker who wonders why Joe Blow is getting special, preferential treatment must not be told that Joe's got a mental problem, or a disorder that legally requires a "reasonable accommodation." All that co-workers may be told is that the company is "acting for legitimate business reasons or in compliance with federal law." In other words, shut up and go away.

Here, for example, is how the EEOC

would have you handle a chemical plant worker who suffers from bipolar disorder. Formerly called manic depression, it is characterized by bouts of great depression and periods of mania. Say the worker is assigned to rotating day, evening and night shifts, creating a problem for the taking of his medication. Under the EEOC's policy guidance, reassigning him, unlike anyone else, to a single, steady shift would be a "reasonable accommodation."

But don't even think of questioning whether it is smart and safe to have a manic depressive working in the explosive setting of a chemical plant.

And if you ask the EEOC if it is serious about the rude warehouse worker, it responds with a straight face that it was "a very carefully crafted example." After all, a spokeswoman said, he's "not a greeter at Disney World."

You shouldn't worry, she added, because a company is not required to enforce these rules if it creates an "undue hardship." Yes, replied a business spokesman, but one person's hardship is another person's reasonable accommodation. Which means, once again, it will take years of court decisions to sort it all out.

So how do you tell the difference between employees who are hotheaded, chronically late or nasty to co-workers just because they're jerks, from those who are hotheaded, etc., because they're deranged? This way: A worker who wants to have his bad behavior protected under the law will, in effect, have to bring a note from his doctor, certifying that he is unhinged.

What all this means is that if you are really troubled, your job is legally protected. You can stay. But if you aren't troubled enough to be a threat to yourself and your co-workers, your job isn't protected. You can go.

In its rush to create legally protected classes of people, Washington has granted special rights and considerations to people who engage in anti-social and destructive behavior, the sort of rights and considerations the rest of us don't have.

Makes you wonder about the mental health of the folks who made these rules.

*Dennis Byrne is a member of the Sun-Times editorial board. E-mail: dbyrne@suntimes.com*

TITLE: IS WORK MAKING YOU CRAZY? ADA HAS YOU COVERED  
BYLINE: Bob Wiemer  
DATE: 05/08/97  
SOURCE: The Sacramento Bee; SBEE  
(Copyright 1997)

SICK PEOPLE aren't funny, but some of the rules governing the treatment of the mentally ill in the workplace are the very stuff of farce. The Equal Employment Opportunity Commission, which promulgated those rules last month, is what Tom Wolfe called a "flak catcher," an employee or agency that absorbs criticism and even vilification so elected officials can avoid political discomfort.

In this case, the EEOC is getting Congress out of a very uncomfortable position. The Americans With Disabilities Act of 1990 is an unwieldy mish-mash of noble sentiments and cynical accommodation to the notion that euphemism triumphs over all. Thus, under its definitions, no one is crippled or handicapped. There are only challenged people. The Americans With Disabilities Act renders that nice, but sappy, sentiment into law.

Congress enacted the law because it was easier than facing the lobbying tactics of the disabled. Marshaling a mass of twisted bodies on gurneys and in wheelchairs is such an effective technique that the disabled seldom leave Washington without the law they came for. That's why bathroom accommodations and parking spaces for the handicapped far outnumber the people who need them.

In extending this workplace equality to psychotics, Congress magisterially declared it law and left the development of regulations up to the EEOC, thus letting the commission take the blame for the bill drafters' idiocies.

Among the regulations promulgated the other day are these: Employers may not ask potential employees if they are mentally ill or if they have a history of mental illness. Nor can they ask employees who are known to be mentally sick if they have been taking their medications. Nonetheless, employers must make a "reasonable accommodation" to any acute-stage behavior that might pop up on the job. Thus, an employee who is rude to co-workers or comes to work looking dirty or disheveled can't be routinely disciplined if he or she can convince a therapist that the behavior arises out of any item on a constantly expanding list of mental and emotional diseases.

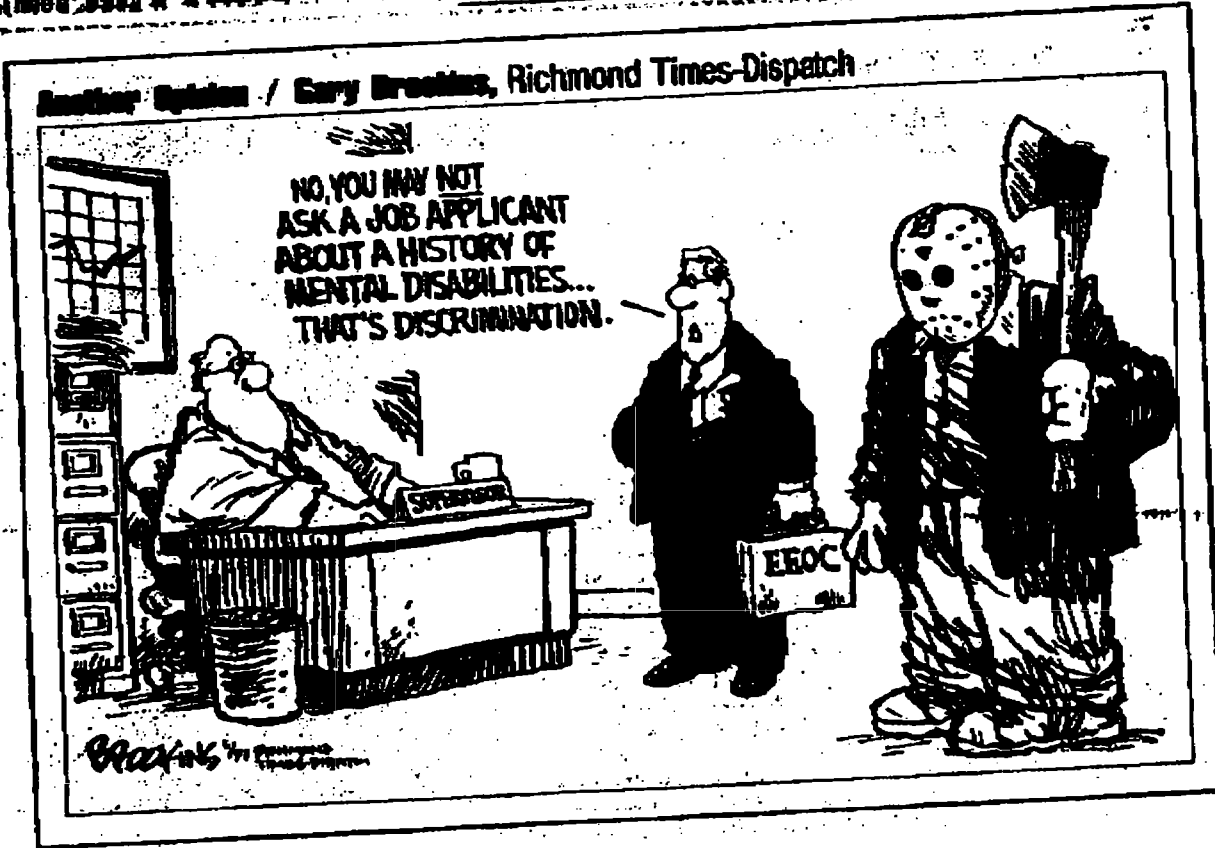
In his short essay "On the Verge of Dementia Praecox," humorist

Robert Benchley feared he was coming down with that malady because one of the symptoms is an inability to concentrate. Benchley confessed that someone could sit on his chest and shout in his face and still not get his attention. Under EEOC regulations, an employer would be required to install soundproofing or erect partitions or other visual barriers to enhance concentration for someone such as Benchley.

WHAT'S MORE, the regulations forbid the employer from disclosing a worker's mental problems. So when people who behave strangely are getting what seem to be special perks, including soundproofed, private work spaces, schedule changes, job coaches or time off, other employees are left to take up the slack and wonder about what's going on.

The workplace trend toward using independent contractors and casual part-timers can only be exacerbated by these regulations. Where's the fairness in that? And where will the EEOC and the courts draw the line on public safety? Will melancholy pilots or bus drivers be allowed to work? And if not, what about suicidal trailer-truck drivers?

Another Opinion / Gary Brooks, Richmond Times-Dispatch



TITLE: ADA Guidelines Go Too Far  
DATE: 05/06/97  
SOURCE: The Salt Lake Tribune; SLTR  
(Copyright 1997)

When does an employer have the right to take corrective action with an employee who becomes agitated by the noise of co-workers, shows up late for work or refuses to work with a supervisor?

Possibly never, if Americans With Disabilities Act guidelines, released last week by the federal Equal Employment Opportunity Commission, are not rewritten.

Because employers could lose power to address job problems like those described above, the workplace has just become less equitable and reliable.

The irony is that these guidelines were a good idea. The act directed employers to make reasonable accommodations for employees with disabilities. It left the definition of "reasonable accommodations" to the employer and employee. In most cases, that seemed to work. But for obvious reasons, employees and employers wanted more detail, particularly in the area of mental disability.

What they got was a lot of nonsense.

The accommodations the government now says are reasonable for a mentally disabled employee include putting up barriers to isolate people readily distracted by noise, reassigning workers to new, less troublesome tasks, changing work schedules to better accommodate medications and treatments, changing supervisors' management styles and more. For example, an employee could be hired for a morning shift and then tell an employer his or her mental disability requires afternoon work. The change in schedule could be required.

More than management, however, it will be co-workers and mentally disabled employees themselves who will pay the price for these guidelines. That price will be paid in the form of resentment, cynicism and possibly more subtle forms of job discrimination.

As it has done too often, the federal government went too far in writing these ADA recommendations, and victims of this excess will be the very people the standards were meant to protect. For the good of the mentally disabled, the guidelines should be rewritten.

TITLE: EMPLOYING MENTALLY ILL WORRIES BOSSES MANDATE FOR 'PARITY'  
TO OTHER  
DISABILITIES OPENS UNCHARTED AREA  
BYLINE: Sheryl Gay Stolberg 1997, New York Times News Service  
DATE: 05/06/97  
SOURCE: St. Louis Post-Dispatch; SLMO  
(Copyright 1997)

IMAGINE, for a moment, that you are Joe Widgetmaker, chief executive of a small, family-owned company. You hire a blind person; you install Braille buttons in the elevator.

You hire a paraplegic; you build a ramp and lower the water fountain. You do this because you are a nice guy. Not to mention that federal law requires it.

But what if your foreman is depressed and sleepless and can't show up on time to get the assembly line rolling? What if your clerk has obsessive-compulsive disorder and persists in addressing the same envelope 100 times?

Should every employer, in the words of Dr. Allan Lans, a New York City psychiatrist, be required to offer "a little wheelchair access for the mentally ill?"

That is precisely what the Equal Employment Opportunity Commission ordered last week, with a clarification of the Americans with Disabilities Act of 1990. Business owners, the commission declared, may not discriminate against otherwise qualified workers with mental illness.

They may not ask job applicants if they have ever been mentally ill, and they must take "reasonable steps" to accommodate employees with psychiatric or emotional problems.

That could mean anything from a flexible schedule for an anxious person to a desk near a window for a person who grows depressed with too little light to a quiet work space for a schizophrenic.

Underlying this new set of rules is the assumption that physical illness and mental illness should be treated as one and the same. But can they? Are depression and schizophrenia akin to diabetes and deafness? Does a troubled mind heal the way a broken leg does?

In the world of psychiatry, this concept is known as parity. And parity is what advocates for the mentally ill have been trying to achieve for years.

Sens. Pete Domenici, R-N.M., and Paul Wellstone, D-Minn., both of whom have had mental illness in their families, put the issue prominently on the public agenda last year when they introduced a law requiring that insurers set the lifetime and annual reimbursement caps as high for mental illness as for physical illness. Congress adopted the law; it will go into effect Jan. 1.

But the guidance from the Equal Employment Opportunity Commission takes parity into some new territory, and there is little agreement even among mental health experts about what parity truly means.

Experts say certain mental illnesses are no harder to diagnose or treat than physical ailments. And the mental illnesses that defy easy diagnosis, such as minor depression and adjustment disorders, are no trickier than, say, lower back pain - the most frequently cited reason for claims filed under the Americans with Disabilities Act.

But just how flexible must employers be? The National Institute of Mental Health estimates that, in the course of a year, one in 10 Americans experiences some disability from a diagnosable mental illness. Are they all entitled to allowances? Are sex addicts and sadists supposed to have their illnesses accommodated at work? These are deceptively hard questions at a time when every minor tic seems to have a diagnostic label.

#### Fear Of A Backlash

To borrow a phrase from Dr. Peter D. Kramer, a psychiatry professor at Brown University and author of "Listening to Prozac," this is an era of "diagnostic bracket creep."

Remember when attention deficit disorder was nothing more than short attention span? Or when voyeurs - who are now included in the Diagnostic and Statistical Manual of Mental Disorders - were simply Peeping Toms?

Now nicotine dependence is classified as a psychiatric disorder along with alcoholism and other serious drug addictions.

Does that mean that smokers need regularly scheduled breaks?  
Can they sue if their bosses don't permit them?

That is probably not what Congress intended when it passed the Americans with Disabilities Act. But there is so much skepticism about the new interpretation of the act that some mental health advocates fear a backlash against the mentally ill.

Among them is Dr. Kay Redfield Jamison, a psychiatry professor at Johns Hopkins University who chronicles her own battle with manic-depressive disorder in her book "An Unquiet Mind."

"Psychiatry," she said, "has brought this on itself in some respects by making everything a diagnosis and by being sort of absurd, not really making clear-cut distinctions between very serious illnesses and things that are part of the human condition."

Jamison said that mental health experts have debated about whether health insurance coverage should be limited to five major mental illnesses - severe depression, schizophrenia, manic depression, obsessive-compulsive disorder and generalized anxiety disorder. All are extremely debilitating, and all can be diagnosed and treated.

#### Small Businesses Worried

Employers, particularly small-business owners, are terrified. A physical disability is easy to spot. But illnesses of the mind are much harder to see.

"The potential for abuse is greater for a small-business owner," said Mary Reed, spokeswoman for the National Federation of Independent Business Owners, which has 600,000 members. "It's more obvious and can be proven more readily if someone is deaf or in a wheelchair. But if someone has chronic lateness or a pattern of hostility, it is more difficult for the small-business owner to know that there is a legitimate disability."

Kramer, the author of the Prozac book, scoffs at the threat of abuse. The stigma attached to psychiatric disabilities is so strong, he said, that sufferers go out of their way to hide their illness, not flaunt it. "I don't see people lining up to say, 'I have a mental illness. I need a day off from work.'"

Moreover, there is considerable evidence that people with

mental disabilities, even serious mental illnesses, can work productively. Dr. David Drake, a research psychiatrist at Dartmouth Medical School, has studied the experiences of more than 1,000 mentally ill people who work in entry-level jobs and has found that they are typically very good employees whose only problems are adjusting to the social milieu of the workplace, and not the work itself.

But there are unanswered questions. Dr. David Mechanic, director of the Institute for Health Care Policy and Aging at Rutgers University, raises a crucial one: "At what point does the need to make accommodations get in the way of productivity?"

That is exactly what Eammon McGeady is wondering. He is president of Martin G. Imbach Inc. in Baltimore, a 50-person company that builds piers, bridges and other marine construction projects. His company, he said, is divided into crews of six people; in each crew there is a crane operator.

"Now if that crane operator says to one of my superintendents, 'I can't come to work until 9 o'clock because I don't like to drive in traffic. I have a phobia.' What do I do with the other five folks?"

Ultimately, it will be left to the courts to decide, and this is what frightens employers the most. Then again, accommodating people with mental illness is hardly unprecedented.

Just last week, before the federal guidelines were announced, the New York Mets disclosed that a pitcher, Pete Harnisch, would be spending time on the disabled list. The reason: depression.

Lans, the New York City psychiatrist, is the director of the Mets' employee assistance program. While he would not discuss the Harnisch case, citing patient confidentiality, he said this was not the first time a major league player had been placed on the disabled roster for an emotional problem. And he was jubilant over the new guidelines.

"Hooray!" he said cheerily. "The idea that the American workplace is this strictly organized, highly functional, extremely efficient group of people going about their business is something out of '1984.'

"Humans are not like that. Humans are messy; no two are alike.

You can put them all in the same size cubicle, and they do different things. Just look at how people decorate their cubicles, they all have their own signatures. I'm not advocating the violent overthrow of the American workplace, but a little humanism is not a bad idea."

TITLE: EEOC: POLITICAL ASYLUM  
DATE: 05/05/97  
SOURCE: Richmond Times-Dispatch; RCHD  
(Copyright 1997)

The government told employers today that they may not discriminate against qualified workers with mental illness. . . and must take reasonable steps to accommodate employees with psychiatric or emotional problems. The guidance, issued by the Equal Employment Opportunity Commission. . . said (employers) may have to allow extra time off from work, alter work schedules or assignments, and make physical changes in the workplace as a 'reasonable accommodation' for employees with mental disabilities. . . . Such disabilities may include major depression, bipolar disorder (manic depression), schizophrenia, and personality disorders. . .

-- The New York Times.  
MEMORANDUM

FROM: I.M. "Hugh" Morless, EEOC Director

TO: All employers

RE: Update of the 1997 Guidance Regarding Mentally Ill Employees

Dear Employer:

As a lawful employer registered with the Department of Labor, you are required by the 1990 Americans with Disabilities Act to make reasonable accommodations to employees with disabilities. Please be advised the following 1998 Amendments to the ADA have been made to update the list of federally recognized disabilities (Note -- you are required by law to post these addenda in a prominent area of the workplace):

Part I: Addenda. Paranoid psychosis; dementia; criminal insanity; catatonia (persistent vegetative state); morbidity (death).

Part II: Definitions. (1) Reasonable accommodation: A "reasonable accommodation" is now deemed to be one enabling the disabled employee to perform up to the level of an abled employee. For instance, in the case of an employee with carpal tunnel

syndrome, this might require the provision of an ergonomic keyboard; in the case of an employee suffering from schizophrenic delusions and withdrawal from reality, the employer may wish to lock all other employees in a reinforced steel cage to guarantee their safety.

### Part III: Frequently Asked Questions.

Q: I own a small run-down hotel on a lonely stretch of highway. My front desk manager has stashed his dead mother in an upstairs room and taken to stabbing female guests with a kitchen knife when they're in the shower. Can I terminate this employee?

A: No. Appropriate action in this situation would be to suggest counseling for the employee or, should the employee decline counseling, to suggest sensitivity training for guests who continue to stigmatize such behavior as somehow "wrong" or "disturbed."

Q: As a regional branch manager for the U.S. Postal Service, I have a number of employees who have begun brandishing firearms and repeatedly muttering, "I see it -- coming here -- hell-wind -- black wings -- yog-Sothoth save me -- the three-lobed burning eye -- in the House of Cthulhu my father lies dreaming." Should I be concerned?

A: No. Obsessive-compulsive fixation on the coming of the Elder Gods is recognized by the American Psychiatric Association's Diagnostic and Statistical Manual (Fourth Edition) as a chronic benign mental disorder; violence by Postal employees ("going postal") will be similarly recognized in the Fifth Edition. As such, employees exhibiting these traits are protected by federal law against discrimination.

Q: One of my employees recently was hit by a bus and killed. Can she be replaced?

A: Not without cause, and not until the EEOC has approved your Form 765(c)(31), Request for Approval of Termination of Terminal Employee. Refer to your state equal-employment office for further restrictions.

**UNFAVORABLE**

Rocky Mountain News  
Sunday, May 4, 1997

MAY-06-97 12:40 From: EEOC DENVER DISTRICT

## THE INSIDE STORY

# It's just what the government ordered

EEOC says businesses must aid those with mental disorders

By Sheryl Gay Stolberg

*The New York Times*

Imagine, for a moment, that you are Joe Widgetmaker, chief executive of a small family-owned company. You hire a blind person; you install Braille buttons in the elevator

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**FLIP TO INSIDE BACK PAGE 74**

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T-138 P.03/04 Job-148

# All disabilities to be treated as one and same

Continued from 3A

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## Concept known as parity

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Jamison said that mental health experts have debated about whether health insurance coverage should be limited to five major mental illnesses — severe depression, schizophrenia, manic depression, obsessive-compulsive disorder and generalized anxiety disorder. All are debilitating, and all can be diagnosed and treated.

"What's unfortunate," she said, "is that there is a huge science that underlies most of the major mental illnesses in terms of diagnosis and treatment, but it gets canceled out by all this kind of squishy stuff."

## Rules scare business owners

Employers, particularly small-business owners, are terrified. A physical disability is easy to spot. But illnesses of the mind are much harder to see.

"The potential for abuse is greater for a small-business owner," said Mary Reed, spokeswoman for the National Federation of Independent Business Owners, which has 600,000 members.

"It's more obvious and can be proven more readily if someone is deaf or in a wheelchair. But if someone has chronic lateness or a pattern of hostility, it is more difficult for the small-business owner

to know that there is a legitimate disability."

Kramer, the author of the Prozac book, scoffs at the threat of abuse. The stigma attached to psychiatric disabilities is so strong, he said, that sufferers go out of their way to hide their illness, not flaunt it.

"I don't see people lining up to say, 'I have a mental illness. I need a day off from work,'" he said.

Moreover, there is considerable evidence that people with mental disabilities, even serious mental illnesses, can work productively.

Dr. David Drake, a research psychiatrist at Dartmouth Medical School, has studied the experiences of more than 1,000 mentally ill people who work in entry-level jobs and has found that they are typically very good employees whose only problems are adjusting to the social milieu of the workplace and not the work itself.

But there are unanswered questions. Dr. David Mechanic, director of the Institute for Health Care Policy and Aging at Rutgers University, raises a crucial one: "At what point does the need to make accommodations get in the way of productivity?"

That is exactly what Eammon McGeedy wonders. He is president of Martin G. Imbach Inc. in Baltimore, a 50-person company that builds piers, bridges and other marine construction projects.

His company, he said, is divided into crews of six people; in each crew there is a crane operator.

"Now if that crane operator says to one of my superintendents, 'I can't come to work until 9 o'clock because I don't like to drive in traffic; I have a phobia. What do I do with the other five folks?'"

Ultimately, it will be left to the courts to decide; and this is what frightens employers the most.

Then again, accommodate people with mental illness is hardly unprecedented.

Just last week, before the federal guidelines were announced, New York Mets disclosed the pitcher, Pete Harnisch, would spend time on the disabled list.

The reason: depression. Alan L. Lins, the New York City laborist, is the director of the employee assistance program.

While Lins would not discuss the Harnisch case, citing confidentiality, he said this was the first time a major league pitcher had been placed on the disabled list for an emotional problem. He was jubilant over the guidelines.

"Hooray!" he said cheerfully. "The idea that the American workplace is this strictly organized, highly functional, extremely efficient group of people go about their business is something out of 1984."

"Humans are not like things. Humans are messy; no two are alike. You can put them all in the same size cubicle and they do different things. Just look at how people decorate their cubicles; they all have their own signature. I'm not advocating the violent overthrow of the American workplace, but a little humanism is a bad idea."

But if nothing else, the guidelines may heighten public awareness of just how many people are emotionally impaired.

"There are very few people who are completely mentally healthy or completely mentally ill," said Arthur Caplan, who heads the Center for Bioethics at the University of Pennsylvania. "I think we are going to realize through this kind of policy that the force is much closer to Allen than to Marcus Welby."

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# Breaks for Mental Illness: Just What the Government Ordered

THE NEW YORK TIMES,

SUNDAY MAY 4, 1997

By SHERYL GAY STOLBERG

**I**MAGINE, for a moment, that you are Joe Widget-maker, chief executive of a small family-owned company. You hire a blind person, you install Braille buttons in the elevator. You hire a paraplegic, you build a ramp and lower the water fountain. You do this because you are a nice guy. Not to mention that Federal law requires it.

But what if your foreman is depressed and sleepless and can't show up on time to get the assembly line rolling? What if your clerk has obsessive-compulsive disorder and persists in addressing the same envelope 100 times?

Should every employer, in the words of Dr. Allan Lans, a New York City psychiatrist, be required to offer "a little wheelchair access for the mentally ill"?

That is precisely what the Equal Employment Opportunity Commission ordered last week, with a clarification of the American Disabilities Act of 1990. Business owners, the commission declared, may not discriminate against otherwise qualified workers with mental illness. They may not ask job applicants if they have ever been mentally ill and they must take "reasonable steps" to accommodate employees with psychiatric or emotional problems.

That could mean anything from a flexible schedule for an anxious person, to a desk near a window for a person who grows depressed with too little light, to a quiet work space for a schizophrenic.

Underlying this new set of rules is the assumption that physical illness and mental illness should be treated as one and the same. But can they? Are depression and schizophrenia akin to diabetes and deafness? Does a troubled mind heal the way a broken leg does?

In the world of psychiatry, this concept is known as parity. And parity is what advocates for the mentally ill have been trying to achieve for years.

Senators Pete Domenici, Republican of New Mexico, and Paul Wellstone, Democrat of Minnesota, both of whom have had mental illness in their families, put the issue prominently on the public agenda last year when they introduced a law requiring that insurers set the lifetime and annual reimbursement caps as high for

mental illness as for physical illness. Congress adopted the law; it goes into effect next Jan. 1.

But the guidance from the Equal Employment Opportunity Commission takes parity into some new territory, and there is little agreement even among mental health experts about what parity truly means.

Experts say certain mental illnesses are no harder to diagnose or treat than physical ailments. And the mental illnesses that defy easy diagnosis, like minor

Underlying the new rules is the assumption that physical illness and mental illness should be treated as one and the same. That's arguable.

depression and adjustment disorders, are no trickier than, say, lower back pain — the most frequently cited reason for claims filed under the Americans With Disabilities Act.

But just how flexible must employers be? The National Institute of Mental Health estimates that, in the course of a year, 1 in 10 Americans experiences some disability from a diagnosable mental illness. Are they all entitled to allowances? Are sex addicts and sadists supposed to have their illnesses accommodated at work? These are deceptively hard questions at a time when every minor tic seems to have a diagnostic label.

To borrow a phrase from Dr. Peter D. Kramer, a psychiatry professor at Brown University and author of "Listening to Prozac," this is an era of "diagnostic bracket creep."

Remember when attention deficit disorder was nothing more than short attention span? Or when voyeurs — who are now included in the Diagnostic and Statistical Manual of Mental Disorders — were simply

Peeping Toms? Now nicotine dependence is classified as a psychiatric disorder along with alcoholism and other serious drug addictions.

Does that mean that smokers need regularly scheduled breaks? Can they sue if their bosses don't permit them?

That is probably not what Congress intended when it passed the Americans With Disabilities Act. But there is so much skepticism about the new interpretation of the act that some mental health advocates fear a backlash against the mentally ill.

Among them is Dr. Kay Redfield Jamison, a psychiatry professor at Johns Hopkins University who chronicles her own battle with manic-depressive disorder in her book "An Unquiet Mind."

"Psychiatry," she said, "has brought this on itself in some respects by making everything a diagnosis and by being sort of absurd, not really making clear-cut distinctions between very serious illnesses and things that are part of the human condition."

Dr. Jamison said that mental health experts have debated about whether health insurance coverage should be limited to five major mental illnesses — severe depression, schizophrenia, manic depression, obsessive-compulsive disorder and generalized anxiety disorder. All are extremely debilitating, and all can be diagnosed and treated.

"What's unfortunate," she said, "is that there is a huge science that underlies most of the major mental illnesses in terms of diagnosis and treatment, but it gets canceled out by all this kind of squishy stuff."

## Employers Are Terrified

Employers, particularly small-business owners, are terrified. A physical disability is easy to spot. But illnesses of the mind are much harder to see.

"The potential for abuse is greater for a small-business owner," said Mary Reed, spokeswoman for the National Federation of Independent Business Owners, which has 600,000 members. "It's more obvious and can be proven more readily if someone is deaf or in a wheelchair. But if someone has chronic lateness or a pattern of hostility, it is more difficult for the small-

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THE NEW YORK TIMES, SUNDAY, MAY 4, 1997

# It's Just What the Government Ordered

Continued From Page 1

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Dr. Kramer, the author of the Prozac book, scoffs at the threat of abuse. The stigma attached to psychiatric disabilities is so strong, he said, that sufferers go out of their way to hide their illness, not flaunt it. "I don't see people lining up to say, 'I have a mental illness. I need a day off from work.'"

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It seems unlikely that people are going to be lining up to say, 'I have a mental illness. I need a day off from work.'

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led the experiences of more than 1,000 mentally ill people who work in entry-level jobs, and has found that they are typically very good employees whose only problems are adjusting to the social milieu of the workplace, and not the work itself.

But there are unanswered questions. Dr. David Mechanic, director of the Institute for Health Care Policy and Aging at Rutgers University, raises a crucial one: "At what point does the need to make accommodations get in the way of productivity?"

That is exactly what Eammon McGeedy is wondering. He is president of Martin G. Imbach Inc. in Baltimore, a 50-person company that builds piers, bridges and other

marine construction projects. His company, he said, is divided into crews of six people; in each crew there is a crane operator.

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Ultimately, it will be left to the courts to decide, and this is what frightens employers the most. Then again, accommodating people with mental illness is hardly unprecedented. Just last week, before the Federal guidelines were announced, the New York Mets disclosed that a pitcher, Pete Harnisch, would be spending time on the disabled. The reason: depression.

Dr. Lans, the New York City psychiatrist, is the director of the Mets' employee assistance program. While he would not discuss the Harnisch case, citing patient confidentiality, he said this was not the first time a major league player had been placed on the disabled roster for an emotional problem. And he was jubilant over the new guidelines.

"Hooray!" he said cheerily. "The idea that the American workplace is this strictly organized, highly functional, extremely efficient group of people going about their business is something out of '1984.'"

"Humans are not like that. Humans are messy; no two are alike. You can put them all in the same size cubicle and they do different things. Just look at how people decorate their cubicles, they all have their own signatures. I'm not advocating the violent overthrow of the American workplace, but a little humanism is not a bad idea."

If nothing else, the new guidelines may heighten public awareness of just how many people are emotionally impaired.

"There are very few people who are completely mentally healthy or completely mentally ill," said Dr. Arthur Caplan, who heads the Center for Bioethics at the University of Pennsylvania. "I think we are going to realize through this kind of policy that our work force is much closer to Woody Allen than to Marcus Welby."

# What to Do When the Limousine Driver Is Manic-Depressive

*To answer some of the questions that employers and employees have about their obligations and rights under the Americans with Disabilities Act (ADA), the Equal Employment Opportunity Commission issued a compliance guide. It includes cases designed to show, for example, how an employer would decide whether an employee has a psychiatric disability that must be accommodated, when a worker may be removed from his position because his disability poses a direct threat or when an employer can ask about an individual's psychiatric disability. Here are some of the examples.*

## Lovesick Worker

An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was most distressed for about a month during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment was short-term, did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. This employee does not have a disability for purpose of the ADA.

## Reckless Chauffeur

A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin around-the-clock labor negotiations during the next several weeks. The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly . . . The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

## Cashier With Dry Mouth

A retail employer does not allow individuals working as cashiers to drink beverages at checkout stations. The retailer also limits cashiers to two 15-minute breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in or-

der to combat dry mouth, a side-effect of his psychiatric medications. This individual requests reasonable accommodation. In this example, the employer should consider either modifying its policy against drinking beverages at checkout stations or modifying its policy limiting cashiers to two 15-minute breaks each day plus a meal break, barring undue hardship.

## Sloppy Box-Loader

An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social . . . The employee company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of co-workers, the employee explains that his appearance and demeanor have deteriorated because of his disability . . .

The dress code and co-worker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Application of these rules to this employee would violate the ADA.

## Loud Librarian

A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and co-workers. After receiving a suspension . . . she discloses her disability, states that it causes her behavior and requests a leave of absence for treatment. The employer may discipline her because she violated a conduct standard — a rule prohibiting disruptive behavior towards patrons and co-workers — that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship.

## Medicated Saw Operator

An individual receives an offer for a job in which she will operate an electric saw, conditioned on a post-offer medical examination. In response to questions at this medical examination, the individual discloses her psychiatric disability and states that she takes a medication to control it. This medication is known to sometimes affect coordination and the company doctor determines that the individual experiences negligible side effects from the medication because she takes a relatively low dosage. She also had an excellent safety record at a previous job, where she operated similar machinery while taking the same medication. This individual does not pose a direct threat.

SUNDAY, MAY 4, 1997

THE NEW YORK TIMES,

3/5

TITLE: New Washington rules: They may drive you mad  
COLUMN: Richard Oppel  
BYLINE: Richard Oppel  
DATE: 05/04/97  
SOURCE: Austin American-Statesman; AAS  
(Copyright 1997)

Let's say you are always late for work. You make dumb decisions. You threaten the guy or gal at the next desk. Are you a candidate for a firing?

I'd have said yes, until last Tuesday.  
That's when that question became blurry.

Why? Because how the boss treats the "mentally impaired" in the workplace under the Americans With Disabilities Act of 1990 became the subject of "clarification" by the Equal Employment Opportunity Commission.

As in the case of some other directives from Washington, the guidelines seem to confuse as much as clarify. While protecting the mentally impaired, the new rules appear to disserve other workers and make greater guesswork of the manager's job.

Robert Pear's article in The New York Times (published Thursday in the American-Statesman) reported the government's advice to employers: Don't discriminate against qualified workers with mental illness. Don't ask job applicants if they have a history of mental illness. And take reasonable steps to accommodate employees with psychiatric or emotional problems.

So, if you are "mentally impaired," you can go to the boss and demand your own cubicle, better working hours and time off to deal with your depression.

A critic of the EEOC's action runs the risk of being viewed as a bigot mired in the "myths, fears and stereotypes" of mental illness, as the EEOC's associate legal counsel, Peggy Mastroianni, described the environment.

We should not stigmatize mental illness. Many mentally ill work productively. The EEOC's new guidelines say the following afflictions are protected in the workplace: major depression, bipolar disorder (manic depression), schizophrenia, obsessive-compulsive disorder and personality disorders.

But a civil society is built on balancing individual and collective rights, and clear lines to limit behavior that encroaches.

A new Austin is emerging, an Austin of entrepreneurs who rely on their wits, competitiveness, creativity and ability to allocate capital and talent to produce new products and services. They are bringing today's prosperity, and they and other proprietors of new and fledgling businesses are the people I worry about most when I think of the EEOC's new guidelines.

Under the rules, the employer may have to provide "room dividers, partitions or other soundproofing or visual barriers between spaces" to help employees who have difficulty concentrating because of a mental illness.

The EEOC's clarification is ambiguous doublespeak. Employers: 1) are not required to "lower their standards for performance" but 2) may have to allow extra time off from work, alter work schedules or assignments and make physical changes in the workplace as a "reasonable accommodation" for employees with mental disabilities.

Isn't tolerating no-shows or late-shows by employees a lowering of standards? Isn't erecting room dividers to wall off an employee who harasses others a lowering of standards?

Our government increasingly staggers deeper into obtuse ambiguity. The EEOC guideline is government saying to the employer, "We won't tell you what it is, but do the right thing, and if you're wrong, beware." The practical effect of the welter of workplace regulations, court rulings and enforcement customs is becoming a sea anchor against the characteristics of enterprise: risk-taking, efficiency, speed and high productivity.

But, still, you might argue, aren't workers better off in 1997 because of employment and workplace rules?

In many ways, they are. Parental leave has improved family life. Reforms on the factory floor have made the workplace a safer place.

However, there is a relationship between the growing body of regulations and new negatives in the private sector. If you are just graduating from college, you know how difficult it is to get a full-time permanent job of quality. Many young people face only temporary, probationary or contract jobs.

Those lower-quality jobs were constructed by employers who believe that once you hire someone, it is virtually impossible to fire them. Screenings for drug use, which only a decade ago many saw as a violation of privacy, now are standard practice because employers can't afford to buy a career-long treatment liability.

Also, many small businesses are forced to merge and consolidate because of the need for greater efficiency in responding to regulations.

Worst of all, as long as laws and regulations protect the unproductive worker, the productive worker cannot fully be rewarded. The law of averages takes over.

The real insanity here is the new EEOC rules.

Sat., May 9, 1997 Rocky Mountain News

# Rocky Mountain News

Larry D. Strutton, *Publisher, President & Chief Executive Officer*

Robert W. Burdick, *Editor*

John Temple, *Managing Editor*

Vincent Carroll, *Editor of the Editorial Pages*

Linda S. Dreger, *Sunday Editor*

*"Give light and the people will find their own way"*

## EDITORIALS

# Mandated job coaches?

**THE ISSUE:**  
Guidelines for employers' handling of mentally ill

**OUR VIEW:**  
Second-guessing by courts will become the rule

The government has issued some startling guidelines further clarifying the Americans With Disabilities Act's provisions on mental illness. What on earth can officials have been thinking?

Not only must employers refrain from inquiring about a job applicant's mental history in deciding whether to hire the person,

the guidelines say employers may have to make extraordinary accommodations for people with mental health problems. It might be necessary, for instance, to build a partition around someone if he is too easily distracted by others. Or an employer might be required to provide a job coach for an employee with certain sorts of psychological problems.

The law can also mean that an employer will have to forego longstanding workplace rules bothersome to a mentally disturbed employee. Even rude behavior or chronic lateness might be signs of mental disturbance, and defended on that basis.

If these particulars strike you as overkill, that's because they are. To be sure, discrimination by an employer on the basis of a dis-

ability is wrong, at least when that disability has nothing to do with performance on the job or the efficiency and safety of the workplace. But this law dictates that disabilities be disregarded even when they are pertinent to a host of business issues. It subordinates a number of other values to just this one, and it substitutes regulations written in Washington for the on-the-spot assessments of managers.

The members of Congress who voted for the law may want you to think the excesses are not their fault because, after all, these interpretations are being promulgated by the Equal Employment Opportunity Commission. The excuse doesn't work. When Congress produces these laws, it too often and quite knowingly leaves it to the bureaucrats to fill in the blanks. The members, having shirked their basic duty, thus hope to get cover for their actions.

Perhaps, when all is said and done, the mental-illness provisions of the disabilities act will have accomplished some good, but no one should pretend there have not been serious trade-offs, and no one should automatically assume, either, that a comparable amount of good could not have been accomplished through measures more respectful of the liberties and rational capacities of average Americans.

TITLE: IN THE WORKPLACE  
MENTAL ILLNESS RULES ARE STRETCHED TOO FAR  
DATE: 05/03/97  
SOURCE: The Columbus Dispatch; CLMB  
(Copyright 1997)

Federal officials seeking to help workers with psychiatric disorders function successfully on the job have instead made it more difficult for employers to comply with the law.

The Equal Employment Opportunity Commission issued guidelines Tuesday that appear to stretch beyond reason the rules governing employment of individuals with mental disabilities.

At issue are the steps an employer may be required to take to accommodate the special needs of workers who are deemed qualified but who suffer disabilities.

These afflictions might be major depression, schizophrenia, obsessive-compulsive disorder, bipolar disorder and personality disorders.

The commission advises employers to consider whether behavior such as chronic lateness, open hostility and poor judgment may be tied into a mental disorder. Many employers already are dealing with such situations by providing circumspect assistance and timely professional help.

In addition, however, an employer may be required to provide "room dividers, partitions or other soundproofing or visual barriers between work spaces" to help mentally ill workers concentrate.

This departs from common sense. Indeed, it borders on the preposterous.

Face it: Factories and offices are designed with productivity in mind.

In many instances, employers willingly make changes to accommodate workers who have physical or mental disabilities.

But there are reasonable, practical limits that even the officials at the EEOC should recognize. Nobody should expect the workplace to look like a treatment center.

## WORKPLACE

# Employers Are Wary of Rules On Mentally Ill

By ELLEN JOAN POLLACK  
And JOANN S. LUBLIN

Staff Reporters of THE WALL STREET JOURNAL

For managers, distinguishing between a bad attitude and a mental illness is about to become a lot trickier.

New guidelines issued by the federal government to help employers understand how the Americans With Disabilities Act applies to people with mental illness surprised many businesses and their lawyers by calling for broad accommodations for emotionally ill workers. The accommodations include putting up barriers to isolate people readily distracted by noise, reassigning workers to new tasks and making changes in a supervisor's management style.

Courts aren't bound to uphold the guidelines, but they often consider agency rules when deciding cases. The guidelines are also significant because many companies have had trouble grappling with how to comply with the ADA in cases where employees have mental and not physical problems.

While the guidelines address a legitimate issue for many employees, they create a new set of problems for employers. "For me the bottom line is that potentially it allows a jerk to hide behind the ADA," says Christopher Bell, an employment lawyer at Jackson, Lewis, Schnitzler & Krupman in Minneapolis. "It does this because it says traits such as poor judgment, poor impulse control, curt and rude behavior and chronic tardiness all can be symptoms of a mental impairment that is a disability."

Mr. Bell, a former lawyer for the Equal Employment Opportunity Commission, which issued the guidelines in March, predicts that companies will end up having to spend a lot of money defending themselves against claims filed by people who have been "disciplined for being rude or disheveled or yelling at a supervisor. . . . It is a license for people with poor behavior to claim discrimination."

Many employers and consultants believe that companies will now have to train managers on evaluating signs that workers have emotional problems. Barry Newman, a consultant at Aon Consulting, says an employee's complaining that he is "depressed and stressed" could be regarded as a clue that a disability may be at play. "Who doesn't use a phrase like that once in a while?" he asks. The manager will have to be "very careful with

that person because [the manager has] been put on notice that they may have a disability."

Bianca Rhodes, chief financial officer of Kinetic Concepts Inc., a health-care products company in San Antonio, Texas, says the guidelines "make it very tough for a manager." Most workplaces, she says, "are stressful and are very noisy. It's difficult to find a euphoric work environment."

Dan Conti, director of the employee-assistance plan at First Chicago NBD Corp., says that as a psychologist he is very supportive of the ADA, but he believes that the guidelines may "backfire" at some companies. "I was concerned when I first saw it," he says. "It may make it difficult for corporations, and hence they may retrench from it," he says.

He says that at his company, requests for assistance often are referred to the company's medical department and its human-resources department for review. Many labor lawyers point out that compliance with the new guidelines will be particularly difficult for small companies with no medical experts on staff and no human-resources experts to help managers identify problems.

Advocates for the mentally ill applaud the guidelines and insist they won't be financially onerous for companies. Jay Cutler, special counsel to the American Psychiatric Association, calls the guidelines "reasonable and responsible," pointing out that they don't put a burden on employers to monitor an employee's medication, for example. The guidelines, he says, "open the door to employment that should have always been open."

Ronald Honberg, director of legal affairs for the National Alliance for the Mentally Ill, says that "most people understand that somebody in a wheelchair needs accommodation in the workplace. It's less clear what kind of accommodations are necessary for someone with a mental illness."

Mr. Honberg says that his organization, which represents 140,000 mentally ill people and their families, typically hears about requests for time off for treatment and requests for adjustments to work schedules. For example, patients on some medications for depression or bipolar disorder are sometimes groggy early in the morning. "A lot of these are just sort of common-sense-type steps. For the most part, these accommodations are not expensive."

But companies argue that disputes resulting from the ADA mental-health rules can be very expensive. Almost two years ago, an arbitrator ordered Pacific Gas & Electric Co. to pay \$1.1 million, including attorneys' fees, in a suit brought by a severely depressed staff lawyer who asked for accommodations that included time off after particularly heavy work periods and, according to PG&E attorney Kenneth Yang, a guarantee of satisfactory performance evaluations for about two years.

Mr. Newman, of Aon Consulting, recalls a recent federal appeals court case involving a woman whose anxiety disorder made speaking on the phone very difficult. The company she worked for reassigned her to a clerical position, but the woman still feared using the phone, and was hospitalized for a lengthy period. She was eventually fired. Although the company won the case, he notes that even victorious lawsuits are very costly.

The guidelines have been issued at a time when many employers are cutting back on mental-health coverage and hiring managed-care firms to scrutinize benefits.

Mr. Cutler, of the American Psychiatric Association, says he hopes that the guidelines will encourage companies to provide coverage because it will lead to "more cost-effective employment and reduced costs to the employer."

But some people who work in the mental-health field are less hopeful. "The new guidelines are a Catch-22," says Jim Wrich of Wrich Associates in Chicago, a mental-health consulting firm. "They will work only if people suffering from mental illness or substance abuse get the right help the first time — and that isn't likely at all today because most companies have adapted managed-care plans" that limit treatment, he says.

—Rochelle Sharpe  
contributed to this article.

ASSOCIATED PRESS -- May 1, 1997 (page one of two)

**New guide may help, but jobs are still hard to find for mentally ill**

By DEB RIECHMANN

Associated Press Writer

WASHINGTON (AP) - Six months ago, Glenn Kennington hired a man to bus tables at the upscale restaurant he manages in suburban Washington.

The man's psychiatric disability didn't bode well for contact with customers, so he was assigned to dish washing. That job proved too stressful, so Kennington switched him to scrubbing pots and pans.

"He's in his own work area. There are no breakables. It's just labor. He's found some success there," said Kennington, general manager of Shelly's Woodroast in Rockville, Md.

Mental health advocates hope new federal rules will encourage more employers like Kennington to hire people with psychiatric disabilities and accommodate their conditions. But company personnel directors say that while the guidelines are a good first step, they leave many questions unanswered.

The 38 pages of guidelines were issued March 25 by the Equal Employment Opportunity Commission, which wants to make it clear that the Americans with Disabilities Act covers people with mental disabilities - such as manic depression, anxiety disorders and schizophrenia - as well as those with physical impairments.

Mental health experts say the EEOC guidelines give employers practical answers to questions like "When can employers legally ask about a psychiatric disability?" or "How far do employers need to go in accommodating these employees?"

But, while happy to receive some direction on this often tight-lipped subject, personnel directors say some of the advice is confusing and appears to conflict with other laws.

The guidelines say employers do not have to accept less from workers with psychiatric disabilities, but might be required, for example, to change work hours for employees on medication, erect cubicles around employees who have trouble concentrating, or let workers wear earphones to block noise.

Ronald Honberg, director of legal affairs for the National Alliance for the Mentally Ill, says only 10 percent to 15 percent of people with mental illnesses have jobs.

It has been illegal for several years for employers to ask job applicants about their mental histories. But Honberg says companies have been slow to stop the practice because they falsely assume these applicants will miss work, be violent or not be able to handle any stress on the job.

While he emphasizes that the majority of mentally ill people are not violent, Honberg says the guidelines do make it clear that if a person legitimately poses a threat to the health and safety of other employees, an employer can let the worker go.

Michael Lotito, counsel to the Society for Human Resource Management, which represents more than 80,000 company personnel directors, says the guidelines are not that clear and also are not easily reconciled with other federal laws, such as the Family and Medical Leave Act.

For instance, when and what employers may ask about why leave is needed and the paperwork required can differ depending on whether disability or family and medical leave rules are followed.

"It's a good first draft," Lotito said. "But the EEOC has taken a rifle shot at something that needs to be a much broader picture."

Lotito is upset, for example, with the EEOC's advice in the guidelines about a sample case involving a warehouse worker with a psychiatric disability.

The worker does not deal with the public, but is rude to co-workers and reports to work in torn clothes, despite the company's policy requiring courteous behavior and a neat appearance. When approached, the worker cites his disability, which the employer cannot disclose to his co-workers.

The EEOC guidelines say that in this case, rigid application of the company's policy for dress code and courtesy would violate the Americans with Disabilities Act.

"If 10 employees come to you and say 'Charlie is acting funny. We're scared. What are you going to do about it?' The employer is going to have a revolt on his hands if he says 'Sorry, I can't discuss it,'" Lotito said. "And that does not further the cause of people with disabilities."

# BUSINESS

## Mental illness covered by disabilities act

By Samuel Goldreich  
THE WASHINGTON TIMES

Federal regulators say mentally ill employees have the same workplace rights as physically handicapped workers under a law written to end discrimination against the disabled.

Guidelines issued last month by the U.S. Equal Employment Opportunity Commission say people with psychiatric disorders — such as depression and schizophrenia — are protected under the 1990 Americans with Disabilities Act (ADA).

That means an employer may not quiz potential workers about their mental health histories and may have to change work rules to avoid adding stress to those with disabilities.

Small-business advocates, meanwhile, complained yesterday that the

guidelines unfairly shift responsibility to employers to deal with problems that a potential employee keeps quiet.

The 10-page EEOC guidelines suggest that companies might even need to put up partitions or other sight and sound barriers to isolate mentally ill employees who cannot deal with routine workplace distractions.

While EEOC officials say they have simply clarified existing law, critics say the guidelines impose confusing new responsibilities on employers to diagnose whether an employee is mentally ill or is simply a poor worker.

"Where problems really will arise are in cases of what are called personality disorders," said mental health counselor Daniel Rees, coordinator of the Human Relations in Management Program at Western Maryland College. "These are people who are disruptive

and are in denial and project their problems back onto the company. These are the sort of people who really should be terminated because they aren't responsive to treatment."

One small-business advocate suggested that the guidelines will force employers to spend time ferreting out personality problems.

"It's unbelievable that a small-business owner can't ask if a job applicant has a mental health disability but then has ... to accommodate someone on the job," said Mary Reed, a lobbyist for the National Federation of Independent Business. "It may be obvious what an employer ought to do to accommodate blindness or someone in a wheelchair but it's difficult to know how to accommodate someone who's manic depressive."

Other critics worry that the EEOC

guidelines could force a company to shut down a worksite while a mentally disabled employee works out his problems.

"We do not have the luxury of having redundancy in any of our jobs so someone can fill in for another worker," said Eammon McGeedy, president of Martin G. Imbach Inc., a Baltimore-based marine construction firm. "If a crane operator can't show up at 7 in the morning because he can't come in until 9 because he has a fear of driving through traffic, what do I do?"

Many employers already have adjusted to requirements to accommodate wheelchairs for the physically disabled, said Dr. Mary Jane England, president of the Washington Business Group on Health (WBGH), a group that

see MENTAL, page B12

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represents 175 major employers, such as Pepsico and Hewlett-Packard.

"This is nothing new," she said. "The law was passed in 1990, and it was our responsibility to provide an accommodating workplace whatever the disability."

The WBGH has been educating members for four years on the mental health implications of the ADA and has published its own set of guidelines. Dr. England said that either the employer or employee could adjust their hours in cases such as the one Mr. McGeady described.

"This is not the bombshell that has been portrayed," said lawyer Tom D'Agostino, editor of the National Disability Law Reporter, who said the EEOC simply has embraced ADA case law that supports its mental health guidelines.

While the guidelines do not have the force of law, they reflect the position the EEOC is taking in court cases to enforce the ADA.

"This is not a signal of who we're going to be suing next," said Ellen Vargas, EEOC legal counsel. "It's to help people to understand how to voluntarily comply with the law."

Mental illness issues have prompted 9,126 complaints to the agency in the last four years, second only to allegations of discrimination involving back disorders. When the guidelines were issued last month, EEOC officials said they were intended to give practical instruction on how employers must provide an accommodating workplace for the mentally ill.

But because the EEOC guidelines require that employers protect the privacy of a mentally ill worker, it puts companies at risk of suits from other employees who complain about preferential treatment, said Richard Block, a New York corporate labor lawyer.

"If someone says, 'I'm stressed and depressed and I need time off,' most people would say there's stress in the modern workplace. Tough noogies," he said.

# Mental disability work rules spark outcry

## Employers fear abuses, lawsuits

By GREGG FIELDS  
Herald Business Writer

AI

New guidelines from the Equal Employment Opportunity Commission, which sharply expand the work force protection of employees suffering from psychiatric disorders like schizophrenia, have sparked a national outcry from critics contending they will lead to costly litigation, lost productivity and could even preclude companies from maintaining a safe and productive workplace.

"I was very disappointed with the guidelines," said Michael Lotito, a San Francisco attorney and board member of the Society for Human Resource Management. "It's simply not an acceptable solution. They don't understand what happens in the real world."

But the EEOC said it's simply interpreting the Americans with Disabilities Act as it was passed by Congress. The statute, which took effect in 1992, has historically been used to fight workplace discrimination against those suffering from physical disabilities, such as confinement to a wheelchair.

But the language of the law defines disability as "a physical or mental impairment," and the

FRONT  
PAGE

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MIAMI HERALD

# Mental illness rules criticized; employers fear abuses, lawsuits

## GUIDELINES, FROM 1A

agency is now broadening the grasp of the act by clarifying how companies must accommodate employees with psychiatric problems.

"It brings mental illness to the same level as physical disability," said Tom Loffredo, an attorney with the Miami firm of Holland & Knight.

In fact, the EEOC said nearly 13 percent of the complaints filed under the ADA relate to psychiatric problems such as anxiety, depression, schizophrenia and bipolar disorder, which is sometimes referred to as manic depression.

"It provides practical instruction to employers and persons with psychiatric disabilities on their respective rights and responsibilities," Gilbert Casellas, EEOC chairman, said of the guidelines.

And the agency downplayed contentions that workplace misbehavior must be tolerated. Misconduct, according to the guidelines, is still punishable. But companies may not discriminate merely because an employee suffers a condition that, in many cases, carries with it a social stigma.

Nevertheless, the guidelines were a shocker for human resource experts, who maintained that the rules are a prescription for conflicts that will inevitably be decided by the courts.

Though Corporate America has made some progress in removing the stigma from mental illnesses, and employee assistance programs often cover treatment for them, some felt that the guidelines strip companies from authority in dealing with on-the-job behavior.

For instance, soundproofing and visual barriers might have to be constructed to "accommodate individuals who have disability-related limitations in concentration."

"That's absurd, and you can quote me," said Brian Grant,

head of the Academy of Occupational and Organizational Psychiatrists.

## Where to draw the line?

Grant said the guidelines are impractical because they presume anti-social behavior may be due to a mental infirmity, which isn't always the case.

For instance, someone who can't get along with others may or may not be suffering from a mental impairment, he said.

"It should not be the employer's burden to accept anything less because of an employee claim of mental disorder," he said. "It's not uncommon for people with personality disorder to have difficulty getting along with others, and they could now claim protection on the basis of that disorder."

Grant took particularly exception to the EEOC guidelines expanding the right of workers to demand time off because they're stressed and depressed. "Well, who isn't?" he said.

Although companies can require that the employee's condition be certified by a health professional, Grant said that, as a practical matter, such a diagnosis is relatively easy to obtain.

The guidelines also restrict disciplinary actions a company may take against an employee suffering from a psychiatric disorder.

In one example, the EEOC said a company would be violating the law if it disciplined a loading dock employee who came to work disheveled, in torn clothes and was rude to co-workers.

The reason: The employee had a psychiatric disability, and his

behavior didn't get in the way of his job.

"This suggests that employers cannot enforce codes of conduct and common courtesy among co-workers," said Susan Meisinger, a senior vice president of the Society for Human Resource Management.

The irony is that the same employee could be disciplined if he isn't suffering from a mental disorder. The reason: He's not protected by the ADA.

## Consistency defense

That dual set of standards could create potentially damaging morale problems in the workplace, said Richard Block, a New York attorney active in employee discrimination cases. Particularly since the ADA bars companies from saying why certain employees' behavior is being accommodated while others is not.

"The key to good human resource policy is to be consistent," Block said.

That consistency is also a good courtroom defense when companies face discrimination cases. But accommodating the ADA could strip them of that defense.

"The way to defend yourself is to say, 'We are consistent,'" Block said. "Now the plaintiffs can say, 'They are not consistent.'"

Nevertheless, others said the guidelines, if imperfect, may nonetheless prove a watershed event in allowing those who suffer from psychiatric disorders to lead productive lives, provided it doesn't prove an undue burden on their employer.

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# The Atlanta Journal

Covers Dixie Like the Dew

## Opinion

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JAMES M. COX, JR., *Chairman, 1937-74*

## New EEOC rules hurt mentally ill

IS IT REASONABLE for employers to ask a job applicant whether he or she has a history of mental illness? The Equal Employment Opportunity Commission says no. We disagree.

The new rule relates to the 1990 Americans With Disabilities Act, which was aimed at eliminating discrimination in the workplace on the basis of physical or mental disability. That is a premise with which few have any dispute. But rules, such as the ones the EEOC issued this week, push the principle beyond reason.

While declaring on one hand that employers do not have to lower their standards to hire someone with a serious mental illness, such as schizophrenia or manic depression, the EEOC sets forth a list of requirements for employers that equals to lower work standards. For example, employers must:

- tolerate chronic lateness, poor judgment and hostility toward co-workers;
- assist with inability to concentrate by providing room dividers, partitions, soundproofing or visual barriers;
- change the work schedule of an employee taking anti-depressants that cause grogginess in the morning;
- beware enforcing a dress code not clearly "job related."

We think such unreasonable rules will boomerang on the very people they are designed to help — by raising fears among otherwise conscientious employers that hiring a mentally ill person is going to force them to lower standards and spend unlimited amounts of money to assist that individual for a lifetime.

Hiring incentives ought to run just the opposite, so that employers who hire a mentally ill individual know about it up front and can assist that person in meeting the job standards of everyone else. Employers ought not be able to reject an applicant solely on the basis of past mental illness, and mental impairment, given modern-day treatments, need not interfere with job performance. The crazy thing about the EEOC rules is that they enforce the notion it might



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**May 2, 1997**

**Letters to the Editor**  
**Atlanta Journal**  
**P.O. Box 4689**  
**Atlanta, Georgia 30302**

**To the Editor:**

I read with concern your editorial discussing the EEOC's recently-issued enforcement guidance on the applicability of the Americans with Disabilities Act to employees with psychiatric disabilities. The editorial, which seriously misrepresents both the law and the guidance, merely contributes to the unfounded beliefs that employers have about their obligations under the ADA.

The editorial's basic premise -- that under the guidance an employer cannot learn whether someone has a psychiatric disability until after the person has begun working -- is simply wrong. The ADA and the guidance clearly state that after making a job offer but before employment has begun, an employer may make disability-related inquiries and conduct medical examinations, so long as it does so for all employees in the same job category.

The editorial also erroneously says that the guidance requires employers to tolerate poor judgment, chronic lateness, and hostility toward co-workers. In fact, the guidance says that traits such as irritability, chronic lateness, and poor judgment are not, in themselves, impairments. Thus people who exhibit these traits are not necessarily people with disabilities who are protected by the ADA.

Even when such traits are linked to a mental impairment, employers do not have an unqualified obligation to excuse them. The guidance says that an employer may discipline an employee with a psychiatric disability for violating conduct standards that are related to the employee's position and necessary for the employer's business, so long as the employer disciplines all employees who violate the rule in the same way. This is true even if the employee claims that a psychiatric disability caused him or her to violate the rule. An employer may also hold an employee with a psychiatric disability to the same performance standards as all other employees.

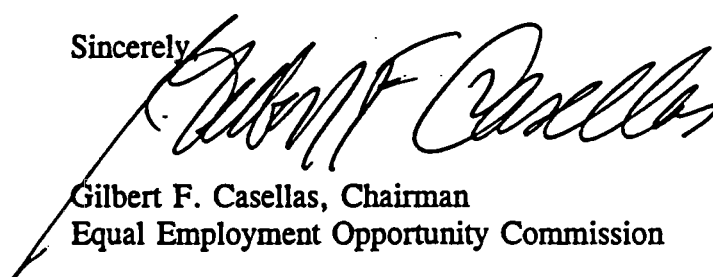
Consistent with the ADA, the guidance says that an employer does have to make reasonable accommodations that will enable an employee with a psychiatric disability to meet conduct and job performance standards, once the employer knows of the existence of the disability and a request for the accommodation has been made. However, your editorial never mentions the concept of "undue hardship," which limits an employer's obligation to make an accommodation that would be too costly or difficult, and thus creates the impression that an employer's obligation to make accommodations is limitless.

The editorial also misleads employers to believe that the kinds of accommodations they will need to make will always be expensive. In fact, many people with psychiatric disabilities

successfully work without accommodations at all; many others require accommodations that are inexpensive and easy to make. Interestingly, the editorial mentions two such accommodations -- the use of room dividers to eliminate noise or visual distractions and simple adjustments to work schedules.

The editorial's message is that the "conscientious employer" will be so confused by the guidance and so fearful about what the ADA requires it to do that it simply will choose not to hire people with psychiatric disabilities. The Commission believes, however, that employers have nothing to fear from the guidance, which is clear, reasonable, and consistent with the ADA. The truly conscientious employer would be better served by reading the guidance than by reading media accounts about it.

Sincerely



Gilbert F. Casellas, Chairman  
Equal Employment Opportunity Commission

# EMPLOYERS TOLD TO ACCOMMODATE THE MENTALLY ILL

## A NEW SET OF U.S. RULES

### Government, Following Up on Disabilities Act, Lists Steps Companies Should Take

By ROBERT PEAR

WASHINGTON, April 29 — The Government told employers today that they may not discriminate against qualified workers with mental illness, may not ask job applicants if they have a history of mental illness and must take reasonable steps to accommodate employees with psychiatric or emotional problems.

The guidance, issued by the Equal Employment Opportunity Commission to carry out the Americans With Disabilities Act of 1990, said employers were not required to lower their standards for performance.

But, it said, they may have to allow extra time off from work, alter work schedules or assignments and make physical changes in the workplace as a "reasonable accommodation" for employees with mental disabilities.

The law defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities." But until now, the Government focused on physical disabilities and provided few answers to the many questions it received about the law's meaning for people with psychiatric disorders.

Such disabilities may include major depression, bipolar disorder (manic depression), schizophrenia, obsessive-compulsive disorder and personality disorders, the commission said.

Nearly 13 percent of all complaints filed with the commission under the disabilities law in the last four years — 9,216 of 72,687 — alleged discrimination resulting from emotional or psychiatric impairments, the largest source of complaints after back problems. The National Institute of Mental Health says 1 in 10 Americans experiences some disability from a diagnosable mental illness in the course of a year.

Peggy R. Mastroianni, associate legal counsel at the Equal Employment Opportunity Commission, said the guidelines were intended to address the "myths, fears and stereotypes" of mental illness.

"We wanted to show that the law applies to people with psychiatric disabilities in the same way it applies to people with physical disabilities," Ms. Mastroianni said. "This is the first time we have explained, in a comprehensive way, how the law applies to people with psychiatric disabilities."

The new rules say employers should be alert to the possibility that traits normally regarded as undesirable — chronic lateness, poor judgment, hostility to co-workers or supervisors — "may be linked to mental impairments."

Under the guidelines, an employer may have to provide "room dividers, partitions or other soundproofing or visual barriers between work spaces" to help employees who have difficulty concentrating because of mental illness. Experts said a person with schizophrenia, for example, might be unusually sensitive to noise and visual distractions in the workplace.

Likewise, the guidelines say, "an employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability." Or, it said, a company may need to change the work schedule of an employee taking antidepressants that cause extreme grogginess and lack of alertness in the morning.

Ronald S. Honberg, director of legal affairs at the National Alliance for the Mentally Ill, hailed the guidelines, saying they "will be extremely helpful to people with severe mental illness, employers, judges" and commission employees who investigate complaints.

Employers' reactions were mixed. "This guidance creates confusion for employers, especially small employers who don't have any special expertise," said Susan R. Meisinger, senior vice president of the Society for Human Resource Management, which represents personnel directors at thousands of companies of all sizes.

But Dr. Mary Jane England, president of the Washington Business Group on Health, which represents 175 big corporations like Pepsico and Hewlett-Packard, welcomed the guidelines, saying they clarified employers' obligations.

The commission said that on job application forms, employers may not ask whether prospective employ-

ees have a history of mental illness, or whether they have been treated or hospitalized for such illness.

After making a job offer, it said, the employer may require a medical examination, including a psychiatric examination, if the company requires all newly hired employees in the same job category to have such examinations. But if the employer uses the results to screen out a person because of disability, "the employer must prove that the exclusionary criteria are job-related and consistent with business necessity," to defend against a charge of job bias.

Moreover, the agency said, "an employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability," unless doing so would impose "an undue hardship" on the operation of the business. Cost is a factor that may be considered in assessing hardship, the agency said.

Ms. Mastroianni said the commission had been flooded with questions about the 1990 law, mostly from employers. Here are some examples:

¶What should an employer do when an employee is not performing well and says he has depression? (The employer, the commission said today, may have to make "reasonable accommodations," like changing the worker's schedule, assigning him to a different job or altering the method of supervision.)

¶Should an employer check on employees to make sure they are taking medications needed to treat a mental illness? (No.)

¶Must an employer excuse the

## Rules that address 'myths, fears and stereotypes.'

conduct of an employee who threatens co-workers because of a mental impairment? (No.)

The commission said employees need not use any "magic words" to request a change. If an employee asks for time off because he is "depressed and stressed," that is enough to put the employer on notice that the worker is requesting a "reasonable accommodation," the agency said.

If the worker's need is not obvious, the employer may ask for documentation from a doctor, to show that the worker has a psychiatric disability

1 of 2

# Employers Told to Adjust for Mentally Ill

requiring time off, the rules say.

Michael J. Lotito, a San Francisco lawyer who advises employers on labor law, said: "We have a long history of accommodating physical impairments of one kind or another. But we have much less experience with mental impairments. If you have cancer or have lost an arm or are blind in one eye, it's pretty clear. But a person with a mental impairment is often in denial. A person who is schizophrenic may not be in a good position to describe the disorder or to describe the accommodations that are needed."

The Government told employers that all information on psychiatric disabilities must be kept confidential, "on separate forms and in separate medical files."

Moreover, it said, if employees ask questions about a co-worker who seems to be receiving preferential treatment, "the employer must not disclose any medical information." Thus, it said, the employer may not tell employees that a worker has a disorder requiring a "reasonable accommodation," but may explain that the company is "acting for legitimate business reasons or in compliance with Federal law."

Federal officials said accommodations for workers with psychiatric disabilities often cost less than the changes needed to accommodate physical disabilities, which may include widening doorways, installing ramps or modifying bathrooms.

Laura L. Mancuso of the Conflict Management Institute in Santa Barbara, Calif., a consultant who has advised hundreds of employers on compliance with the 1990 law, said: "Accommodations for workers with psychiatric disabilities are, in most cases, inexpensive or free. An employee with psychiatric problems may initially need additional time from supervisors or co-workers, but research shows that the need tends to fade over time."

The Government also said employers might run afoul of the law if they rigidly enforced a dress code or rules of conduct that were not "job-related and consistent with business necessity."

As an example, the agency described the case of a person with a psychiatric disability who works in a warehouse loading boxes for shipment and has no contact with customers. Over several weeks, he reports to work looking disheveled. He is abrupt and rude on the rare occasions when he must talk to fellow employees. But his work has not suffered.

The company handbook says employees should have a neat appearance at all times and should be courteous to one another. The employer takes disciplinary action against the employee, who says his appearance and demeanor deteriorated because of his disability.

The agency concluded that in this case, the dress code and co-worker courtesy rules were not justified by a business necessity, so the "rigid application of these rules to this employee would violate the Americans With Disabilities Act."



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

May 1, 1997

Mr. R.W. Apple, Jr.  
Washington Bureau Chief  
*The New York Times*  
1627 I Street, N.W.  
Washington, D.C. 20006

Dear Mr. Apple:

*New York Times* reporter Robert Pear's story yesterday, *Employers Told to Accommodate the Mentally Ill*, is an informative account of the guidance issued by the EEOC to assist employers and others in complying with issues related to individuals with psychiatric disabilities under Title I of the Americans with Disabilities Act (ADA). Unfortunately, Mr. Pear erroneously indicated in his lead that the EEOC issued the guidance on April 29. The guidance, in fact, was issued over a month ago on March 25 with a press release notifying all major media about the availability of the guidance.

This error has caused a great deal of confusion on the part of your readers, among them members of the disability community as well as your fellow reporters. They have contacted the agency in attempts to clear up whether we have issued *new* guidance which postdates the March 25 issuance. More disturbingly, a number of callers have voiced disapproval over their not being notified more timely about important agency business. Timely and informative education and outreach to the general public and agency constituents has been one of the hallmarks of this agency's reinvention efforts. Through no fault on our part, many may now believe that the agency has suffered a set back in this area.

Immediate calls were made yesterday to request that a correction be run in today's *Times*. Calls were made to you, bureau editor Andrew Rosenthal, and to Mr. Pear. I was successful only in talking to Mr. Pear directly. He said that he was doing a follow up piece, which would address the misinformation. However, he did not say when the piece would run.

No correction appeared in today's paper. I hope you share my opinion that, under the circumstances, an immediate correction is clearly warranted. Please feel free to contact me at (202) 663-4902 if you have any questions or would like to discuss this matter further. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Reginald A. Welch".

Reginald A. Welch  
Director of Communications

Philadelphia

## **MENTAL RULES JUST PLAIN NUTS ... 05/01/97**

**Newspaper: DAILY NEWS**

**Section: Editorial**

**Edition: Sports Final**

**Published: 05/01/97**

**Page: 50**

**Keywords: Thursday, Editorial, Mental Illness, Employee, Job, Law, Economic Development, Bonus, Animal, Genes**

### **MENTAL RULES JUST PLAIN NUTS**

**THE NEW FEDERAL** directive to employers on discrimination against mentally ill workers is well-intentioned, but, not to put too fine a point on it, a little crazy.

Like everyone else, the mentally ill deserve to be treated fairly in the work place. But the Equal Employment Opportunity Commission's new guidelines are not equal or fair. In fact, they create a new protected class with special rights.

Under its expanded interpretation of the 1990 Americans With Disabilities Act, the **EEOC** says employers must take into account that if such undesirable traits as poor judgment, hostility and chronic lateness are linked to **mental** impairments, they must be accommodated. Those are loopholes that are an invitation to scams and a formula for endless litigation.

Employers still may demand that mentally ill employees be "qualified to perform the essential functions of the job." But they also must provide extra time off for workers to deal with psychiatric disabilities. They must be prepared to modify schedules or jobs and provide job coaches. They may be required to install "room dividers, partitions or other soundproofing or visual barriers" to deal with emotional quirks.

When fellow employees complain that a co-worker is getting preferential treatment, employers may say only that it is for legitimate business reasons or to comply with the law. This is a far cry from the equal treatment the **EEOC** was created to enforce.

Agency lawyers say the guidelines aim to erase "myths, fears and stereotypes." A noble goal. But forcing employers to place some workers in a kid-gloves category smacks of mandated charity. And special rights serve to confirm the stereotypes. Especially in light of the wide list of disabilities covered, including depression, schizophrenia, obsessive-compulsive disorder and that catch-all, "personality disorders."

Unlike physical disabilities, **mental** illnesses are difficult to define and harder to treat a factor that makes the guidelines a bonanza for any worker savvy enough to use them to advantage against employers fearful of costly and embarrassing litigation.

Witness this example: An employee asks for time off because he is "depressed and stressed." The **EEOC** says that is all that is necessary to put an employer on notice that the worker may need "reasonable accommodation" e.g.: a sabbatical, better working hours, more days off, maybe a separate office far from the madding crowd. Hey, who doesn't?

With the National Institute of **Mental** Health estimating that one in 10 Americans suffers some disability from a diagnosable **mental** illness, the rules make an inordinate proportion of the work force eligible, by hook or by crook, for special treatment.

That's not only unfair. It's downright nuts.

#### **Bonus babies**

The mandate of the Economic Development Corp. is "to protect and enhance the city's job and revenue base." Given that the agency doled out oodles in bonuses, some might assume its mission

is protecting and enhancing the revenues of its staff.

"Define 'oodles,'" you might say. Sorry, but the EDC also is protecting and enhancing its stonewalling skills, refusing to divulge the exact amount. It has indicated, however, that nearly all 210 employees got bonuses.

"For what?" you might ask. Supposedly for performance and tenure. Can't speak for performance again, mum's their word but the agency has a rather liberal definition of "tenure." Six months is apparently enough. That's how long Russell (Son of Ray) Harding, \$95,000-per-year senior vice president, had been on the job when he raked in a \$3,300 bonus.

Ross Moskowitz, executive vice president for business recruitment and retention, got \$10,472. Twelve other veeps received bonuses ranging from \$2,576 to \$7,418. The total amount paid to everyone else is still a secret.

Perhaps there is a reason for all this secrecy. It's human nature to try to prevent embarrassing revelations. People might make fun of an agency that throws around public money.

And consider this: The EDC, an agency of 210 people, has 16 vice presidents. The U.S., a nation of 260 million, has one.

Mayor Giuliani ought to be fuming. He has been trying to convince the cops that they deserve zero raises for the last two years. And nobody had a better year than the cops.

So here's the deal: Let the EDC veeps explain to the cops why they deserve a bonus and the cops don't. If the cops can be persuaded, then those EDC people are worth their weight in gold.

Move over, Mickey

From the wires: NEW YORK (AP) With a single genetic switch, scientists have created a strain of supermice two to three times more muscular than usual, with big, broad shoulders and massive hips.

At least they won't have to work out anymore.


Slug: ED01ED.EDT

<b>EEOC</b>	<b>NOTICE</b>	Number
		915.002
		Date 3-25-97

*OLC.*

1. **SUBJECT:** EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities
2. **PURPOSE:** This enforcement guidance sets forth the Commission's position on the application of Title I of the Americans with Disabilities Act of 1990 to individuals with psychiatric disabilities.
3. **EFFECTIVE DATE:** Upon receipt.
4. **EXPIRATION DATE:** As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.
5. **ORIGINATOR:** ADA Division, Office of Legal Counsel.
6. **INSTRUCTIONS:** File after Section 902 of Volume II of the Compliance Manual.

3-25-97  
Date

  
\_\_\_\_\_  
Gilbert F. Casellas  
Chairman

The subject Enforcement Guidance is available on the bbs and may be downloaded from the OLC Library under the file name "PSYCH.ADA."

**DISTRIBUTION: CM Holders**

# Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities

## INTRODUCTION

The workforce includes many individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood. Congress intended Title I of the Americans with Disabilities Act (ADA)<sup>1</sup> to combat such employment discrimination as well as the myths, fears, and stereotypes upon which it is based.<sup>2</sup>

The Equal Employment Opportunity Commission ("EEOC" or "Commission") receives a large number of charges under the ADA alleging employment discrimination based on psychiatric disability.<sup>3</sup> These charges raise a wide array of legal issues including, for example, whether an individual has a psychiatric disability as defined by the ADA and whether an employer may ask about an individual's psychiatric disability. People with psychiatric disabilities and employers also have posed numerous questions to the EEOC about this topic.

This guidance is designed to:

- facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability;
- respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and

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<sup>1</sup> 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

<sup>2</sup> H.R. Rep. No. 101-485, pt. 3, at 31-32 (1990) [hereinafter House Judiciary Report].

<sup>3</sup> Between July 26, 1992, and September 30, 1996, approximately 12.7% of ADA charges filed with EEOC were based on emotional or psychiatric impairment. These included charges based on anxiety disorders, depression, bipolar disorder (manic depression), schizophrenia, and other psychiatric impairments.

EEOC Enforcement Guidance:  
The Americans with Disabilities Act and Psychiatric Disabilities

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- answer questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities.<sup>4</sup>

## WHAT IS A PSYCHIATRIC DISABILITY UNDER THE ADA?

Under the ADA, the term "disability" means: "(a) A physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."<sup>5</sup>

This guidance focuses on the first prong of the ADA's definition of "disability" because of the great number of questions about how it is applied in the context of psychiatric conditions.

### Impairment

#### 1. What is a "mental impairment" under the ADA?

The ADA rule defines "mental impairment" to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."<sup>6</sup> Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder,

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<sup>4</sup> The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

<sup>5</sup> 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1996). See generally EEOC Compliance Manual § 902, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7251 (1995).

<sup>6</sup> 29 C.F.R. § 1630.2(h)(2) (1996). This ADA regulatory definition also refers to mental retardation, organic brain syndrome, and specific learning disabilities. These additional mental conditions, as well as other neurological disorders such as Alzheimer's disease, are not the primary focus of this guidance.

and post-traumatic stress disorder), schizophrenia, and personality disorders. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (now the fourth edition, DSM-IV) is relevant for identifying these disorders. The DSM-IV has been recognized as an important reference by courts<sup>7</sup> and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes.

Not all conditions listed in the DSM-IV, however, are disabilities, or even impairments, for purposes of the ADA. For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's definition of "disability."<sup>8</sup> While DSM-IV covers conditions involving drug abuse, the ADA provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use.<sup>9</sup> The DSM-IV also includes conditions that are not mental disorders but for which people may seek

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<sup>7</sup> See, e.g., Boldini v. Postmaster Gen., 928 F. Supp. 125, 130, 5 AD Cas. (BNA) 11, 14 (D.N.H. 1995) (stating, under section 501 of the Rehabilitation Act, that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association . . . .").

<sup>8</sup> These include various sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. § 12211(b) (1994); 29 C.F.R. § 1630.3(d) (1996).

<sup>9</sup> 42 U.S.C. § 12210(a) (1994). However, individuals who are not currently engaging in the illegal use of drugs and who are participating in, or have successfully completed, a supervised drug rehabilitation program (or who have otherwise been successfully rehabilitated) may be covered by the ADA. Individuals who are erroneously regarded as engaging in the current illegal use of drugs, but who are not engaging in such use, also may be covered. Id. at § 12210(b).

Individuals with psychiatric disabilities may, either as part of their condition or separate from their condition, engage in the illegal use of drugs. In such cases, EEOC investigators may need to make a factual determination about whether an employer treated an individual adversely because of his/her psychiatric disability or because of his/her illegal use of drugs.

treatment (for example, problems with a spouse or child).<sup>10</sup> Because these conditions are not disorders, they are not impairments under the ADA.<sup>11</sup>

Even if a condition is an impairment, it is not automatically a "disability." To rise to the level of a "disability," an impairment must "substantially limit" one or more major life activities of the individual.<sup>12</sup>

2. **Are traits or behaviors in themselves mental impairments?**

No. 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.<sup>13</sup>

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<sup>10</sup> See DSM-IV chapter "Other Conditions That May Be a Focus of Clinical Attention."

<sup>11</sup> Individuals who do not have a mental impairment but are treated by their employers as having a substantially limiting impairment have a disability as defined by the ADA because they are regarded as having a substantially limiting impairment. See EEOC Compliance Manual § 902.8, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7282 (1995).

<sup>12</sup> This discussion refers to the terms "impairment" and "substantially limit" in the present tense. These references are not meant to imply that the determinations of whether a condition is an impairment, or of whether there is substantial limitation, are relevant only to whether an individual meets the first part of the definition of "disability," i.e., actually has a physical or mental impairment that substantially limits a major life activity. These determinations also are relevant to whether an individual has a record of a substantially limiting impairment or is regarded as having a substantially limiting impairment. See *id.* §§ 902.7, 902.8, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7276-78, 7281 (1995).

<sup>13</sup> *Id.* § 902.2(c)(4), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7258 (1995).

## Major Life Activities

An impairment must substantially limit one or more **major life activities** to rise to the level of a "disability" under the ADA.<sup>14</sup>

### 3. What major life activities are limited by mental impairments?

The major life activities limited by mental impairments differ from person to person. There is no exhaustive list of major life activities. For some people, mental impairments restrict major life activities such as learning, thinking, concentrating, interacting with others,<sup>15</sup> caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments.<sup>16</sup>

### 4. To establish a psychiatric disability, must an individual always show that s/he is substantially limited in **working**?

No. The first question is whether an individual is substantially limited in a major life activity **other than working** (e.g., sleeping, concentrating, caring for oneself). **Working** should be analyzed only if **no other major life activity** is substantially limited by an impairment.<sup>17</sup>

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<sup>14</sup> 42 U.S.C. § 12102(2)(A) (1994); 29 C.F.R. § 1630.2(g)(1) (1996). See also EEOC Compliance Manual § 902.3, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7261 (1995).

<sup>15</sup> Interacting with others, as a major life activity, is not substantially limited just because an individual is irritable or has some trouble getting along with a supervisor or coworker.

<sup>16</sup> Sleeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully.

<sup>17</sup> See 29 C.F.R. pt. 1630 app. § 1630.2(j) (1996) ("[i]f an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered . . . ."); see also EEOC Compliance Manual § 902.4(c)(2), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7266 (1995).

## Substantial Limitation

Under the ADA, an impairment rises to the level of a disability if it substantially limits a major life activity.<sup>18</sup> "Substantial limitation" is evaluated in terms of the **severity** of the limitation and the **length of time** it restricts a major life activity.<sup>19</sup>

The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition. Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/her family members, friends, or coworkers may suffice.

5. When is an impairment sufficiently **severe** to substantially limit a major life activity?

An impairment is sufficiently severe to substantially limit a major life activity if it **prevents** an individual from performing a major life activity or **significantly restricts the condition, manner, or duration** under which an individual can perform a major life activity, as compared to the **average person in the general population**.<sup>20</sup> An impairment **does not significantly restrict** major life activities if it results in only **mild limitations**.

6. Should the corrective effects of **medications** be considered when deciding if an impairment is so severe that it substantially limits a major life activity?

No. The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without

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<sup>18</sup> 42 U.S.C. § 12102(2) (1994).

<sup>19</sup> See generally EEOC Compliance Manual § 902.4, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7262 (1995).

<sup>20</sup> See 29 C.F.R. § 1630.2(j) (1996).

regard to mitigating measures, including medications.<sup>21</sup> Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.<sup>22</sup> Relevant evidence for EEOC investigators includes, for example, a description of how an individual's condition changed when s/he

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<sup>21</sup> S. Rep. No. 101-116, at 23 (1989); H.R. Rep. No. 101-485, pt. 2, at 52 (1990); House Judiciary Report, supra n.2, at 28-29. See also 29 C.F.R. pt. 1630 app. § 1630.2(j) (1996).

<sup>22</sup> ADA cases in which courts have disregarded the positive effects of medications or other treatment in the determination of disability include Canon v. Clark, 883 F. Supp. 718, 4 AD Cas. (BNA) 734 (S.D. Fla. 1995) (finding that individual with insulin-dependent diabetes stated an ADA claim), and Sarsycki v. United Parcel Ser., 862 F. Supp. 336, 340, 3 AD Cas. (BNA) 1039 (W.D. Okla. 1994) (stating that substantial limitation should be evaluated without regard to medication and finding that an individual with insulin-dependent diabetes had a disability under the ADA). Pertinent Rehabilitation Act cases in which courts have made similar determinations include Liff v. Secretary of Transp., 1994 WL 579912, at \*3-\*4 (D.D.C. 1994) (deciding under the Rehabilitation Act, after acknowledging pertinent ADA guidance, that depression controlled by medication is a disability), and Gilbert v. Frank, 949 F.2d 637, 641, 2 AD Cas. (BNA) 60 (2d Cir. 1991) (determining under the Rehabilitation Act that an individual who could not function without kidney dialysis had a substantially limiting impairment).

Cases in which courts have found that individuals are not substantially limited after considering the positive effects of medication are, in the Commission's view, incorrectly decided. See, e.g., Mackie v. Runyon, 804 F. Supp. 1508, 1510-11, 2 AD Cas. (BNA) 260 (M.D. Fla. 1992) (holding under section 501 of the Rehabilitation Act that bipolar disorder stabilized by medication is not substantially limiting); Chandler v. City of Dallas, 2 F.3d 1385, 1390-91, 2 AD Cas. (BNA) 1326 (5th Cir. 1993) (holding under section 504 of the Rehabilitation Act that an individual with insulin-dependent diabetes did not have a disability), cert. denied, 114 S. Ct. 1386, 3 AD Cas. (BNA) 512 (1994).

went off medication<sup>23</sup> or needed to have dosages adjusted, or a description of his/her condition before starting medication.<sup>24</sup>

7. How long does a mental impairment have to last to be substantially limiting?

An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity.<sup>25</sup> Whether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication.

Example A: An employee has had major depression for almost a year. He has been intensely sad and socially withdrawn (except for going to work), has developed serious insomnia, and has had severe problems concentrating. This employee has an impairment (major depression) that significantly restricts his ability to interact with others, sleep, and concentrate. The effects of this impairment are severe and have lasted long enough to be substantially limiting.

In addition, some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.<sup>26</sup>

Example B: An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, he experienced increasingly severe and frequent cycles of depression and mania; at times, he became extremely withdrawn socially or had difficulty caring

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<sup>23</sup> Some individuals do not experience renewed symptoms when they stop taking medication. These individuals are still covered by the ADA, however, if they have a record of a substantially limiting impairment (i.e., if their psychiatric impairment was sufficiently severe and long-lasting to be substantially limiting).

<sup>24</sup> If medications cause negative side effects, these side effects should be considered in assessing whether the individual is substantially limited. See, e.g., Guice-Mills v. Derwinski, 967 F.2d 794, 2 AD Cas. (BNA) 187 (2d Cir. 1992).

<sup>25</sup> EEOC Compliance Manual § 902.4(d), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7273 (1995).

<sup>26</sup> Id., 8 FEP Manual (BNA) 405:7271.

for himself. His symptoms have abated with medication, but his doctor says that the duration and course of his bipolar disorder is indefinite, although it is potentially long-term. This employee's impairment (bipolar disorder) significantly restricts his major life activities of interacting with others and caring for himself, when considered without medication. The effects of his impairment are severe, and their duration is indefinite and potentially long-term.

However, conditions that are temporary and have no permanent or long-term effects on an individual's major life activities are not substantially limiting.

Example C: An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was most distressed for about a month during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment was short-term, did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. This employee does not have a disability for purposes of the ADA.

8. Can chronic, episodic disorders be substantially limiting?

Yes. Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years.<sup>27</sup>

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<sup>27</sup> See, e.g., Clark v. Virginia Bd. of Bar Exam'rs, 861 F. Supp. 512, 3 AD Cas. (BNA) 1066 (E.D. Va. 1994) (vacating its earlier ruling (at 3 AD Cas. (BNA) 780) that plaintiff's recurrent major depression did not constitute a "disability" under the ADA).

9. When does an impairment substantially limit an individual's ability to interact with others?

An impairment substantially limits an individual's ability to interact with others if, due to the impairment, s/he is **significantly restricted as compared to the average person in the general population**. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a **substantial limitation** in interacting with others. An individual would be substantially limited, however, if his/ her relations with others were characterized on a **regular basis** by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.

Example: An individual diagnosed with schizophrenia now works successfully as a computer programmer for a large company. Before finding an effective medication, however, he stayed in his room at home for several months, usually refusing to talk to family and close friends. After finding an effective medication, he was able to return to school, graduate, and start his career. This individual has a mental impairment, schizophrenia, which substantially limits his ability to interact with others when evaluated without medication. Accordingly, he is an individual with a disability as defined by the ADA.

10. When does an impairment substantially limit an individual's ability to concentrate?

An impairment substantially limits an individual's ability to concentrate if, due to the impairment, s/he is **significantly restricted as compared to the average person in the general population**.<sup>28</sup> For example, an individual would be substantially limited if s/he was easily and frequently distracted, meaning that his/her attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if s/he experienced his/her "mind going blank" on a frequent basis.

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<sup>28</sup> 29 C.F.R. § 1630.2(j)(ii) (1996); EEOC Compliance Manual § 902.3(b), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7261 (1995).

Such limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.<sup>29</sup>

Example A: An employee who has an anxiety disorder says that his mind wanders frequently and that he is often distracted by irrelevant thoughts. As a result, he makes repeated errors at work on detailed or complex tasks, even after being reprimanded. His doctor says that the errors are caused by his anxiety disorder and may last indefinitely. This individual has a disability because, as a result of an anxiety disorder, his ability to concentrate is significantly restricted as compared to the average person in the general population.

Example B: An employee states that he has trouble concentrating when he is tired or during long meetings. He attributes this to his chronic depression. Although his ability to concentrate may be slightly limited due to depression (a mental impairment), it is not significantly restricted as compared to the average person in the general population. Many people in the general population have difficulty concentrating when they are tired or during long meetings.

11. When does an impairment substantially limit an individual's ability to sleep?

An impairment substantially limits an individual's ability to sleep if, due to the impairment, his/her sleep is **significantly restricted as compared to the average person in the general population**. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

For example, an individual who sleeps only a negligible amount without medication for many months, due to post-traumatic stress disorder, would be significantly restricted as compared to the average person in the general population and therefore would be substantially limited in sleeping.<sup>30</sup> Similarly,

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<sup>29</sup> Substantial limitation in concentrating also may be associated with learning disabilities, neurological disorders, and physical trauma to the brain (e.g., stroke, brain tumor, or head injury in a car accident). Although this guidance does not focus on these particular impairments, the analysis of basic ADA issues is consistent regardless of the nature of the condition.

<sup>30</sup> A 1994 survey of 1,000 American adults reports that 71% averaged  
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an individual who for several months typically slept about two to three hours per night without medication, due to depression, also would be substantially limited in sleeping.

By contrast, an individual would not be substantially limited in sleeping if s/he had some trouble getting to sleep or sometimes slept fitfully because of a mental impairment. Although this individual may be slightly restricted in sleeping, s/he is not significantly restricted as compared to the average person in the general population.

12. When does an impairment substantially limit an individual's ability to care for him/herself?

An impairment substantially limits an individual's ability to care for him/herself if, due to the impairment, an individual is **significantly restricted as compared to the average person in the general population** in performing basic activities such as getting up in the morning, bathing, dressing, and preparing or obtaining food. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

Some psychiatric impairments, for example major depression, may result in an individual sleeping too much. In such cases, an individual may be substantially limited if, as a result of the impairment, s/he sleeps so much that s/he does not effectively care for him/herself. Alternatively, the individual may be substantially limited in working.

## DISCLOSURE OF DISABILITY

Individuals with psychiatric disabilities may have questions about whether and when they must disclose their disability to their employer under the ADA. They may have concerns about the potential negative consequences of disclosing a psychiatric disability in the workplace, and about the confidentiality of information that they do disclose.

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5-8 hours of sleep a night on weeknights and that 55% averaged 5-8 hours a night on weekends (with 37% getting more than 8 hours a night on weekends). See The Cutting Edge: Vital Statistics -- America's Sleep Habits, Washington Post, May 24, 1994, Health Section at 5.

13. May an employer ask questions on a job application about history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability?

No. An employer may not ask questions that are likely to elicit information about a disability before making an offer of employment.<sup>31</sup> Questions on a job application about psychiatric disability or mental or emotional illness or about treatment are likely to elicit information about a psychiatric disability and therefore are prohibited before an offer of employment is made.

14. When may an employer lawfully ask an individual about a psychiatric disability under the ADA?

An employer may ask for disability-related information, including information about psychiatric disability, only in the following limited circumstances:

- **Application Stage.** Employers are prohibited from asking disability-related questions before making an offer of employment. An exception, however, is if an applicant asks for reasonable accommodation for the hiring process. If the need for this accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability. The employer may require the applicant to provide documentation from an appropriate professional concerning his/her disability and functional limitations.<sup>32</sup> A variety of health professionals may provide such documentation regarding psychiatric disabilities including primary health care professionals,<sup>33</sup> psychiatrists, psychologists,

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<sup>31</sup> See 42 U.S.C. § 12112(d)(2) (1994); 29 C.F.R. § 1630.13(a) (1996). See also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 4, 8 FEP Manual (BNA) 405:7192 (1995).

<sup>32</sup> Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7193 (1995).

<sup>33</sup> When a primary health care professional supplies documentation about a psychiatric disability, his/her credibility depends on how well s/he knows the individual and on his/her knowledge about the psychiatric disability.

psychiatric nurses, and licensed mental health professionals such as licensed clinical social workers and licensed professional counselors.<sup>34</sup>

An employer should make clear to the applicant why it is requesting such information, i.e., to verify the existence of a disability and the need for an accommodation. Furthermore, the employer may request only information necessary to accomplish these limited purposes.

Example A: An applicant for a secretarial job asks to take a typing test in a quiet location rather than in a busy reception area "because of a medical condition." The employer may make disability-related inquiries at this point because the applicant's need for reasonable accommodation under the ADA is not obvious based on the statement that an accommodation is needed "because of a medical condition." Specifically, the employer may ask the applicant to provide documentation showing that she has an impairment that substantially limits a major life activity and that she needs to take the typing test in a quiet location because of disability-related functional limitations.<sup>35</sup>

Although an employer may not ask an applicant if s/he will need reasonable accommodation for the job, there is an exception if the employer could reasonably believe, before making a job offer, that the applicant will need accommodation to perform the functions of the job. For an individual with a non-visible disability, this may occur if the individual voluntarily discloses his/her disability or if s/he voluntarily tells the employer that s/he needs reasonable accommodation to perform the job. The employer may then ask certain limited questions, specifically:

- whether the applicant needs reasonable accommodation; and

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<sup>34</sup> Important information about an applicant's functional limitations also may be obtained from non-professionals, such as the applicant, his/her family members, and friends.

<sup>35</sup> In response to the employer's request for documentation, the applicant may elect to revoke the request for accommodation and to take the test in the reception area. In these circumstances, where the request for reasonable accommodation has been withdrawn, the employer cannot continue to insist on obtaining the documentation.

- what type of reasonable accommodation would be needed to perform the functions of the job.<sup>36</sup>
- **After making an offer of employment, if the employer requires a post-offer, preemployment medical examination or inquiry.** After an employer extends an offer of employment, the employer may require a medical examination (including a psychiatric examination) or ask questions related to disability (including questions about psychiatric disability) **if the employer subjects all entering employees in the same job category to the same inquiries or examinations regardless of disability.** The inquiries and examinations do not need to be related to the job.<sup>37</sup>
- **During employment, when a disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity."**<sup>38</sup> This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions<sup>39</sup> will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Thus, for example, inquiries or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position. In addition, inquiries or

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<sup>36</sup> EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6-7, 8 FEP Manual (BNA) 405:7193-94 (1995).

<sup>37</sup> If an employer uses the results of these inquiries or examinations to screen out an individual because of disability, the employer must prove that the exclusionary criteria are job-related and consistent with business necessity, and cannot be met with reasonable accommodation, in order to defend against a charge of employment discrimination. 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. §§ 1630.10, 1630.14(b)(3), 1630.15(b) (1996).

<sup>38</sup> 42 U.S.C. § 12112(d)(4) (1994); 29 C.F.R. § 1630.14(c) (1996).

<sup>39</sup> A "qualified" individual with a disability is one who can perform the essential functions of a position with or without reasonable accommodation. 42 U.S.C. § 12111(8) (1994). An employer does not have to lower production standards, whether qualitative or quantitative, to enable an individual with a disability to perform an essential function. See 29 C.F.R. pt. 1630 app. § 1630.2(n) (1996).

examinations are permitted if they are required by another Federal law or regulation.<sup>40</sup> In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.<sup>41</sup>

Example B: A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. There is no indication, however, that his failure to learn his route is related in any way to a medical condition. Because the employer does not have a reasonable belief, based on objective evidence, that this individual's ability to perform his essential job function is impaired by a medical condition, a medical examination (including a psychiatric examination) or disability-related inquiries would not be job-related and consistent with business necessity.<sup>42</sup>

Example C: A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin

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<sup>40</sup> 29 C.F.R. § 1630.15(e) (1996) ("It may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation . . .").

<sup>41</sup> There may be additional situations which could meet the "job-related and consistent with business necessity" standard. For example, periodic medical examinations for public safety positions that are narrowly tailored to address specific job-related concerns and are shown to be consistent with business necessity would be permissible.

<sup>42</sup> Of course, an employer would be justified in taking disciplinary action in these circumstances.

around-the-clock labor negotiations during the next several weeks. The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk of substantial harm to himself and others. There is no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings. The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

Example D: An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was adjusted. Her employer may request a fitness-for-duty examination because it has a reasonable belief, based on the employee's hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. This examination, however, must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would, for example, exceed this limited scope.

15. Do ADA confidentiality requirements apply to information about a psychiatric disability disclosed to an employer?

Yes. Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA. This includes medical information that an individual voluntarily tells his/her employer. Employers must collect and maintain such information on separate forms and in separate medical files, apart from the usual personnel files.<sup>43</sup> There are limited exceptions to the ADA confidentiality requirements:

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<sup>43</sup> For a discussion of other confidentiality issues, see EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21-23, 8 FEP Manual (BNA) 405:7201-02 (1995).

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first aid and safety personnel may be told if the disability might require emergency treatment; and
- government officials investigating compliance with the ADA must be given relevant information on request.<sup>44</sup>

**16. How can an employer respond when employees ask questions about a coworker who has a disability?**

If employees ask questions about a coworker who has a disability, the employer must not disclose any medical information in response. Apart from the limited exceptions listed in Question 15, the ADA confidentiality provisions prohibit such disclosure.

An employer also may not tell employees whether it is providing a reasonable accommodation for a particular individual. A statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because only individuals with disabilities are entitled to reasonable accommodation under the ADA. In response to coworker questions, however, the employer may explain that it is acting for legitimate business reasons or in compliance with federal law.

As background information for all employees, an employer may find it helpful to explain the requirements of the ADA, including the obligation to provide reasonable accommodation, in its employee handbook or in its employee orientation or training.

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<sup>44</sup> 42 U.S.C. § 12112(d)(3)(B), (4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1996). The Commission has interpreted the ADA to allow employers to disclose medical information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws. 29 C.F.R. pt. 1630 app. § 1630.14(b) (1996). The Commission also has interpreted the ADA to permit employers to use medical information for insurance purposes. *Id.* See also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21 nn.24, 25, 8 FEP Manual (BNA) 405:7201 nn.24, 25 (1995).

## REQUESTING REASONABLE ACCOMMODATION

An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless it can show that the accommodation would impose an undue hardship.<sup>45</sup> An employee's decision about requesting reasonable accommodation may be influenced by his/her concerns about the potential negative consequences of disclosing a psychiatric disability at work. Employees and employers alike have posed numerous questions about what constitutes a request for reasonable accommodation.

17. When an individual decides to request reasonable accommodation, what must s/he say to make the request and start the reasonable accommodation process?

When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."<sup>46</sup>

Example A: An employee asks for time off because he is "depressed and stressed." The employee has communicated a request for a change at work (time off) for a reason related to a medical condition (being "depressed and stressed" may be "plain English" for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations.<sup>47</sup>

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<sup>45</sup> See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.2(o), .9 (1996); 29 C.F.R. pt. 1630 app. § 1630.9 (1996).

<sup>46</sup> Schmidt v. Safeway, Inc., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (an employee's request for reasonable accommodation need not use "magic words" and can be in plain English). See Bultemeyer v. Ft. Wayne Community Schs., 6 AD Cas. (BNA) 67 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist).

<sup>47</sup> See Question 21 infra about employers requesting documentation after  
(continued...)

**Example B:** An employee submits a note from a health professional stating that he is having a stress reaction and needs one week off. Subsequently, his wife telephones the Human Resources department to say that the employee is disoriented and mentally falling apart and that the family is having him hospitalized. The wife asks about procedures for extending the employee's leave and states that she will provide the necessary information as soon as possible but that she may need a little extra time. The wife's statement is sufficient to constitute a request for reasonable accommodation. The wife has asked for changes at work (an exception to the procedures for requesting leave and more time off) for a reason related to a medical condition (her husband had a stress reaction and is so mentally disoriented that he is being hospitalized). As in the previous example, if the need for accommodation is not obvious, the employer may request documentation of disability and clarification of the need for accommodation.<sup>48</sup>

**Example C:** An employee asks to take a few days off to rest after the completion of a major project. The employee does not link her need for a few days off to a medical condition. Thus, even though she has requested a change at work (time off), her statement is not sufficient to put the employer on notice that she is requesting reasonable accommodation.

18. **May someone other than the employee request a reasonable accommodation on behalf of an individual with a disability?**

Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a

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(...continued)

receiving a request for reasonable accommodation.

<sup>48</sup> In the Commission's view, Miller v. Nat'l Cas. Co., 61 F.3d 627, 4 AD Cas. (BNA) 1089 (8th Cir. 1995) was incorrectly decided. The court in Miller held that the employer was not alerted to Miller's disability and need for accommodation despite the fact that Miller's sister phoned the employer repeatedly and informed it that Miller was falling apart mentally and that the family was trying to get her into a hospital. See also Taylor v. Principal Financial Group, 5 AD Cas. (BNA) 1653 (5th Cir. 1996).

disability.<sup>49</sup> Of course, an employee may refuse to accept an accommodation that is not needed.

19. Do requests for reasonable accommodation need to be in writing?

No. Requests for reasonable accommodation do not need to be in writing. Employees may request accommodations in conversation or may use any other mode of communication.<sup>50</sup>

20. When should an individual with a disability request a reasonable accommodation to do the job?

An individual with a disability is not required to request a reasonable accommodation at the beginning of employment. S/he may request a reasonable accommodation at any time during employment.<sup>51</sup>

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<sup>49</sup> Cf. Beck v. Univ. of Wis., 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996) (assuming, without discussion, that a doctor's note requesting reasonable accommodation on behalf of his patient triggered the reasonable accommodation process); Schmidt v. Safeway, Inc., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (stating that a doctor need not be expressly authorized to request accommodation on behalf of an employee in order to make a valid request).

In addition, because the reasonable accommodation process presumes open communication between the employer and the employee with the disability, the employer should be receptive to any relevant information or requests it receives from a third party acting on the employee's behalf. 29 C.F.R. pt. 1630 app. § 1630.9 (1996).

<sup>50</sup> Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation. Of course, employers must keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. 29 C.F.R. § 1602.14 (1996).

<sup>51</sup> As a practical matter, it may be in the employee's interest to request a  
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21. May an employer ask an employee for **documentation** when the employee requests reasonable accommodation for the job?

Yes. When the need for accommodation is not obvious, an employer may ask an employee for **reasonable** documentation about his/her disability and functional limitations. The employer is entitled to know that the employee has a covered disability for which s/he needs a reasonable accommodation.<sup>52</sup> A variety of health professionals may provide such documentation with regard to psychiatric disabilities.<sup>53</sup>

Example A: An employee asks for time off because he is "depressed and stressed." Although this statement is sufficient to put the employer on notice that he is requesting accommodation,<sup>54</sup> the employee's need for accommodation is not obvious based on this statement alone. Accordingly, the employer may require **reasonable** documentation that the employee has a disability within the meaning of the ADA and, if he has such a disability, that the functional limitations of the disability necessitate time off.

Example B: Same as Example A, except that the employer requires the employee to submit all of the records from his health professional regarding his mental health history, including materials that are not relevant to disability and reasonable accommodation under the ADA. This is not a request for **reasonable** documentation. All of these records are not required to determine if the employee has a disability as defined by the ADA and needs the requested reasonable accommodation because of his disability-related functional limitations. As one alternative, in order to determine the scope of its ADA obligations, the employer may ask the

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<sup>51</sup>(...continued)

reasonable accommodation **before** performance suffers or conduct problems occur.

<sup>52</sup> EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7193 (1995).

<sup>53</sup> See supra nn.32-34 and accompanying text. See also Bultemeyer v. Ft. Wayne Community Schs., 6 AD Cas. (BNA) 67 (7th Cir. 1996) (stating that, if employer found the precise meaning of employee's request for reasonable accommodation unclear, employer should have spoken to the employee or his psychiatrist, thus properly engaging in the interactive process).

<sup>54</sup> See Question 17, Example A, supra.

employee to sign a limited release allowing the employer to submit a list of specific questions to the employee's health care professional about his condition and need for reasonable accommodation.

22. May an employer require an employee to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?

The ADA does not prevent an employer from requiring an employee to go to an appropriate health professional of the employer's choice if the employee initially provides insufficient information to substantiate that s/he has an ADA disability and needs a reasonable accommodation. Of course, any examination must be job-related and consistent with business necessity.<sup>55</sup> If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

## SELECTED TYPES OF REASONABLE ACCOMMODATION

Reasonable accommodations for individuals with disabilities must be determined on a case-by-case basis because workplaces and jobs vary, as do people with disabilities. Accommodations for individuals with psychiatric disabilities may involve changes to workplace policies, procedures, or practices. Physical changes to the workplace or extra equipment also may be effective reasonable accommodations for some people.

In some instances, the precise nature of an effective accommodation for an individual may not be immediately apparent. Mental health professionals, including psychiatric rehabilitation counselors, may be able to make suggestions about particular accommodations and, of equal importance, help employers and employees communicate effectively about reasonable accommodation.<sup>56</sup> The questions below

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<sup>55</sup> Employers also may consider alternatives like having their health professional consult with the employee's health professional, with the employee's consent.

<sup>56</sup> The Job Accommodation Network (JAN) also provides advice free-of-charge to employers and employees contemplating reasonable accommodation. JAN is a service of the President's Committee on Employment of People with Disabilities which, in turn, is funded by the U.S. Department of Labor. JAN can be  
(continued...)

discuss selected types of reasonable accommodation that may be effective for certain individuals with psychiatric disabilities.<sup>57</sup>

23. Does reasonable accommodation include giving an individual with a disability time off from work or a modified work schedule?

Yes. Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a disability is a reasonable accommodation, unless (or until) the employee's absence imposes an undue hardship on the operation of the employer's business.<sup>58</sup> This includes leaves of absence, occasional leave (e.g., a few hours at a time), and part-time scheduling.

A related reasonable accommodation is to allow an individual with a disability to change his/her regularly scheduled working hours, for example, to work 10 AM to 6 PM rather than 9 AM to 5 PM, barring undue hardship. Some medications taken for psychiatric disabilities cause extreme grogginess and lack

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reached at 1-800-ADA-WORK.

<sup>57</sup> Some of the accommodations discussed in this section also may prove effective for individuals with traumatic brain injuries, stroke, and other mental disabilities. As a general matter, a covered employer must provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, barring undue hardship. 42 U.S.C. § 12112(b)(5)(A) (1994).

<sup>58</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o) (1996). Courts have recognized leave as a reasonable accommodation. See, e.g., Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 3 AD Cas. (BNA) 1636 (7th Cir. 1995) (defendant had duty to accommodate plaintiff's pressure ulcers resulting from her paralysis which required her to stay home for several weeks); Vializ v. New York City Bd. of Educ., 1995 WL 110112, 4 AD Cas. (BNA) 345 (S.D.N.Y. 1995) (plaintiff stated claim under ADA where she alleged that she would be able to return to work after back injury if defendant granted her a temporary leave of absence); Schmidt v. Safeway, Inc., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) ("[A] leave of absence to obtain medical treatment is a reasonable accommodation if it is likely that, following treatment, [the employee] would have been able to safely perform his duties . . . .").

of concentration in the morning. Depending on the job, a later schedule can enable the employee to perform essential job functions.

**24. What types of physical changes to the workplace or equipment can serve as accommodations for people with psychiatric disabilities?**

Simple physical changes to the workplace may be effective accommodations for some individuals with psychiatric disabilities. For example, room dividers, partitions, or other soundproofing or visual barriers between workspaces may accommodate individuals who have disability-related limitations in concentration. Moving an individual away from noisy machinery or reducing other workplace noise that can be adjusted (e.g., lowering the volume or pitch of telephones) are similar reasonable accommodations. Permitting an individual to wear headphones to block out noisy distractions also may be effective.

Some individuals who have disability-related limitations in concentration may benefit from access to equipment like a tape recorder for reviewing events such as training sessions or meetings.

**25. Is it a reasonable accommodation to modify a workplace policy?**

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, barring undue hardship.<sup>59</sup> For example, it would be a reasonable accommodation to allow an individual with a disability, who has difficulty concentrating due to the disability, to take detailed notes during client presentations even though company policy discourages employees from taking extensive notes during such sessions.

**Example:** A retail employer does not allow individuals working as cashiers to drink beverages at checkout stations. The retailer also limits cashiers to two 15-minute breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in order to combat dry mouth, a side-effect of his psychiatric medication. This individual requests reasonable accommodation. In this example, the employer should consider either modifying its policy against drinking beverages at checkout stations or modifying its policy limiting cashiers to two 15-minute breaks each day plus a meal break, barring undue hardship.

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<sup>59</sup> 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1996).

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. As an example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship.<sup>60</sup> In addition, an employer, in spite of a "no-leave" policy, may, in appropriate circumstances, be required to provide leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship.<sup>61</sup>

26. Is adjusting **supervisory methods** a form of reasonable accommodation?

Yes. Supervisors play a central role in achieving effective reasonable accommodations for their employees. In some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail). Supervisors also may provide or arrange additional training or modified training materials.

Adjusting the level of supervision or structure sometimes may enable an otherwise qualified individual with a disability to perform essential job functions. For example, an otherwise qualified individual with a disability who experiences limitations in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.<sup>62</sup>

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<sup>60</sup> See Dutton v. Johnson County Bd., 1995 WL 337588, 3 AD Cas. (BNA) 1614 (D. Kan. 1995) (it was a reasonable accommodation to permit an individual with a disability to use unscheduled vacation time to cover absence for migraine headaches, where that did not pose an undue hardship and employer knew about the migraine headaches and the need for accommodation).

<sup>61</sup> See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1996).

<sup>62</sup> Reasonable accommodation, however, does not require lowering standards or removing essential functions of the job. Bolstein v. Reich, 1995 WL 46387, 3 AD Cas. (BNA) 1761 (D.D.C. 1995) (attorney with chronic depression and severe personality disturbance was not a qualified individual with a disability because his requested accommodations of more supervision, less complex

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**Example:** An employee requests more daily guidance and feedback as a reasonable accommodation for limitations associated with a psychiatric disability. In response to his request, the employer consults with the employee, his health care professional, and his supervisor about how his limitations are manifested in the office (the employee is unable to stay focused on the steps necessary to complete large projects) and how to make effective and practical changes to provide the structure he needs. As a result of these consultations, the supervisor and employee work out a long-term plan to initiate weekly meetings to review the status of large projects and identify which steps need to be taken next.

27. Is it a reasonable accommodation to provide a job coach?

Yes. An employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship.<sup>63</sup> An employer also may be required to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.

28. Is it a reasonable accommodation to make sure that an individual takes medication as prescribed?

No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a

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assignments, and the exclusion of appellate work would free him of the very duties that justified his GS-14 grade), motion for summary affirmance granted, 1995 WL 686236 (D.C. Cir. 1995). The court in Bolstein noted that the plaintiff objected to a reassignment to a lower grade in which he could have performed the essential functions of the position. 1995 WL 46387, \* 4, 3 AD Cas. (BNA) 1761, 1764 (D.D.C. 1995).

<sup>63</sup> See 29 C.F.R. pt. 1630 app. § 1630.9 (1996) (discussing supported employment); U.S. Equal Employment Opportunity Commission, "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act," at 3.4, 8 FEP Manual (BNA) 405:7001 (1992) [hereinafter Technical Assistance Manual]. A job coach is a professional who assists individuals with severe disabilities with job placement and job training.

barrier that is unique to the workplace. When people do not take medication as prescribed, it affects them on and off the job.

29. When is reassignment to a different position required as a reasonable accommodation?

In general, reassignment must be considered as a reasonable accommodation when accommodation in the present job would cause undue hardship<sup>64</sup> or would not be possible.<sup>65</sup> Reassignment may be considered if there are circumstances under which both the employer and employee voluntarily agree that it is preferable to accommodation in the present position.<sup>66</sup>

Reassignment should be made to an equivalent position that is vacant or will become vacant within a reasonable amount of time. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Reassignment is not required if a vacant position at a lower level is also unavailable.

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<sup>64</sup> For example, it may be an undue hardship to provide extra supervision as a reasonable accommodation in the present job if the employee's current supervisor is already very busy supervising several other individuals and providing direct service to the public.

<sup>65</sup> 42 U.S.C. § 12111(9)(B) (1994). For example, it may not be possible to accommodate an employee in his present position if he works as a salesperson on the busy first floor of a major department store and needs a reduction in visual distractions and ambient noise as a reasonable accommodation.

See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 17, 8 FEP Manual (BNA) 405:7399-7400 (1996) (where an employee can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability, an employer must reassign him/her to an equivalent vacant position for which s/he is qualified, absent undue hardship).

<sup>66</sup> Technical Assistance Manual, supra note 63, at 3.10(5), 8 FEP Manual (BNA) 405:7011-12 (reassignment to a vacant position as a reasonable accommodation); see also 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1996).

## CONDUCT

Maintaining satisfactory conduct and performance typically is not a problem for individuals with psychiatric disabilities. Nonetheless, circumstances arise when employers need to discipline individuals with such disabilities for misconduct.

30. May an employer **discipline** an individual with a disability for **violating a workplace conduct standard** if the misconduct resulted from a disability?

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.<sup>67</sup> For example, nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.<sup>68</sup> Other conduct standards, however, may not be job-related for the position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard -- a prohibition against employee theft -- that is job-related for the position in question and consistent with business necessity.

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<sup>67</sup> 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. § 1630.10, .15(c) (1996).

<sup>68</sup> See EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) (an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); see 56 Fed. Reg. 35,733 (1991) (referring to revisions to proposed ADA rule that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

Example C: An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.

31. Must an employer make reasonable accommodation for an individual with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?

**An employer must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the**

future, barring undue hardship.<sup>69</sup> Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.<sup>70</sup>

Example A: A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. After receiving a suspension as the second step in uniform, progressive discipline, she discloses her disability, states that it causes her behavior, and requests a leave of absence for treatment. The employer may discipline her because she violated a conduct standard -- a rule prohibiting disruptive behavior towards patrons and coworkers -- that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future.

Example B: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 AM to 5:30 PM, but he arrives at 9:00, 9:30, 10:00 or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 AM to 6:30 PM, a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 AM.

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<sup>69</sup> See 29 C.F.R. § 1630.15(d) (1996).

<sup>70</sup> Therefore, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur. See Question 20 supra.

Example C: An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. When he learns that his employment has been terminated, the employee asks the employer to put the termination on hold and to give him a month off for treatment instead. This is the employee's first request for accommodation and also the first time the employer learns about the employee's disability. The employer is not required to rescind the discharge under these circumstances, because the employee violated a conduct standard -- a rule prohibiting threats of physical harm against supervisors -- that is job-related for the position in question and consistent with business necessity. The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.<sup>71</sup>

32. How should an employer deal with an employee with a disability who is engaging in misconduct because s/he is not taking his/her medication?

The employer should focus on the employee's conduct and explain to the employee the consequences of continued misconduct in terms of uniform disciplinary procedures. It is the **employee's** responsibility to decide about medication and to consider the consequences of not taking medication.<sup>72</sup>

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<sup>71</sup> Regardless of misconduct, an individual with a disability must be allowed to file a grievance or appeal challenging his/her termination when that is a right normally available to other employees.

<sup>72</sup> If the employee requests reasonable accommodation in order to address the misconduct, the employer must grant the request, subject to undue hardship.

## DIRECT THREAT

Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a "direct threat."<sup>73</sup> Employers must apply the "direct threat" standard uniformly and may not use safety concerns to justify exclusion of persons with disabilities when persons without disabilities would not be excluded in similar circumstances.<sup>74</sup>

The EEOC's ADA regulations explain that "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."<sup>75</sup> A "significant" risk is a high, and not just a slightly increased, risk.<sup>76</sup> The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence.<sup>77</sup> With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat.<sup>78</sup> An individual does not pose a "direct threat" simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability.<sup>79</sup>

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<sup>73</sup> See 42 U.S.C. § 12113(b) (1994).

<sup>74</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

<sup>75</sup> 29 C.F.R. § 1630.2(r) (1996). To determine whether an individual would pose a direct threat, the factors to be considered include: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm. Id.

<sup>76</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

<sup>77</sup> 29 C.F.R. § 1630.2(r) (1996).

<sup>78</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

<sup>79</sup> House Judiciary Report, supra n.2, at 45.

33. Does an individual pose a direct threat in operating machinery solely because s/he takes medication that may as a side effect diminish concentration and/or coordination for some people?

No. An individual does not pose a direct threat solely because s/he takes a medication that may diminish coordination or concentration for some people as a side effect. Whether such an individual poses a direct threat must be determined on a case-by-case basis, based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence. Therefore, an employer must determine the nature and severity of this individual's side effects, how those side effects influence his/her ability to safely operate the machinery, and whether s/he has had safety problems in the past when operating the same or similar machinery while taking the medication. If a significant risk of substantial harm exists, then an employer must determine if there is a reasonable accommodation that will reduce or eliminate the risk.

Example: An individual receives an offer for a job in which she will operate an electric saw, conditioned on a post-offer medical examination. In response to questions at this medical examination, the individual discloses her psychiatric disability and states that she takes a medication to control it. This medication is known to sometimes affect coordination and concentration. The company doctor determines that the individual experiences negligible side effects from the medication because she takes a relatively low dosage. She also had an excellent safety record at a previous job, where she operated similar machinery while taking the same medication. This individual does not pose a direct threat.

34. When can an employer refuse to hire someone based on his/her history of violence or threats of violence?

An employer may refuse to hire someone based on his/her history of violence or threats of violence if it can show that the individual poses a direct threat. A determination of "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering the most current medical knowledge and/or the best available objective evidence. To find that an individual with a psychiatric disability poses a direct threat, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. This includes an assessment of the likelihood and imminence of future violence.

**Example:** An individual applies for a position with Employer X. When Employer X checks his employment background, she learns that he was terminated two weeks ago by Employer Y, after he told a coworker that he would get a gun and "get his supervisor if he tries anything again." Employer X also learns that these statements followed three months of escalating incidents in which this individual had had several altercations in the workplace, including one in which he had to be restrained from fighting with a coworker. He then revealed his disability to Employer Y. After being given time off for medical treatment, he continued to have trouble controlling his temper and was seen punching the wall outside his supervisor's office. Finally, he made the threat against the supervisor and was terminated. Employer X learns that, since then, he has not received any further medical treatment. Employer X does not hire him, stating that this history indicates that he poses a direct threat.

This individual poses a direct threat as a result of his disability because his recent overt acts and statements (including an attempted fight with a coworker, punching the wall, and making a threatening statement about the supervisor) support the conclusion that he poses a "significant risk of substantial harm." Furthermore, his prior treatment had no effect on his behavior, he had received no subsequent treatment, and only two weeks had elapsed since his termination, all supporting a finding of direct threat.

35. Does an individual who has attempted **suicide** pose a direct threat when s/he seeks to return to work?

No, in most circumstances. As with other questions of direct threat, an employer must base its determination on an individualized assessment of the person's ability to safely perform job functions when s/he returns to work. Attempting suicide does not mean that an individual poses an imminent risk of harm to him/herself when s/he returns to work. In analyzing direct threat (including the likelihood and imminence of any potential harm), the employer must seek reasonable medical judgments relying on the most current medical knowledge and/or the best available factual evidence concerning the employee.

**Example:** An employee with a known psychiatric disability was hospitalized for two suicide attempts, which occurred within several weeks of each other. When the employee asked to return to work, the employer allowed him to return pending an evaluation of medical reports to determine his ability to safely perform his job. The individual's therapist and psychiatrist both submitted documentation stating that he

could safely perform all of his job functions. Moreover, the employee performed his job safely after his return, without reasonable accommodation. The employer, however, terminated the individual's employment after evaluating the doctor's and therapist's reports, without citing any contradictory medical or factual evidence concerning the employee's recovery. Without more evidence, this employer cannot support its determination that this individual poses a direct threat.<sup>80</sup>

## PROFESSIONAL LICENSING

Individuals may have difficulty obtaining state-issued professional licenses if they have, or have a record of, a psychiatric disability. When a psychiatric disability results in denial or delay of a professional license, people may lose employment opportunities.

36. Would an individual have grounds for filing an ADA charge if an employer refused to hire him/her (or revoked a job offer) because s/he did not have a professional license due to a psychiatric disability?

If an individual filed a charge on these grounds, EEOC would investigate to determine whether the professional license was required by law for the position at issue, and whether the employer in fact did not hire the individual because s/he lacked the license. If the employer did not hire the individual because s/he lacked a legally-required professional license, and the individual claims that the licensing process discriminates against individuals with psychiatric disabilities, EEOC would coordinate with the Department of Justice, Civil Rights Division, Disability Rights Section, which enforces Title II of the ADA covering state licensing requirements.

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<sup>80</sup> Cf. Ofat v. Ohio Civ. Rights Comm'n, 1995 WL 310051, 4 AD Cas. (BNA) 753 (Ohio Ct. App. 1995) (finding against employer, under state law, on issue of whether employee who had panic disorder with agoraphobia could safely return to her job after disability-related leave, where employer presented no expert evidence about employee's disability or its effect on her ability to safely perform her job but only provided copies of pages from a medical text generally discussing the employee's illness).

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