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NEW EEOC PUBLICATION ON MENTAL HEALTH CONDITIONS[1]

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The Equal Employment Opportunity Commission ("EEOC") recently issued a new publication detailing its position on the rights of job applicants and employees with mental health conditions under the federal Americans with Disabilities Act ("ADA"). A companion publication sets forth how the EEOC sees the role of mental health providers in obtaining reasonable accommodations for their clients.

Together, the publications shed new light on the EEOC's view of three different mental health issues under the ADA: covered mental health conditions, accommodations, and privacy.

Mental Health Conditions

First, the publications describe the EEOC's view of which mental health conditions may qualify for protection under the ADA. On the one hand, the EEOC opines that "[m]ental health conditions like major depression, post-traumatic stress disorder (PTSD), bipolar disorder, schizophrenia, and obsessive compulsive disorder (OCD) should easily qualify." On the other hand, the EEOC recognizes that the ADA only protects conditions that would "substantially limit . . . a major life activity" if "left untreated," including an employee's "ability to concentrate, interact with others, communicate, eat, sleep, care for [himself], [or] regulate [his] thoughts or emotions."

By contrast, the EEOC acknowledges that an employer "doesn't have to hire or keep people in jobs they can't perform, or employ people who pose a 'direct threat' to safety (a significant risk of substantial harm to self or others)." However, the EEOC cautions that "an employer cannot rely on myths or stereotypes about [an employee's] mental health condition when deciding whether [they] can perform a job or whether [they] pose a safety risk." In other words, "[b]efore an employer can reject [an employee] for a job based on [their] condition, it must have objective evidence that [the employee] can't perform [their] job duties, or that [they] would create a significant safety risk, even with a reasonable accommodation."

[1] While the EEOC's publications may prove helpful for employers to interpret federal disability law, California employers should note that California's Fair Employment & Housing Act ("FEHA") departs from the ADA in many respects and often provides broader protections to employees compared to federal law.

Accommodations

Second, the publication for mental health providers describes types of accommodations and provides guidance to employees and their health provider about how to obtain reasonable accommodations. The publications list the following as "examples of possible accommodations" for mental health conditions:

- altered break and work schedules (e.g., scheduling work around medical appointments)
- time off for treatment
- quiet office space or devices that create a quiet work environment
- specific shift assignments
- changes in supervisory methods (e.g., providing written instructions, or breaking tasks into smaller parts)
- eliminating a non-essential (or marginal) job function that someone cannot perform because of a disability
- telework or permission to work from home
- reassignment to a vacant position that the employee can perform (i.e., where an employee has been working successfully in a job but can no longer do so because of a disability)

While the publication references "time off" as a common accommodation, the EEOC also specifically opines that "forced leave" may violate the ADA.

Moreover, despite setting forth these examples, the publications do not disturb existing law requiring a case-by-case analysis of accommodation requests. For example, the EEOC recognizes that employers need only provide accommodations that "would help [the employee] do the job" without "significant financial or operational difficulty"; an employer "never has to excuse a failure to meet production standards or rules of conduct that are both necessary for the operation of the business and applied equally to all employees, or to retain an individual who cannot do the job even with a reasonable accommodation."[2]

Further, the EEOC recognizes that employers may ask employees to provide a written accommodation request generally describing their condition and how it affects their work, and a letter from the employee's health care provider documenting that he or she has a mental health condition (e.g., by stating that the employee has an anxiety disorder), and that he or she needs an accommodation because of it. To that end, the EEOC's publication for mental health providers encourages providers to provide documentation of (1) their professional qualifications, (2) the nature and length of their

[2] Notably, the EEOC opines that "Because an employer does not have to excuse poor job performance, even if it was caused by a medical condition or the side effects of medication, it is generally better to get a reasonable accommodation before any problems occur or become worse." However, west coast employers should note that this particular guidance from the EEOC may stand in tension with case law from the Ninth Circuit. *See, e.g.*, *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1095 (9th Cir. 2007) (plaintiff in ADA case was "entitled to have the jury instructed that if it found that her conduct at issue was caused by or was part of her disability, it could then find that one of the 'substantial reasons' she was fired was her bipolar condition."); *Dark v. Curry County*, 451 F.3d 1079, 1084-86 (9th Cir. 2006) (employee's "misconduct . . . fail[ed] to qualify as a legitimate, nondiscriminatory explanation for [employee's] discharge" where the employer (1) "d[id] not argue that [the] 'misconduct' resulted from other than his disability"; (2) required the employee to undergo a fitness for duty evaluation between the employee's misconduct and its termination decision; (3) offered conflicting termination reasons and directly cited the employee's "seizures" in defending its termination decision; and (4) conceded in briefing that similar accidents involving non-disabled employees "did not give rise to conclusions that [those] employees were unfit for duty"). Given the complexity of the law in this area, employers in the Ninth Circuit should exercise caution and consult qualified legal counsel if an employee claims that his or her performance issue or misconduct has been caused by a mental health, medical, or physical condition or impairment.

relationship with the employee, the nature of the employee's condition (i.e., by describing the general type of disorder or how the condition limits the employee's brain/neurological function or other major life activity if the employee does not wish to disclose the diagnosis), (3) the employee's functional limitations in the absence of treatment, (4) the need for a reasonable accommodation, and (5) suggested accommodations if the provider is aware of an effective one.

Privacy

Third, the EEOC describes its position on employee privacy and confidentiality. According to the EEOC, federal law only permits an employer to ask medical questions, including questions about mental health, in 4 situations:

- When an employee asks for a reasonable accommodation;
- After the employer has made a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions;
- When the employer is engaging in affirmative action for people with disabilities (e.g., if an employer is tracking the disability status of its applicant pool in order to assess its recruitment and hiring efforts or considering whether special hiring rules may apply, in which case employees may choose whether to respond);
- On the job, when there is objective evidence that an employee may be unable to do his or her job or that he or she may pose a safety risk because of his or her condition.

The EEOC further opines that employers must keep any medical information shared by an employee confidential, "even from co-workers."

In an accompanying press release, the EEOC noted that charges alleging discrimination based on mental conditions are on the rise, with nearly 5,000 such charges filed during fiscal year 2016 with the EEOC obtaining some $20 million for those complainants. EEOC Chair Jenny R. Yang further explained that the mental health publications were prompted by a "need to raise awareness about these issues" that the EEOC observed during its "recent outreach to veterans who have returned home with service-connected disabilities":

> Employers, job applicants, and employees should know that mental health conditions are no different than physical health conditions under the law. . . . This resource document aims to clarify the protections that the ADA affords employees.

According to the EEOC, these mental health condition publications are "part of an ongoing series of publications providing individuals with medical conditions or work restrictions with user-friendly explanations of their rights, and with information that they can give to a health care provider to explain how to provide appropriate medical documentation, if required." Prior publications addressed employment issues related to workers with HIV infection (available at https://www.eeoc.gov/eeoc/newsroom/wysk/hiv_aids_discrimination.cfm) and pregnant workers (available at https://www.eeoc.gov/eeoc/publications/pregnant_workers.cfm).

Conclusion

These publications confirm the EEOC's continued enforcement focus on disability discrimination issues, and suggest that mental health claims may take center stage in the coming years. The EEOC's commentary on veterans with mental health conditions also signals a particular interest in claims involving military service-related disabilities. Employers should take this opportunity to review their

accommodation and leave practices, procedures, and training to ensure they comply with the ADA, the FMLA and applicable state disability and leave laws.

If you have questions about the EEOC's publications, please contact us.

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