A top-down view of a desk with a laptop, glasses, and a pen. The laptop is on the left, with its keyboard and trackpad visible. A pair of black-rimmed glasses is in the upper right, and a black pen is in the lower right. The background is a plain white surface.

Work**Smarts** Half-Day Seminar

**When Mental Health Enters the
Workplace: Understanding the Fine Line
Between Employee Wellness and
Employer Obligation**

DeAndrea Washington & Bethany Vanhooser

 Spencer**Fane**[®]



Where Are We Now?



\$1 trillion

worth of lost productivity for the global economy due to anxiety and depression, according to the World Health Organization.⁴

In the words of another respondent,
“Today’s American workforce is a mental wreck across the board.”

America’s mental health crisis is multifaceted, resulting in a wide range of residual consequences. U.S. workers experiencing mental health issues are not only at risk for other health issues but also less productive in professional situations.³ As a result, companies’ bottom lines suffer:

As one HR professional put it,

“Everyone is experiencing mental health challenges due to our very disruptive and changing times.”

Anxiety, PTSD Drive Rise in Mental Health Employment Bias Claims



J. Edward Moreno
Reporter



Employment Law

Benefits

Recruiting

Talent Management

Performance Management

HR Technology

M

ADA and mental health rights: 3 new lawsuits sound warning

WEALTH MANAGEMENT INDUSTRY NEWS

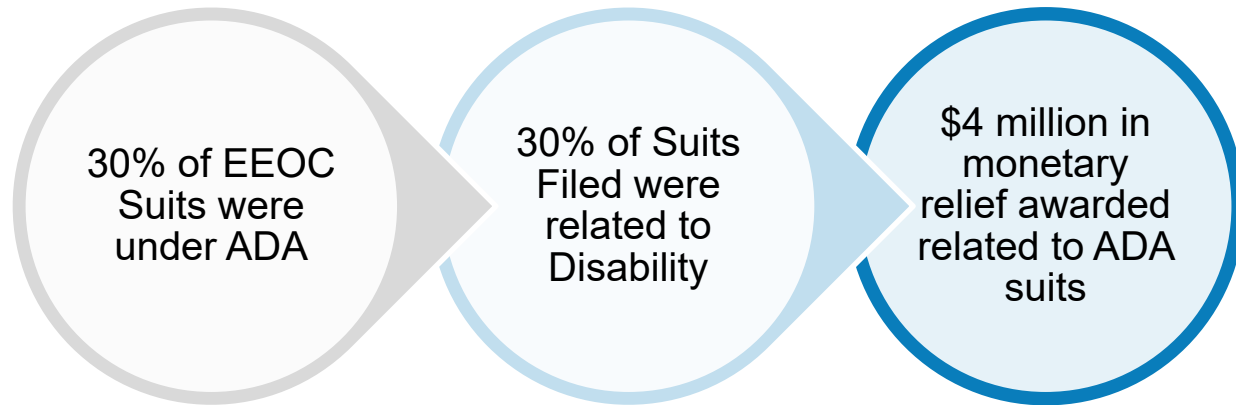
Ex-broker's lawsuit against Morgan Stanley highlights surge in complaints over mental health issues

By **Victoria Zhuang** March 23, 2023, 10:44 p.m. EDT 6 Min Read

Press Release 05-09-2023

Hobby Lobby To Pay \$50,000 To Settle Disability Discrimination Suit
Arts and Crafts Retailer Refused to Allow Service Dog as Reasonable Accommodation, Federal Agency Charges

EEOC Scrutiny



Source:
https://www.eeoc.gov/office-general-counsel-fiscal-year-2022-annual-report?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Recent EEOC Lawsuit Involving Mental Health Condition

EEOC's Claims

- Failure to provide a reasonable accommodation
- Retaliation

Employer's Actions

- Employee with autism and ADHD was unable to process sounds and voices at noisy crowded and noisy construction site because of disability
- Employee requested accommodation for several months but was denied and placed on unpaid leave after requesting accommodation allegedly for a foot injury
- Employer refused to allow employee to return to work for months despite doctor's clearance in retaliation for requesting an accommodation
- Alleged discriminatory conduct from April to November – 7 months

Warnings

- “In this case, an employee was left in the lurch for months, without pay, just because he requested an accommodation for his disabilities. The EEOC has stepped in to right this wrong.” - Jeffrey Burstein, regional attorney for the EEOC's N.Y. Office
- “The EEOC is committed to defending the rights of people with disabilities in the workplace, and that includes addressing acts of retaliation against employees who seek reasonable accommodations.” – Timothy Riera, acting director of the N.Y. Office

EEOC ADA Settlements: Mental Health Conditions

\$250,000

EEOC v. Ranew's Management Co. (2022) (N.D. Ga.)

- Employee diagnosed with severe depression terminated after requesting and being granted time off to recuperate, per doctor's recommendation. When employee tried to return to work and presented a doctor's release, he was fired by the company's CEO and told he couldn't be trusted to perform his job.

\$125,000

EEOC v. TrueBlue and PeopleReady (2022) (E.D. Va.)

- Employee, diagnosed with a psychiatric disability, was hospitalized and medically cleared to return to work but was terminated. Termination also allegedly based on the employee's need to take future intermittent leave for outpatient medical appointments.

\$100,000

EEOC v. Hollingsworth Richards, LLC (2022) (E.D. La.)

- Employee disclosed ADHD diagnosis and that she was taking medication under supervision of a doctor was discharged. Manager told employee to stop taking medication & ordered her to take a drug test; employee was then discharged before confirmed test results were received.

Source: <https://www.eeoc.gov/select-list-resolved-cases-involving-mental-health-conditions-under-ada-may-2022>

7

EEOC ADA Settlements: Mental Health Conditions

\$130,000

EEOC v. Kaiser Foundation Health Plan of Georgia (2021) (N.D. Ga.)

- Employee's disabilities made it traumatic for her to enter workplace through revolving doors. Employee requested to use available non-revolving doors as a reasonable accommodation. Kaiser refused. Court held that a reasonable accommodation need not relate to the performance of an essential function of the job; employees with disabilities are also entitled to accommodations to access the workplace and to enjoy the same benefits and privileges of employment as other employees.

\$35,000

EEOC v. Interconnect Cable Technologies Corp. (2020) (M.D. Fl.)

- Employee diagnosed with major depressive disorder and hospitalized, had job duties removed, was demoted, and had her pay cut upon returning to work after hospitalization. Employer terminated her about four months after the hospitalization.

Source: <https://www.eeoc.gov/select-list-resolved-cases-involving-mental-health-conditions-under-ada-may-2022>

Wellness
Resources

Legal
Requirements



ADA Framework

Qualified Individual with Disability

Provides protection from discrimination for individuals with a disability by prohibiting covered employees from discriminating against individuals in the full range of employment-related activities.



Disability means:

Physical or **mental** impairment that substantially limits major life activity;

A record of such impairment; or

Being regarded as having such an impairment.



Includes “any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

Qualified Individual with Disability

- Major life activities include:
 - Caring for oneself
 - Performing manual tasks
 - Seeing
 - Hearing
 - Eating
 - **Working**
- “Substantially limit” factors include:
 - Nature and severity of impairment
 - Duration or expected duration
 - Existence of any actual or expected permanent or long-term impact
- Disability is considered without regard to mitigating factors such as medication or treatment used to mitigate effects of condition

ADA Legal Claims

- Disability Discrimination
- Failure to Provide a Reasonable Accommodation
- Harassment
- Retaliation
- Beware of “regarded as” claims

Qualified Individual with Disability

Diagnosis of a mental health illness alone is **NOT** sufficient to trigger ADA protections.

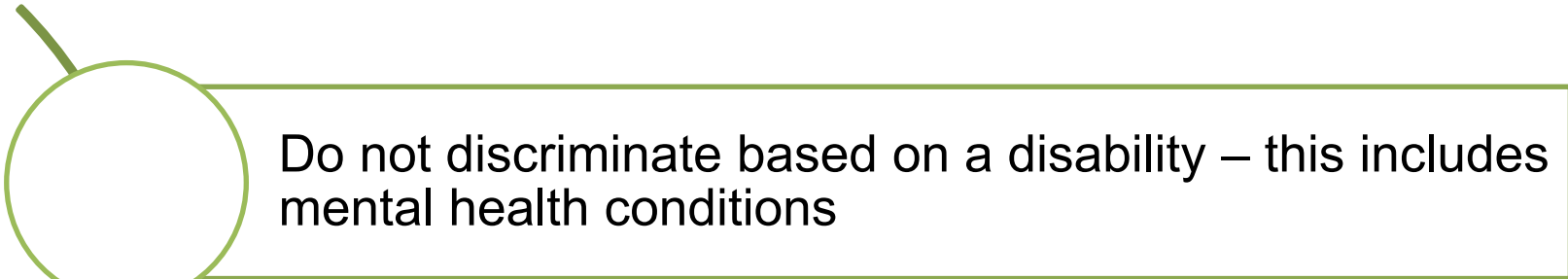
Mere statements about being depressed, anxious, or struggling mentally generally not enough.

Individuals with mental conditions who are currently stable due to medications or treatment **ARE** still protected.

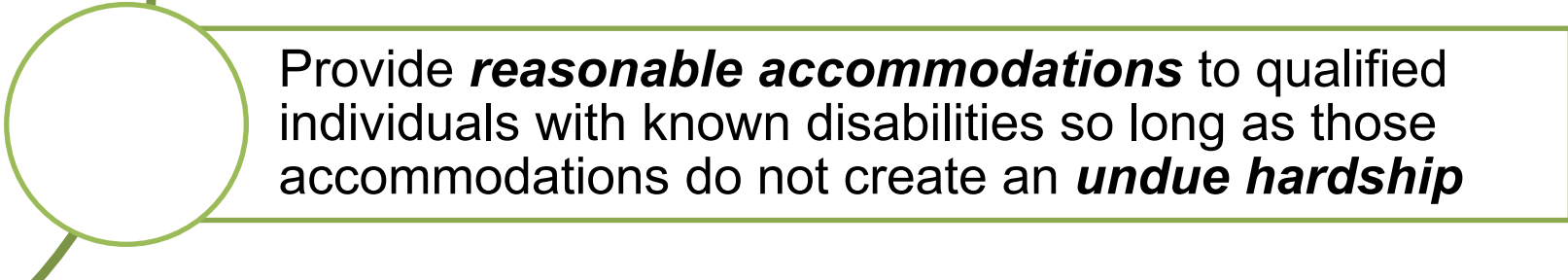
Mental Health Illnesses under ADA

- Major depression
- PTSD
- Mood disorders (bipolar)
- Anxiety disorders
- Autism
- Attention Deficit Hyperactivity Disorder
- Many others

Employer Obligations Under the ADA



Do not discriminate based on a disability – this includes mental health conditions

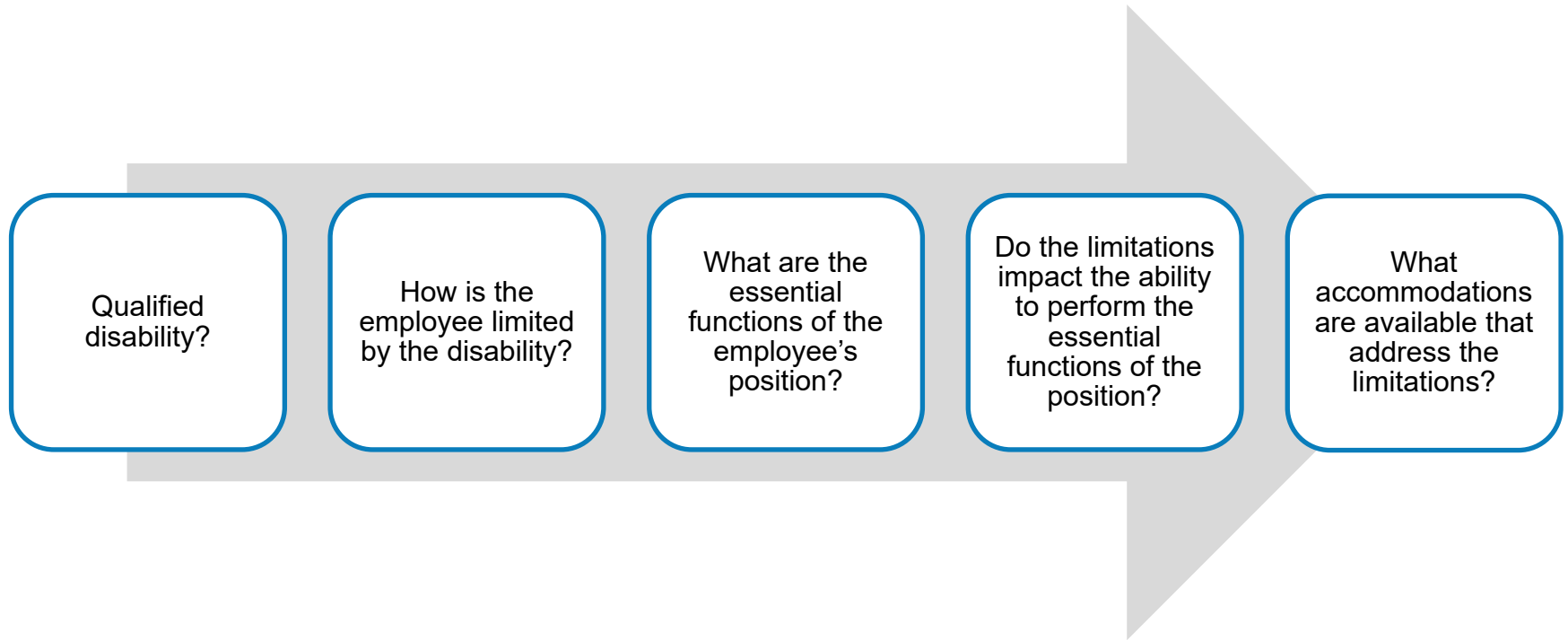


Provide **reasonable accommodations** to qualified individuals with known disabilities so long as those accommodations do not create an **undue hardship**

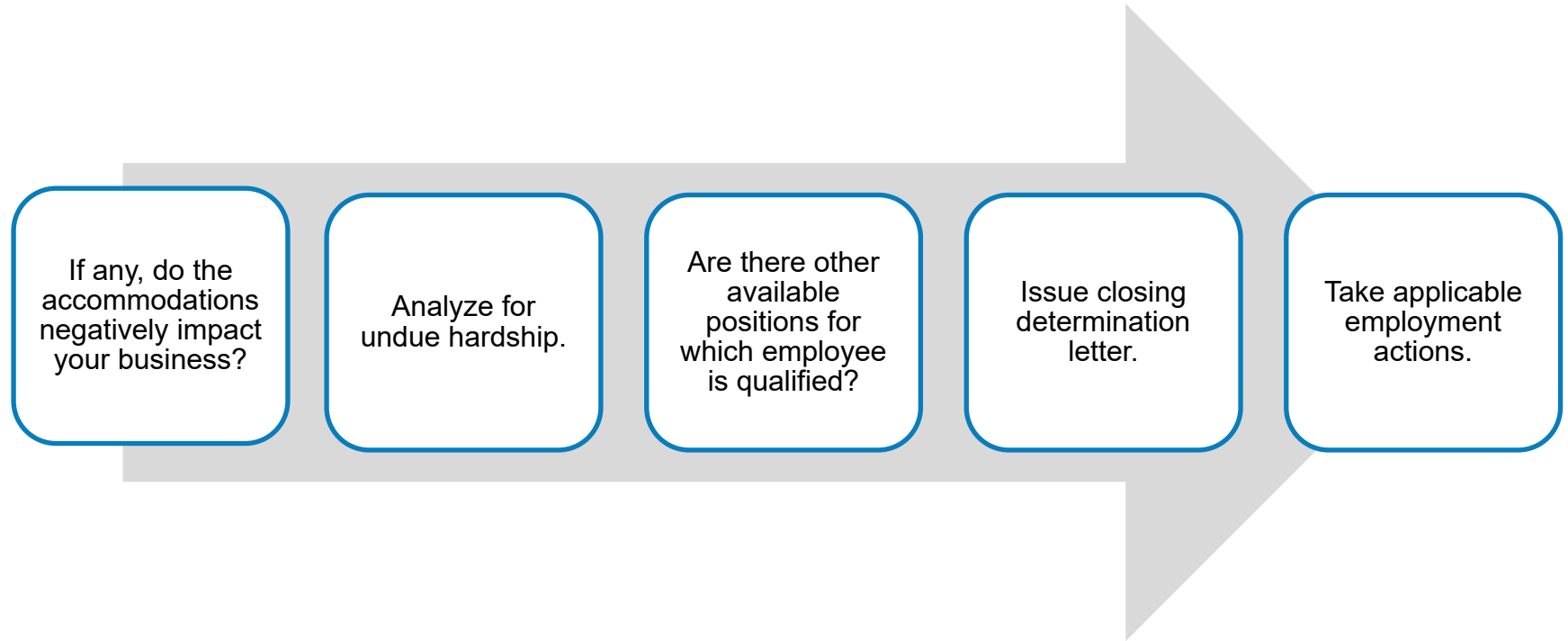
Reasonable Accommodations

- Reasonable accommodations = adjustments to a work setting that make it possible for qualified employees with disabilities to perform the essential functions of their jobs.
- Accommodations vary
 - Will depend on restrictions, job duties, work environment, etc.
- Recognition of mental health accommodation requests is key.
- Input from the medical provider regarding condition and the restrictions is often helpful.

Step-by-Step: The Interactive Process



Step-by-Step: The Interactive Process



When Accommodations Become Undue Hardships

- Undue hardship has a specific definition under ADA regulations:
 - Defined as an action requiring “significant difficulty or expense” incurred by the employer when certain factors are present.
- Factors:
 - Nature and net cost of the accommodation
 - Overall financial resources of the employer
 - Size of the facility or the employer overall, including number of employees
 - Number, type, and location of the employer’s facilities
 - If accommodation is provided by a specific facility, consider financial resources, number of employees, and effect on expenses and resources of particular facility
 - Type of operation of the employer
 - Impact of the accommodation on the operation of the facility/employer

Potential Accommodations for Mental Impairments

Duties

- Modifications to non-essential job functions
- Division of assignments to smaller tasks
- Additional training

Management

- Regular meetings
- Additional forms of communications
- Education and training of all employees

Workplace

- Working from home or telecommuting
- Part-time schedule

Leave

- Sick leave
- Flexible use of vacation time

Breaks

- Breaks according to individual needs versus fixed schedule

Workspace

- Removal of distractions – Addition of soundproofing, partitions, etc.
- Private office

Equipment/Technology

- Audio/video recordings
- Handheld electronic devices



Tips for Handling Top Accommodation Requests

Requests for Remote Work

- Review functions of the position to determine whether employee must be physically present to perform essential job duties and whether the reason for the position can be fulfilled remotely.
- Consider implementing a trial period to determine whether the job duties can be fulfilled offsite and whether employee is able to be effective as a remote worker.
- Review reason for employee's request and determine if employee's needs can be met another way.

Service Animal Requests

- Review applicable state law.
- Follow same reasonable accommodations process you apply to all other requests.
- Carefully examine how the support animal will assist the employee in performing the essential functions of the job.
- If your workplace does not have a “pet-friendly” atmosphere, thoroughly investigate potential problems of allowing animals in the workplace before deciding that the animal will not be permitted due to undue hardship.

Leave as an Accommodation

- Unpaid leave is a reasonable accommodation to be considered in the interactive process.
- Ask:
 - Will the leave allow the employee to perform the essential functions of the position in the near future?
 - Is there an estimated date when the employee will be able to perform the essential functions of the position?
 - For sporadic leave, is the frequency and flexibility manageable based on employee's job functions?

Practical Points: Job Accommodations

Work Leave: leave of absence is sometimes needed but should be accommodation of last resort

Performance: employers are not required to lower performance standards to accommodate an employee with a mental disability

Code of Conduct: employers are not required to change a code of conduct or code of ethics to accommodate an employee with a mental disability

Supervision Changes: employers can be required to change a supervisor's leadership practices or management style as an accommodation (i.e. more structured supervision with task reminders)

Safety Concerns: employers can take safety concerns into consideration but should be grounded in evidence. Vague or general fears that individuals with mental disabilities are going to be violent in the workplace are insufficient.



You Be The Judge

Qualified Individual with Disability

- Employee routinely tardy or absent from work
- Employee sent text messages to employer stating thing such as:
 - My head is really hurting
 - I have a fever and other symptoms
 - I am sick
 - I am having a tough time and dealing with a mental thing
- In a meeting with employer, shortly before termination, informed them that she felt depressed.
- When discussing her tardiness, said it was related to supervisor's work environment, including lack of leadership, direction, trust, favoritism, etc.

Was this enough to place employer on notice of disability?

A

The text messages were sufficient to place the employer on notice

B

The meeting with the employer where she stated she was depressed was sufficient

C

Employee did not establish that employer was on notice of employee's disability



Answer: C – Employee did not establish employer was on notice of employee’s disability.

- Text messages were not sufficient to apprise supervisor of disability.
- Conversation with employer where employee mentioned depression is a closer issue. However, this was not enough.
- Employee only made “a single, unsubstantiated statement that she was depressed without any corroborating medical evidence and without ever having sought medical help, and she consistently presented the issue as a workplace conflict, not a disability.”
- Mention of depression alone is not sufficient.
- Employee failed to set forth prima facie case of disability discrimination under ADA.

***Hrlicka v. General Motors, LLC*, 63 F. 4th 555 (6th Cir. 2023)**

Case Study: Sufficiency of Accommodation Request

- Employee with anxiety and depression had related absences, including emergency room visit.
- Information about health problems, prescriptions and doctor appointments was provided to supervisor, and employee repeatedly requested leave.
- Employee did not explicitly request an “accommodation” under the ADA.
- Supervisor referred employee to handbook but did not provide further information or notify human resources of the situation.
- Employee quit.

What do you think the court decided?

A

Employer was not aware of employee's disability

B

Employer was aware of disability, but employee did not request an accommodation

C

Employer was aware of disability and the requested accommodation

D

Employee did not have a disability under the ADA



Answer: C – Employer was aware of disability and the requested accommodation.

- Court determined that “a reasonable jury could conclude that [employer] was aware of [employee’s] disability; that she requested an accommodation; and that [employer], had it engaged in the interactive process, could have reasonably accommodated her.”
- Fact issue as to whether employer engaged in interactive process
- Therefore, employer’s request for summary judgment was denied.

Garrison v. Dolgencorp, LLC, 939 F.3d 937, 941 (8th Cir. 2019)

Case Study: Failure to Accommodate

- Office manager diagnosed with depression and anxiety.
- Requested accommodation to work 4 hours per day for 30 days and a new work location. Accommodation was approved, then employee was reassigned locations.
- Employee requested new supervisor as an accommodation, which was denied. Employee was then invited to request additional accommodations.
- Employee provided list of 18 accommodations in order “to maximize her productivity.”
- Accommodations denied, and employer concluded no accommodation would allow employee to perform essential functions of position.
- Employee was terminated and then sued.

Did employer have an obligation to provide the requested accommodations?

A

No, because the requested accommodations were not reasonable.

B

Yes, because they were necessary accommodations.

C

The employer was required to provide some type of accommodation even if it was not requested



Answer: A – No, because the requested accommodations were not reasonable.

- Accommodations requested were not reasonable, because they were to allow employee to “maximize productivity,” not to perform essential functions of position.
- Employee failed to show that she requested a reasonable accommodation. Therefore, whether the interactive process took place is unimportant.
- Summary judgment affirmed.

***Edwards v. WellStar Med. Group, LLC*, 20-13866, 2022 WL 3012297 (11th Cir. July 29, 2022)**

Case Study: Interactive Process & Accommodations

- Employee sought accommodations for his Autism Spectrum Disorder.
- Employer agreed to some requests, such as the noise-cancelling headset, specialized job coach, time-management and organization software, and providing training to employee's managers on managing employees with ASD—but found others unreasonable.
- In particular, employer raised concerns about providing employee with an individual to assist in translating his verbal information into writing, request for individuals to help him with administrative tasks and recording meeting notes was unreasonable because employee's role requires responding to clients and others quickly and under dynamic conditions. In addition, this would require employer to hire full-time assistance to handle basic email and administrative tasks for employee.
- Discussions continued with employee and employer for months.
- Ultimately, they could not agree on accommodations. Employee was reassigned.

What did the employer do wrong here?

A

Failed to provide requested accommodation to assist employee with translating verbal information into written materials

B

Failed to engage in the interactive process

C

Reassigned employee

D

The employer did nothing wrong



Answer: D – Employer did nothing wrong.

- Court held “requests for individuals to assist [employee] with translating verbal information into written materials, recording meeting notes, and performing administrative tasks were unreasonable because they would exempt him from performing essential functions.”
- The appropriate accommodation need not be “the employee's preferred accommodation,” and the employer is free to “choose the less expensive accommodation or the accommodation that is easier for it to provide.”
- The record reflects that employer appropriately engaged in good faith.
- Employer worked with employee over several months, explaining accommodations it deemed unreasonable, asking employee to respond with alternate accommodations, and offering to consult directly with employee’s doctors. Further, employer's placement of employee in the job-reassignment program is precisely one of the possible accommodations the ADA contemplates.

***Thompson v. Microsoft Corp.*, 2 F. 4th 460 (5th Cir. 2021)**

Case Study: ADA Retaliation

- Employee sought accommodation for bipolar disorder.
- No allegations were made that bipolar disorder impacted his work or a major life activity.
- Alleged that employer began denying work, reducing hours, and denying overtime after he requested accommodation.

Could this conduct be the basis for retaliation claim?

A

Yes, because he was disabled.

B

No, because employee did not establish disability under the ADA.

C

Yes, if he had a good faith belief he was disabled



Answer: C – Yes, if he had a good faith belief he was disabled.

- Failed to state a claim for disability discrimination.
- BUT court vacated dismissal of retaliation claim.
- “As long as a plaintiff has a good faith belief that he was disabled and requested a reasonable accommodation, he can state a claim for ADA retaliation.”
- To state an ADA retaliation claim, an employee “must show that he engaged in a protected activity, that he suffered an adverse employment action, and that a causal connection exists between that protected activity and the adverse employment action.”
- Complaint alleged reasonable belief that employee was engaging in protected activity.

***Ibela v. Allied Universal*, 2022 WL 1418886 (2nd Cir. May 5, 2022)**

Case Study: Medical Examinations

- Supervisor required employee to undergo mental health counseling based on off-duty conduct and employee's "tumultuous" affair with coworker.

Can an employer require counseling?

A

Yes, always

B

Yes, if job-related and a business necessity

C

Never



Answer: B – Yes, if job-related and a business necessity.

- Mental health counseling was not job-related and consistent with business necessity in this case.
- Supervisor had no information that the employee's job performance was impaired because of her emotional state.

***Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619 (6th Cir. 2014)**



WorkSmarts

Top Tips

Practical Considerations & Practice Tips

- Distinguish between wellness programs (what you can do) and ADA requirements (what you must do).
- Consider establishing a wellness program and resources to reduce litigation risk.
- Develop ADA and reasonable accommodation policies and standard procedures.
- Keep it simple and always show your work!
- Be consistent
- Be patient
- Train, train, train



Questions?

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End Date: 05/17/2023
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