Chronic Depression in the Workplace – What's an Employer To Do?

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TABLE OF CONTENTS

Page

Overview

These case studies provide a guide to working with employees with depression. Special emphasis is placed on issues presented under the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and the Minnesota Human Rights Act ("MHRA"). These case studies are not, however, intended to provide a definitive answer to all the disability issues that may arise with such illnesses, nor are they intended as legal advice in a particular situation. Cases of disabilities and depression must be addressed taking into account the unique circumstances of each employee and work setting.

For the most part, mental and emotional illnesses may be analyzed under the same criteria used in analyzing physical disabilities. However, a few special issues arise with depression and related illnesses and will be emphasized in these case studies. These issues include:

1. Does the definition of disability change when a mental or emotional illness is involved;
2. When and how can an employer request medical information related to a mental or emotional condition;
3. What reasonable accommodations are required for depression or related illnesses;
4. What leaves of absence are required for employees with depression; and
5. When can an employer terminate an employee with a disability for misconduct or poor performance.

Case Study #1 Definition of Disability

David is an accountant at a large accounting firm. You were recently hired as a Human Resources Manager, so you are still getting to know the firm's employees. A few days ago, Leah, one of the directors to whom David reports, contacted you about concerns with David's work and attendance. Leah indicated that David has not been meeting deadlines, his work often has numerous errors, and he has had several absences in the past few months. To better understand the situation you decide to meet with David.

During the meeting, you learn that David has depression and has been meeting regularly with a psychiatrist to treat his depression. He mentions that he experiences trouble sleeping, has been unable to attend social events, and has trouble concentrating. David says he takes medication prescribed by his psychiatrist to manage his depression. David does not mention any work restrictions; however, he tells you that that tasks are taking him a longer time to complete, he cannot focus in meetings, and that if his work day started at a later time, he may be able to better complete his work.

You wonder if depression is a disability that you are obligated to reasonably accommodate or whether you can take discipline David without creating disability discrimination issues.

Issue #1 Is depression a disability?

Guiding Principle: Not every impairment[1] qualifies as a disability under the ADA.[2] In many cases, it is not the name of the impairment that determines whether a disability exists.[3] The degree and effects of the illness determine whether a disability exists.[4] An individualized assessment is required to determine if an impairment substantially limits a major life activity.[5]

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[1] The ADA's regulations define a "physical or mental impairment" as

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as an intellectual disability, … organic brain syndrome, **emotional or mental illness**, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (emphasis added).

[2] 29 C.F.R. § 1630.2(j)(1)(ii).

[3] Notably, depression, anxiety, and ADHD are not *per se* disabilities under the ADA. *See Russell v. Phillips 66 Co.*, 184 F. Supp. 3d 1258, 1268 (N.D. Okla., 2016).

[4] The ADA defines a disability as:

> (A) a physical or mental impairment that **substantially** limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(1) (emphasis added).

The condition, manner or duration of an individual's performance of a major life activity may be considered to determine whether an impairment results in substantial limitation. 29 C.F.R. Pt. 1630, App. § 1630.2(j)(4). The definition of disability under the Minnesota Human Rights Act ("MHRA") mirrors the ADA's definition, with one exception—the impairment must **materially** limit of one or more major life activities to constitute a disability. *See* Minn. Stat. § 363A.03, subd. 12.

Importantly, in response to several Supreme Court decisions narrowly defining "disability" under the ADA, Congress enacted the ADA Amendments Act of 2008 ("ADAAA"), mandating the definition of disability be construed broadly under the ADA. *See* 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.1(4). Likewise, the ADAAA directs that "substantially limits" is to be broadly construed in favor of expansive coverage. *See* 29 C.F.R. § 1630.2(j)(1)(i).

[5] Under the ADA, major life activities include, but are not limited to:

Appropriate questions would be:

(1) Does David have an impairment?

(2) Is David substantially (materially) limited from performing a major life activity?

(3) Does David have a record of such an impairment?

(4) Is David regarded as having such an impairment?

Application:

Physical or Mental Impairment.

> You know that David is diagnosed with depression, but you are unsure as to whether that diagnosis alone is sufficient to be considered an impairment under the ADA. To show that he has an impairment, David must show that he has an impairment that prevents or restricts him from doing activities "that are of central importance to most people's daily lives permanently or over a long term period."[6]

Substantial (Material) Limitation.

> Although you know that David has trouble sleeping and focusing, you are unsure whether his depression is substantially limiting a major life activity. To be substantially limiting, an impairment need **not** prevent, or significantly restrict an individual from performing a major life activity.[7] Rather, an individual's performance of a major life activity is compared "to the performance of the same major life activity by most people in the general population."[8] You know that major life activities include, but are not limited to, functions such as caring for

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> (i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
>
> (ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

29 C.F.R. § 1630.2(h)(1).

6 *See Johnson v. City of Chicago Bd. of Ed.*, 142 F. Supp. 3d 675, 685 (N.D. Ill. 2015).

7 29 C.F.R. § 1630.2(j) ("'Substantially limits' is not meant to be a demanding standard.").

8 29 C.F.R. § 1630.2(j)(v).

oneself, performing manual tasks, sleeping, concentrating, interacting with others, and working.[9]

To show he is limited in the major life activity of working, David must present "evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs … from which" he would be excluded due to a disability.[10] But an inability to perform a *single job* would not support a finding that he is substantially limited from working.[11]

Here, there may be some dispute about whether David is limited in his job as well as others. He mentions some problems completing his job (focusing and concentrating) due to his depression, but you do not know whether he is unable to work a "broad class of jobs" due to his impairments.[12]

Given David's statement that he has trouble sleeping and focusing, you believe his depression might be limiting, to some degree, his ability to perform other tasks such as concentrating and meeting work deadlines. You do not know which specific activities his depression is limiting or the degree of any such limitation.[13] David's statement that he has trouble sleeping indicates that he may be limited in the major life activity of sleeping.[14] Despite not knowing the degree to which David is limited, working and sleeping are major life activities and the term "substantially limits" is to be "construed broadly."[15] In addition, when evaluating ADA cases, "the primary object of attention … should be whether covered entities have complied with their obligations … not whether an individual's impairment substantially limits a major life activity."[16] Consequently, you decide it is better to err on the side of caution when determining the degree to which David is limited from working and sleeping, and conclude his ability to work and sleep are substantially limited.

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9 29 C.F.R. § 1630.2(i).

10 *See Johnson*, 142 F. Supp. 3d at 686.

11 *Id.*; s*ee also Russell*, 184 F. Supp. 3d, at 1268 (courts should consider the major life activity of "working" only as a last resort).

12 *Johnson,* 142 F. Supp. 3d at 687.

13 *See id.* at 687 (it is not enough that the plaintiff merely state that her "everyday activities" are limited, she must show her psychological disorders were permanent or long-term).

14 29 C.F.R. § 1630.2(h)(1)(i).

15 29 C.F.R. § 1630.2(j)(1)(i).

16 29 C.F.R. § 1630.2(j)(1)(iii).

Record of Disability.

> David could present evidence that he has received medical treatment for depression or has been diagnosed with depression.[17] But, a record of an impairment alone does not establish a record of disability—the record must include information indicating the impairment substantially limits a major life activity. [18]

Regarded as Disabled.

> The "regarded as" prong requires that the employer perceive the employee as having an impairment—it does **not** require an employer view the impairment as a substantial limitation.[19] To be "regarded as" disabled the impairment cannot be transitory and minor.[20] Whether an impairment is transitory and minor is determined using an objective standard, meaning, it is not enough for an employer to believe the impairment is transitory and minor, the impairment must actually be transitory and minor.[21] This prong also requires that an individual be subjected to an action prohibited by the ADA.[22]

Case Study #2 Medical Information

In view of your belief that David is possibly disabled, you would like to get more information about his disability and the limitations it places on his ability to perform his job. This information will help you evaluate David's request for a later start time and identify other possible accommodations.[23]

Issue #2 What medical information can an employer request from an employee who has requested an accommodation for a claimed disability?

Guiding Principle: You may obtain medical information **only if**:

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17 *See Johnson*, 142 F. Supp. 3d at 688.

18 29 C.F.R. § 1630.2(k)(1).

19 42 U.S.C. § 12102(3)(A).

20 42 U.S.C. § 12102(3)(B). An impairment is transitory if it has "an actual or expected duration of 6 months or less." *Id.*

21 29 C.F.R. § 1630.15(f).

22 42 U.S.C. § 12102(3)(A).

23 "Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Pt. 1630, App. § 1630.9.

- The reason for requesting the medical information is "**job-related and consistent with business necessity**."[24] Specifically, medical information may be requested (1) if there is evidence of problems related to job performance or safety; or (2) if needed to determine whether an employee in a physically demanding job continues to be fit for duty.[25] For example, an employer may be able to request medical information if it knows about an "employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition."[26]
- If an employee requests a reasonable accommodation and his or her disability or the need for an accommodation is not obvious, an employer may require the individual to provide documentation of the need for accommodation.[27]
- Medical information accompanying a reasonable accommodation request is sufficient if it:
  (1) describes the nature, severity, and duration of the employee's impairment;
  (2) describes the activity or activities that the impairment limits;
  (3) describes the extent to which the impairment limits the employee's ability to perform the activity or activities; and

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[24] 42 U.S.C. § 12112(d)(4) (emphasis added); 29 C.F.R. § 1630.14(c). The MHRA permits an employer to request an individual's medical information for the purpose of determining an appropriate accommodation, but the individual must consent to disclosure of such information. Minn. Stat. § 363A.20, subd. 8(1)–(2).

[25] EEOC, *ADA Technical Assistance Manual* § 6.6 (1992). Although the *Manual* limits this criteria to "**physically** demanding jobs," jobs that involve unusually high mental demands may arguably permit medical or psychological examinations to determine continuing fitness for duty. (emphasis added).

[26] EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examination of Employees under the Americans with Disabilities Act (ADA)*, Question 5 (July 27, 2000) (hereinafter "*DRI & ME Guidance*"), http://www.eeoc.gov/policy/docs/guidance-inquiries.html (last visited Apr. 18, 2017).

[27] 29 C.F.R. Pt. 1630, App. § 1630.2(k); *see also Porfiri v. Eraso*, 121 F. Supp. 3d 188, 198 (D.D.C. 2015) (physical impairment was "inconspicuous and intermittent" and thus, need for accommodation was not obvious).

(4) substantiates why the requested reasonable accommodation is needed.[28]

- The employer, however, must limit its request to information relevant to the existence of a disability and the need to accommodate the existing disability.[29]
- All medical records must be kept confidential and filed separately from other personnel records.[30]

If all of the above conditions are met, an employer may require the employee to provide medical information for the purpose of determining the appropriate accommodation.

Application: Under the present circumstances, you have determined that you can request certain medical information from David for job-related reasons, such as David's attendance and performance issues, as well as his request for a later start time. You further believe that business necessity compels you to require that David improve his attendance so that all accountants will be functioning at full capacity to meet reporting period deadlines. In addition, although David has requested a specific accommodation, this accommodation does not address his attendance and performance issues. The appropriate accommodation is not obvious to you, and, as a result, you are permitted to request medical information to aid in identifying an appropriate accommodation.

Issue #3 How does an employer request medical information?

Guiding Principles: There are no legal guidelines for how medical information is to be requested under the ADA.[31] However, some suggestions include:

- Think through the meeting with the employee in advance, considering how to word the request.
- Draft a form for limited release of medical information.[32] This form should clearly delineate the information that will

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28 *DRI & ME Guidance*, Question 10.

29 *Reasonable Accommodation Guidance*, Question 6.

30 29 C.F.R. § 1630.14(c); Minn. Stat. § 363A.20, subd. 8(a)(1)(iv), (2), (b).

31 *See* Issue #7 for guidelines on requesting medical information under the FMLA. Minnesota law requires the employer to pay "the cost of furnishing any records required by the employer as a condition of employment." Minn. Stat. § 181.61.

32 *See* Attached Form *Authorization for the Release of Medical Information for Americans with Disabilities Act ("ADA") Reasonable Accommodations.*

be requested. Bring this form to the meeting, explain what information the form pertains to, and request that the employee sign the release.[33] Explain that you are required by law to maintain the confidentiality of all medical information that is obtained in connection with the accommodation process.[34] Clarify that there are a few limited situations where you are permitted to disclose certain medical information related to an accommodation.[35]

- Have another manager or supervisor present when the request is made as a witness.
- Express your concern for the employee. Be tactful and sensitive to the employee's potential embarrassment.
- Specify the types of information you are seeking, which might include information regarding the disability, its functional limitations, and the need for an accommodation.
- Explain to the employee the job-related reasons that you are requesting the medical documentation.
- Explain any consequences of refusing to provide the requested medical information.

Application: You set up a meeting with David to request medical information to help assess potential accommodations. Before meeting with David, you plan what you will say.

- You plan to tell David what you have "observed" about his attendance and performance issues.
- You intend to express your "concern" and tell him that you want to discuss a "sensitive" issue related to his job performance.
- You plan to inform him that his job performance has recently been unacceptable and to give him specific examples of his deficiencies;
- You plan to conclude that based on the information David has provided to you regarding his depression, you believe David's attendance and performance issues may be related to his depression. You plan not to refer to his depression as a "disability" at this point, but as a "medical condition." You also plan to tell David you need more information before you can determine whether to grant his request for a later start time.

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33 *Reasonable Accommodation*, Question 6 n.28.

34 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C).

35 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C).

David is initially disinclined to provide the requested documentation from his psychiatrist. You explain to David that if he does not provide this documentation, you will have to determine whether to grant his request for a later start time based on the information you currently possess. In addition, you will be forced to take disciplinary action against him for his attendance and performance problems. You should also tell him that regular attendance and meeting deadlines are essential functions of his job.

Issue #4 What medical information is sufficient?

Guiding Principles: Conclusory statements that an employee suffers from a mental impairment, such as depression, is insufficient evidence to show that the employee's impairment limits a major life activity.[36]

Application: If David's psychiatrist merely provides information stating that David suffers from depression, you may request further information regarding David's impairment that includes a specific description of **how** his mental impairment substantially limits major life activities.

Case Study #3 Reasonable Accommodation

David eventually agrees to provide the requested medical information and signs the release. You receive a letter from David's psychiatrist, Dr. Levinson, confirming that David has depression and is experiencing resulting limitations. Dr. Levinson explains that given David's insomnia and trouble focusing, he recommends that David be permitted to attend work at a later start time and be provided longer time to complete tasks. Dr. Levinson also suggests that on days when David's depression is significantly limiting, David be permitted to take the day off. Dr. Levinson writes that David is currently taking prescription medicine to reduce his symptoms. This medication however, causes David constant fatigue. Dr. Levinson explains that David's depression, in combination with the fatigue, has impaired David's attendance.

You must now consider whether there are any reasonable accommodations that must be provided to allow David to perform the essential functions of his job.

Issue #5 What reasonable accommodations must an employer offer to an employee with depression or a related illness?

Before determining the reasonable accommodations you must offer David, you must first determine the essential functions of his job.

Guiding Principles: A job function may be essential "if the reason the position exists is to perform that function, or if a limited number of employees are

[36] *See Wilkey v. County of Orange*, No. SACV 16-01168-CJC(KSX), 2017 WL 7795726, at *4 (S.D. Cal. Nov. 9, 2017).

available among whom the performance of the job function can be distributed."[37] Factors to consider include:[38]

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent performing the function;
- The consequences of excusing an employee in this position from performing the function;
- The terms of any applicable collective bargaining agreement;
- The work experience of people who have performed this job in the past or who currently perform similar jobs; and/or
- Other relevant factors such as the nature of the work operation or the organizational structure of the workforce.

It may be particularly difficult to determine essential job functions where the tasks are not physical, but rather involve mental processes and interpersonal skills. Under these circumstances, it may be important to:

- Indicate **how** a task is to be performed.

Example: Not "Prepare variance reports for clients."

But "Prepare timely and accurate variance reports for clients."

- Describe the **mental** process, not just the concrete task.

Example: Not "Use Generally Accepted Accounting Principles."

But "Evaluate records, financial statements and financial reports using Generally Accepted Accounting Principles."

- State the **quantity** of work an employee is required to produce, which might be expressed (1) in terms of quantity of work to be produced within a particular time frame or (2) in terms of expected turn-around time.

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37 *Scruggs v. Pulaski Cty.* 817 F.3d 1087, 1092 (8th Cir. 2016).

38 29 C.F.R. § 1630.2(n)(3).

Examples: "Prepare sales reports for ten clients per month."

- "Respond to client calls and emails within twenty-four hours of the time received."
- "During tax season, accurately complete clients' tax returns within ten business days of receiving necessary client information."

Guiding Principles: An employer is only required to provide **work-related accommodations**—it is not obligated to provide accommodations that are primarily for an employee's personal benefit.[39] Keeping in mind the confidentiality requirements of the ADA,[40] when considering reasonable accommodations an employer should consult with:

- the affected employee;
- the employee's treating physician(s) or other treating professionals;
- physicians or other experts conducting medical evaluations; and
- managers or supervisors familiar with the workplace and the job requirements.[41]

Consultation is central to determining a reasonable accommodation. The ADA[42] places responsibility on both the employer and the employee to engage in an informal, flexible interactive process.[43] The employee, however, must give the

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39 29 C.F.R. Pt. 1630, App. § 1630.9.

40 During the interactive process, if the employer decides to consult with managers or individuals familiar with the disability, it should withhold the employee's name and any other identifying information. *See* Job Accommodation Network ("JAN"), *The Interactive Process*, (Dec. 28, 2011), http://askjan.org/media/eaps/interactiveprocessEAP.doc (last visited Apr. 10, 2018). The regulations, however, do provide three exceptions to the confidentiality rule. *See* 29 C.F.R. § 1630.14(d)(1). In relevant part, "[s]upervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations." *Id.*

41 EEOC, *ADA Technical Assistance Manual*, § 3.8, 3.11, 4.5 and 6.4 (1992).

42 Notably, the MHRA does not require an employer to engage in an interactive process with an employee to determine an appropriate reasonable accommodation. *McBee v. Team Indus., Inc.*, 906 N.W.2d 880 (Minn. Ct. App. 2018).

43 29 C.F.R. § 1630.2(o)(3).

employer enough information for the employer to inquire further as to the need for a reasonable accommodation.[44]

An employee who refuses to provide necessary documentation or declines an offered reasonable accommodation may be barred from bringing a claim.[45] However, if no possible reasonable accommodation exists, an employer does **not** violate the ADA by declining to engage in the interactive process.[46]

Application: You decide that you are not qualified to determine what reasonable accommodations might help David. After receiving Dr. Levinson's letter, you discuss the contents with David and ask him whether he believes any specific accommodations, outside of his request to attend work later, would be required.

Guiding Principles: Typical accommodations for the mental illnesses might include:[47]

- Reducing distractions in the work area by providing space enclosures or a private office;
- Providing daily to-do lists and other organizational tools, or dividing large assignments into smaller tasks;
- Assigning a mentor to assist with determining goals and to meet with on a weekly basis;
- Part-time or modified work schedules, which may include adjusting arrival and departure times, or providing for an alternate break schedule;
- Paid or unpaid leave[48] for a finite period of time;[49]
- Reassignment to a vacant position that relieves work-related problems arising from the disability;[50]

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44 *See Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012).

45 *See Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 482 (5th Cir. 2016).

46 *See Hunt-Watts v. Nassau Health Care Corp.*, 43 F. Supp. 3d 119, 135 (E.D.N.Y. 2014).

47 JAN, *Employees with Mental Health Impairments*, (Oct. 22, 2015), https://askjan.org/media/Psychiatric.html (last visited Apr. 10, 2018).

48 *See generally* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), https://www.eeoc.gov/eeoc/publications/ada-leave.cfm (last visited April 10, 2018).

49 *Aspen v. Wilhelmsen Ships Ser.*, CIV. A. No. 13–6057, 2015 WL 1020660, at *5 (E.D. Pa. Mar. 9, 2015) (medical leave for indefinite period of time is not a reasonable accommodation).

- Acquisition or modifications of equipment or devices necessary to satisfy job-related requirements;[51]
- Permitting short breaks to take medication[52] or allowing longer breaks when medication causes nausea;[53]and/or
- Allowing an employee to work at home in certain circumstances.[54]

Issue #6 Is attendance an essential function of a job?

Guiding Principles: Many courts hold that regular attendance can be an essential function of a job, particularly where an employee must work as part of a team, use on-site items or equipment to perform his or her job, or interact face-to-face with clients.[55] Courts disagree, however, about when **physical** attendance is an essential function of a job.[56] Although some courts note that such job positions are rare, it seems likely that when an individual can perform all work-related duties remotely, **physical** attendance may not be deemed an essential function.[57]

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[50] An employee must able to perform the essential functions of the new position, with or without reasonable accommodation, and possesses the requisite skills, experience, education and other job-related requirements of the position. *Reasonable Accommodation*, Reassignment.

[51] JAN, *Employers' Practical Guide to Reasonable Accommodation Under the ADA*, Part D., Question 5a., http://askjan.org/Erguide/Three.htm#C (last visited Apr. 10, 2018).

[52] *Reasonable Accommodation*, Question 37.

[53] *Reasonable Accommodation*, Question 22.

[54] An employee may be permitted to work at home if the essential functions of the job can be performed remotely. *Reasonable Accommodation*, Question 34. Additionally, an employer may deny a request to work at home if there is an alternative reasonable accommodation or if it causes the employer undue hardship. *Id.*; *see also* EEOC, *Work At Home/Telework as a Reasonable Accommodation*, Question 2 (Oct. 27, 2005), https://www.eeoc.gov/facts/telework.html (last visited Apr. 10, 2018).

[55] *See Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 391–92 (6th Cir. 2017); *see also Taylor-Novotny v. Health All. Med. Plans, Inc.*, 772 F.3d 478, 489–90 n.47 (7th Cir. 2014).

[56] *Compare McMillan v. City of New York*, 711 F.3d 120, 126–27 (2d Cir. 2013) ("Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment."), *with E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 762–63 (6th Cir. 2015) ("Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.").

[57] *See Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1239 (9th Cir. 2012).

Because many mental disabilities, like depression, may result in frequent or unexpected absences, an employer should include in any job description or list of essential functions, a statement of attendance requirements. For example:

- Must be available to work Saturdays and evenings on short notice, when necessary.
- Although the firm realizes that injury or illness may result in absences, regular attendance is critical in this job because the expertise this employee is providing will not be available from any other source.

Application: David admits that he has had excessive absences, but as a reasonable accommodation, he would like to work from 10:00 a.m. to 7:00 p.m. instead of 8:00 a.m. to 5:00 p.m. You wonder if you have to grant this request.

You determine that although it is not ideal to have one accountant working later hours, it is not an "undue hardship" on your company to allow David special working hours if it indeed helps with his absences and ability to concentrate. If David is still not able to maintain regular attendance, however, he may be subject to disciplinary action.

Case Study #4 Leaves of Absence

David's doctor recommended approval for possible intermittent leave on days when David's symptoms are especially bad. David has not put his leave request in writing as required by the firm's leave policy. You wonder whether these absences are covered by the Family and Medical Leave Act ("FMLA").

Issue #7 When does an employee with depression qualify for a leave of absence?

Guiding Principles: Both the ADA and the FMLA[58] may require an employer to grant an employee a leave of absence because of the employee's medical situation. These two statutes intersect quite frequently and, in some cases, seem to place conflicting—or at least inconsistent—requirements on the employer.

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[58] The FMLA requires an employer (50 or more employees) to provide up to 12 weeks of unpaid leave to an employee who has a "serious health condition," as defined in the Act. 29 C.F.R. §§ 825.100(a), 825.104(a).

To be eligible for leave, an employee must (1) have been employed by the employer for at least 12 months on the date on which the leave starts, (2) have worked for the employer for at least 1250 hours during the previous twelve months, and (3) be employed at a worksite where 50 or more employees are employed within 75 miles of that worksite. 29 U.S.C. § 2611(2).

- Under the ADA, an employer may be required to provide a leave of absence as a form of "reasonable accommodation" to an employee with a "disability." The leave of absence has no set length—it continues until it becomes an "undue hardship."[59]
- Under the FMLA, an employer is required to provide an employee with a leave of absence if the employee has a "serious health condition."[60]
- The FMLA leave continues for 12 workweeks—either in one long block, several smaller blocks, or on an intermittent basis. Unlike the ADA, the FMLA does not allow an employer to deny leave based on "undue hardship." In other words, an employer has an "all-or-nothing" obligation to provide leave. An employer cannot curtail the 12-week FMLA leave simply because such leave imposes difficulties on the employer.[61]
- A "serious health condition" is an "illness, injury, impairment, or physical or mental condition" that:
    a. Requires inpatient care (i.e., overnight hospital stay) or subsequent treatment in connection with such inpatient care; or
    b. Requires continuing treatment by a health care provider that involves a period of incapacity[62] for more than three consecutive days; and either:
        (1) Treatment two or more times, within 30 days of the first day of incapacity (unless extenuating circumstances exist), by a health care provider, nurse under direct supervision of a provider, or provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
        (2) One treatment session by a health care provider which results in a regimen of

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59 *See* 29 C.F.R. 1630.2(p).

60 *See supra* note 59 for statutory reference.

61 *See supra* note 59 for statutory reference.

62 "Incapacity" means "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." 29 C.F.R. § 825.113(b).

continuing treatment under the supervision of the health care provider,[63]

c. Involves incapacity due to pregnancy or prenatal care; or

d. Involves incapacity due to a chronic serious health condition that:

(1) requires periodic visits (i.e., at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider; and

(2) continues over an extended period of time; and

(3) may cause episodic period of incapacity (e.g., asthma, diabetes, epilepsy).

e. Involves incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include: Alzheimer's, a severe stroke, or the terminal stages of a disease; or

f. Requires multiple treatments by a health care provider or a provider of health care services under orders of, or on referral by, a health care provider, either for

(1) restorative surgery after an accident or other injury, or

(2) a condition likely to result in a period of incapacity of more than three consecutive days in the absence of medical intervention or treatment, such as cancer, severe arthritis, or kidney disease.[64]

- An individual may have both a "disability" and a "serious health condition," however, there may be times when an employee falls under one category but not under the other. An employer need not be concerned about possible competing provisions in the FMLA and the ADA unless the

63 "Treatment" related to a period of incapacity means "an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity." 29 C.F.R. § 825.115(a)(3) (emphasis added).

64 29 U.S.C. § 2611(11); 29 C.F.R. §§ 825.113–.115.

employee has **both** a "disability" and "a serious health condition." Thus, to determine what obligations an employer has to an employee with a medical condition, the employer will need to determine whether the employee has **only** a "disability," **only** a "serious medical condition," or **both**.

Application: You determine that David probably has both a disability and a serious health condition. His depression is certainly a serious health condition—David has had depression for many years; as a result of his depression, he is required to routinely see a psychiatrist.

However, you are unsure if his requested intermittent absences qualify as FMLA leave so you decide that you need to gather more information regarding the need for, and timing of this leave. You are unsure how to gather medical information under the FMLA. You are also concerned that the intermittent leave may pose an undue hardship on David's department due to tight turnaround times for reporting periods and tax purposes.

Guiding Principles: The ADA and FMLA differ regarding how to contact a medical provider, what information can be obtained, and what factors will end a leave.

- The ADA sets no limitations on the employer's ability to contact an employee's health care provider. Notably, under the MHRA, an employer must obtain **employee consent** to request and obtain medical information.[65]
- The ADA and MHRA both limit the type of information an employer can request. Under the ADA, an employer may only obtain information that is "job-related and consistent with business necessity."[66] The MHRA allows an employer to receive, with employee consent, medical information for the purposes of (1) assessing the employee's continuing ability to perform his or her job, (2) assessing a request or need for accommodation, or (3) any other legitimate business reason.[67]
- Under the FMLA, an employer is more restricted in how an employee's medical information can be gathered. An employer may not speak to an employee's doctor directly

65 Minn. Stat. § 363A.20, subd. 8(2).

66 29 C.F.R. § 1630.14(c).

67 Minn. Stat. § 363A.20, subd. 8(2).

or obtain copies of medical records;[68] instead, it must elicit information through a Certification Form. The employer must notify the employee of his or her obligation to provide the Certification and must advise the employee of the consequences for failing to provide such Certification.[69]

- If the FMLA Certification is incomplete or contains "vague, ambiguous, or non-responsive" information, the employer must indicate, in writing, what information is needed to make the certification sufficient and complete.[70] The employee then has seven calendar days to cure the deficiency, "unless not practicable under the particular circumstances, despite the employee's diligent good faith efforts."[71] If the deficiency is not cured, a human resources professional, leave administrator, or management official employed by the employer can contact the signing health care provider to clarify or verify the certification.[72] An employee's direct supervisor, however, is never permitted to contact the signing health care provider.[73]
- When clarifying or authenticating FMLA certification, the requested information cannot extend beyond information necessary to (1) verify that the employee has a serious health condition; or (2) clarify information on the form.[74]
- The FMLA certification form contains questions that are job-related and consistent with business necessity, and thus the FMLA certification is consistent with the ADA. However, the issue of what reasonable accommodations an employee might be entitled to is not addressed in the FMLA certification. In other words, many of the questions an employer might raise under the ADA are already

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68 29 C.F.R. § 825.305.

69 29 C.F.R. § 825.300(c);

70 29 C.F.R. 825.305(c).

71 *Id.*

72 29 C.F.R. §§ 825.307(a); *see also New FMLA Rules Allow Direct Physician Contact, but Final Regulations are Narrower than Proposal*, 16 NO. 11 FAM. & MED. LEAVE HANDBOOK NEWSL. 9 (Feb. 2009).

73 *Id.*

74 29 C.F.R. § 825.307(a).

included on the FMLA Certification Form – except for the issue of reasonable accommodation.[75]

Issue #8 What are the requirements for an employee who needs intermittent leave?

Guiding Principles: An employee is not required to specifically request "FMLA leave" to be entitled to it.[76] The employee need only provide sufficient information to establish a qualifying reason.

Under the FMLA, an employee does not have to provide the employer with written notice of the need for a leave.[77] If the need for leave is foreseeable, an employee is required to provide the employer with 30 days' notice before FMLA is to begin, unless such notice is not practicable.[78] When the timing of need for leave is unforeseeable, an employee is required to provide notice as soon as practicable under the facts and circumstances of the particular case.[79] Moreover, absent unusual circumstances, if an employee fails to follow an employer's required procedures for requesting leave, an employer can deny or delay the leave, as long as the employer's policy does not require notice to be given sooner than required under the FMLA.[80]

- To qualify for intermittent leave, an employee must show (1) a medical need for the leave and (2) that this medical need can best be accommodated through an intermittent or reduced schedule leave.[81]

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75 The ADA may also provide an avenue for an employer to obtain health information that will aid in its decision regarding FMLA leave. Specifically, "[i]f an employee's serious health condition may also be a disability within the meaning of the [ADA]," an employer is permitted to consider "information received pursuant to the [ADA] procedures … in determining the employee's entitlement to FMLA-protected leave." 29 C.F.R. § 825.306(d).

76 29 C.F.R. § 825.302(c).

77 *Id.*

78 29 C.F.R. § 825.302(a).

79 29 C.F.R. § 825.303(a).

80 29 C.F.R. § 825.302(d).

81 29 C.F.R. § 825.203.

- A treatment regimen and other information described in the certification of a serious health condition satisfy the "medical need" requirement.[82]
- Intermittent leave may include periods from one hour to several weeks and may be taken for medical appointments associated with a serious health condition.[83]

Issue #9 What limitations may an employer place on an employee's medical leave of absence?

Guiding Principles:

- Employees needing intermittent leave or leave on a reduced schedule must attempt to schedule their leave so as not to disrupt the employer's business.[84]
- An employer may assign an employee to an alternative position with equivalent pay and benefits if that better accommodates the employee's intermittent leave.[85] However, the employer is required to reinstate the employee to "the same or an equivalent position" as the employee held before the leave commenced.[86] An "equivalent position" is defined as having "virtually identical" "pay, benefits and working conditions, including privileges, perquisites and status."[87] Additionally, it must involve "the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[88]
- An employer is not required to reinstate the employee if he or she would have lost his or her job had he or she actually been in the workplace instead of on FMLA leave.[89]

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82 29 C.F.R. § 825.202(b).

83 *Id.*

84 29 C.F.R. § 825.203.

85 29 U.S.C. § 2612(b)(2); 29 C.F.R. § 825.204(a)–(d).

86 29 U.S.C. § 2614(a); 29 C.F.R. § 825.204(e).

87 29 C.F.R. § 825.215(a).

88 *Id.*

89 29 C.F.R. § 825.216.

- An employer may deny reinstatement to a "key employee" at the end of FMLA leave, if reinstatement would result in "substantial and grievous economic injury."[90] A "key employee" is a salaried employee who is among the highest paid 10% of all the employees employed by the employer within 75 miles of the key employee's work site.[91] The term "substantial and grievous economic injury" means that there is a threat to the economic viability of the employer or a substantial, long-term economic injury.[92]

Application: You conclude that David's psychiatrist appointments qualify for treatment as intermittent leave under the FMLA. You provide him with the required FMLA notices. You decide, however, to reassign him to work with some more experienced accountants to minimize his leave's impact on the workplace. You also ask David to schedule his psychiatrist appointments in the morning to minimize the disruption of his absences in the workplace. You determine that you will need to reinstate David to his job after he completes his intermittent leave.

Case Study #5 Poor Performance

David has used up all of his vacation, all of his sick leave, and all of his FMLA leave, but he still continues to have unpredictable absences. In addition, when he is able to work, he is not completing the quantity of work described in his job description and he is having substantial problems with the accuracy and timeliness of his work. David has told you that he believes his accuracy and timeliness of work are affected by his depression. David's supervisor wants to terminate his employment. David, however, has proposed that the firm give him another position as a consultant. The firm does not have any current openings in this category.

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90 29 C.F.R. § 825.216(b). An employer will **lose** its right to deny reinstatement to a key employee, even if reinstatement causes substantial and grievous economic injury, if the employer does not provide proper notice to the employee **at the time the employee gives notice of the need for FMLA leave**, **or when FMLA leave begins, if earlier**. 29 C.F.R. § 825.219(a). If an employer "believes that reinstatement may be denied to a key employee, [it] must give written notice to the employee . . . that he or she qualifies as a key employee." *Id*. The employer must also "fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave." *Id.*

91 29 C.F.R. § 825.217(a).

92 29 C.F.R. § 825.218(c).

Issue #10 May an employer punish misconduct or poor performance even if the misconduct or poor performance arises from the mental or emotional illness?

Guiding Principles: The EEOC provides that an employer may discipline an employee if the employee's disability causes a violation of a conduct rule "if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard."[93] Although courts disagree on whether an employer can discharge an employee due to disability-related misconduct, the U.S. Court of Appeals for the Eighth Circuit, which includes Minnesota, holds that an employer does not violate the ADA for disciplining an employee in such circumstances as long as it would take the same action if an employee did not have a disability.[94]

Regardless of a court's position on this issue, it is critical that an employer evaluate a disabled employee's job performance **after providing reasonable accommodations**. When determining whether to discipline or terminate an employee for misconduct, which might be related to the employee's disability, EEOC guidance instructs employers to consider the following factors:[95]

- the **nature of the job**,
- the **specific conduct** at issue, and
- the **working environment**.

Specific examples of when discipline might be justified for disability-related misconduct include:

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93 EEOC, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* (Jan. 2011), (herein after "*Applying Performance and Conduct Standards*"), https://www.eeoc.gov/facts/performance-conduct.html#fn1 (last visited Apr. 18, 2017).

94 Typically, courts in the Ninth and Tenth Circuits have found that an employer violates the ADA if it disciplines or terminates an employee for disability-caused misconduct. *See, e.g.*, *Dark v. Curry Cty.*, 451 F.3d 1078, 1084–85 (9th Cir. 2006) (employer violated ADA when it terminated employee for misconduct caused by his disability). However, in most other circuits, an employer does not violate the ADA by disciplining or terminating an employee for disability-related misconduct. *See, e.g.*, *J.A.M. v. Nova Se. Univ., Inc.*, 646 F. App'x 921, 926 (11th Cir. 2016) (misconduct need not be excused even if related to disability); *Walz v. Ameriprise Fin., Inc.*, 22 F. Supp. 3d 981, 986 (D. Minn. 2014), *aff'd,* 779 F.3d 842 (8th Cir. 2015) (same).

95 *Applying Performance and Conduct Standards*, Question 9.

- When the misconduct evidences moral turpitude or poor character and the integrity of the employee is an essential part of the employee's job.[96]
- When the misconduct evidences poor judgment that would affect job performance.[97]
- When disciplining the disabled employee is consistent with how nondisabled employees who have engaged in similar misconduct have been treated.[98]

Issue #11 Must the employer accommodate an employee by transferring him or her into a different position if he or she cannot perform in the current role?

Guiding Principle: While a transfer into a vacant position may be a reasonable accommodation, employers are not generally required to create a new position for an employee.[99] Importantly, the purpose of a reasonable accommodation is to permit employees to continue working **in their current positions,** with certain adaptions.[100] An employer is not required to grant an employee's specific requested accommodation.[101] Additionally, if the reason for poor performance cannot be cured by a transfer, then the employer need not agree to transfer the employee.[102]

Application: You should engage in the interactive process with David to determine if there are any other reasonable accommodations that would allow him adequately to perform. However, if the ability to concentrate and timeliness would not improve because all of your jobs require the same attention to detail and level of stress, David's request to

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96 *Id.*, Example 14 (citing *Ray v. The Kroger Co.*, 264 F. Supp.2d 1221, 1229 n.4 (S.D. Ga. 2003) (termination of clerk who had uncontrollable outbursts of profanity, vulgar language, and racial slurs as a result of Tourette Syndrome did not violate ADA because such conduct was impermissible in front of customers)).

97 *Willis v. Norristown Area Sch. Dist.*, 2 F. Supp. 3d 597, 603 (E.D. Pa. 2014) (upholding discharge of teacher whose judgment in classroom was allegedly affected by a mental condition).

98 *Walz*, 22 F. Supp. 3d at 986 (employer "need not tolerate misconduct that would result in termination of a non-disabled employee").

99 *Moore v. CVS Rx Servs., Inc.*, 142 F. Supp. 3d 321, 341 (M.D. Pa. 2015) (employer not required to create a new position for employee suffering from postpartum depression so that she could avoid interactions with people).

100 *Id.* at 341.

101 *Id.* (the employer has the ultimate discretion to choose between effective accommodations).

102 *See supra* note 99.

transfer may not be reasonable.[103] Additionally, you are not required to create a position or hold a vacant position open for David.

CONCLUSION

These case studies demonstrate that employers must communicate carefully with employees with depression to minimize the risk of unintentionally violating their rights under both discrimination and leave laws.

[103] *See id.* (since all jobs required interaction with other employees, the plaintiff's request to transfer into a new position to avoid interactions was "highly unreasonable" and would not "permit her continued employment" with defendant).