

BEAUTIFUL MINDS REDUX 2010:

CHALLENGES AND OPPORTUNITIES IN MANAGING MENTAL DISABILITIES IN THE WORKPLACE UNDER THE ADA AND ADAAA

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Introduction

By any measure, today's workforce is populated by an array of personalities and learning styles. In academia and high tech, in particular, popular stereotypes even suggest a dominance of eccentric, but gifted, individuals. The idea of a "normal" employee personality or style has long since vanished. In its place is a rich mixture of persons, each unique in their mode of learning and expression, each varied in their mood and affect, and many increasingly availing themselves of mental and emotional health aids and counsel as they navigate life's experiences.

This paper¹ will discuss many of the most common mental and emotional conditions employers are called upon to manage in both well-performing and underperforming employees. It will first survey ADA holdings in the area of mental and emotional disabilities, and examine the relatively poor experience challenged learners and those with mental disabilities have had in litigation under the ADA. It will then review the recent ADA amendments, which will almost certainly promote better outcomes for disabled persons bringing claims. Finally, it will explore the tension between the "don't ask, don't tell" model of employer management (respecting privacy and not seeking to engage until the employee steps forward), and the "let's get it out in the open so we can deal with it" model that some argue achieves better outcomes. Finally, it will catalogue some of the strategies mental health advocates suggest are most effective in getting the most out of employees.

I. Background and Statistics.

A. Anecdotes.

The history honor roll of accomplishment is literally littered with famous people who have bested conditions widely thought to be mental disabilities. Perhaps the most highly publicized recent story is that of John Forbes Nash, who dealt with Schizophrenia and went on to win a Nobel prize for economics.² "A Beautiful Mind" (Sylvia Nasar, Touchstone Books (1998)) inspires us, but Dr. Nash is not alone among giants who suffered from this or other processing or cognitive disorders. For example, Sir Issac Newton had a complete psychotic breakdown at age 51, perhaps schizophrenic in nature. Indeed, learning struggles that today might be called "disabilities" were evident in Edison (called "addled" by his public school teachers and left public school at age 7) and Einstein (failing grades in several disciplines). Gifted persons reported to have

suffered from dyslexia include Hans Christian Andersen, Anne Bancroft, Leonardo da Vinci, Winston Churchill, Walt Disney, George Patton, Nelson Rockefeller, Tom Cruise, Woodrow Wilson and William Butler Yeats. Those with mood disorders include Ernest Hemingway, Mike Wallace, and Kurt Vonnegut. Notables thought to have had ADD (or ADHD) include John Kennedy, Napoleon Bonaparte, Dwight David Eisenhower, Benjamin Franklin, Eleanor Roosevelt, Steven Spielberg, John Lennon, Henry Ford, and Alexander Graham Bell. Luminaries reported to have had other learning disorders include Galileo, Mozart, and Werner von Braun.

And lest we think that people with learning disorders don't fit well even into the business community, some famous business leaders with self-described learning disorders include Charles Schwab, Richard Branson (head of 150 businesses including Virgin Airways), William Hewlett, John T. Chambers (CEO of Cisco Systems), Paul Orfalea (founder and head of Kinko's), Ingvar Kamprad (founder and head of IKEA) and Tommy Hilfiger.³

B. Overall Statistics and Data.

Some benchmark statistics about mental disabilities give insight into its prevalence:

1. Four of the ten leading causes of disability for persons age 5 and older are mental disabilities.⁴
2. An estimated 15% of the U.S. population use some form of mental health services each year.
3. One in four people will experience mental illness in his or her lifetime.⁵
4. Every year, more than 51 million Americans experience diagnosable mental disorders. More than 6.5 million of these individuals are disabled by severe mental illnesses that not only impair normal daily activities, but have a significant impact on the economy. Approximately \$24 billion is lost annually in productivity and workdays alone (not including treatment costs, health plan costs, and the like).⁶
5. The National Institute of Mental Health estimates that there are a little over 3 million adults, ages 18-69, have a serious mental illness. Among this group, between 70% and 90% are unemployed, a rate higher than for any other group of people with disabilities in the nation.⁷
6. At the same time, ignoring for the moment the recent economic trough, the Bureau of Labor Statistics shows that workers generally in the U.S. are becoming more scarce.⁸ When the economy recovers, this scarcity will increase as more baby boomers leave the workforce; as family sizes shrink; and as security and

competitive concerns put increasing pressure on limiting the number of H-1B and other Visas.⁹

C. Specific Illnesses and Data.

In evaluating situations involving mental disabilities, it is often helpful to have at least a basic understanding of the disorder or illness involved. Some of the more common disorders and illnesses are described below.

1. Schizophrenia. This group of disorders affects one percent of the population, both in the United States and other countries.¹⁰ It is now generally thought to result from a combination of genetic vulnerability and life stresses, either physical or emotional. It is characterized by a splitting of the psychic function, and can be slightly, moderately, severely or absolutely disabling. It often appears near and after age 30. The first episode can last from two weeks to months, or longer. Later episodes are often more frequent and more severe, and complete recovery is rare, but in many cases may result in a level of function tolerable to society. Nash's case seems an exception, in that he made a spontaneous and dramatic partial recovery later in life.

2. Panic and Anxiety Disorder. Panic and Anxiety Disorder (PAD) affects 15 million North Americans.¹¹ Persons affected with this syndrome often:

- a. Show extraordinary job commitment
- b. Pay strong attention to details
- c. Exhibit a high degree of selflessness

PAD is highly treatable, and very responsive to accommodation.

3. Clinical Depression. Clinical depression is one of the most costly of illnesses.¹² The total annual cost of treatment per worker in 1995 was \$600. It is as costly as AIDS or heart disease to the U.S. economy. Annually, it accounts for \$43.7 billion in losses from absenteeism, lost productivity and direct treatment costs. It tends to affect people in their prime working years. One study estimated that more than 80% of sufferers can be successfully treated.

Clinical depression is the third most common reason for a referral to Employee Assistance Programs, behind only family issues and stress.¹³ One employer study showed that over one half of all medical plan expenses for mental health issues were for depression,¹⁴ about the same level as the overall costs of treatment for heart disease. A clinical study showed that almost three-fourths of the individuals afflicted are women.¹⁵ However, another study found that many more men suffer from depression, but simply don't self report or answer the surveys truthfully.¹⁶

Treatment is critical. The American Psychological Association suggests that 15 percent of the severely clinically depressed, especially those untreated, are vulnerable to commit suicide.¹⁷

4. Alcoholism, Drug Addiction and Substance Abuse Disorders. Chemical dependency directly affects up to 6 million Americans, and indirectly affects many more.¹⁸ At some time in their lives, at least 90% of adults in the U.S. have some sort of experience with alcohol, and a substantial number (60% of males and 30% of females) have had one or more alcohol-related adverse life event.¹⁹ The lifetime risk for developing Alcohol Dependency was approximately 15 percent in the general population in the mid-1990's,²⁰ and the current rate of Alcohol Dependency as a percentage of the overall population is about five percent.

Not surprisingly, substance abuse disorders often are intertwined with other mental disorders, such as Conduct Disorder, Antisocial and Borderline Personality Disorders, and BiPolar Disorder.²¹

5. Bi-polar Disorder. Bi-polar disorder affects approximately 1.5 percent of the population. With this disorder, a person has periodic mood swings in which they cycle from depression to mania.²² There is no test for the disorder. It usually is described as falling into three levels of severity. There is no cure, but it can be medically managed and therapeutically controlled.²³ Job accommodations are effective, but what is needed varies from case to case.²⁴

6. Mood or Affective Disorders. This generic term refers to a grouping of mood disorders like Bi-Polar and Substance Induced Mood Disorder, but also extends to disorders beyond those two families of illness.²⁵ Some of these disorders appear to be incident-induced and transitory and, thus, are likely not to be sufficiently permanent to qualify as ADA disabilities. Others, however, are chronic and may meet that criterion.

7. Learning Disorders. Learning disorders (LDs) are diagnosed when an individual's achievement on individually administered standardized tests in reading, math or written expression is substantially (i.e., at least 2 standard deviations) below the average expected for age, schooling and level of intelligence.²⁶ While statistics vary widely, data show that LD's affect between 2 and 10 percent of the relevant population, and are often correlated with other disorders like ADHD, Major Depressive Disorder and Dysthymic Disorder.

8. Attention Disorders. Attention Deficit/Hyperactivity Disorder (ADHD) is a persistent pattern of inattention and/or hyperactivity/impulsivity. Inattention may manifest in school, business or social situations. Individuals with this disorder may fail to pay close attention to detail or may make careless mistakes. They often appear as if their mind is elsewhere or they are not listening. They often begin one task, and move on to another, and yet a third, prior to completing the first task. Tasks that require sustained mental effort are viewed as unpleasant and markedly aversive.²⁷ Work habits

are often disorganized and the materials necessary for doing the task are often scattered, lost or carelessly handled and damaged. The doer is easily distracted by irrelevant stimuli, and is often forgetful about appointments and commitments. Impulsivity manifests itself as impatience, delayed responses and scattered actions.

Symptoms are most marked in the elementary grades, and become masked in later years. Some 3% to 7% of elementary children are assessed with the disorder, but adolescent and adult data is murkier.²⁸

II. The Americans with Disabilities Act and Mental Disabilities.

The ADA specifically states that it protects qualified individuals with mental disabilities (and those with a record of, or regarded as, having a mental disability). In 1997, the EEOC issued its “Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.” Yet, the ADA does not appear to have provided a substantial benefit to employees with mental disabilities. In the first 15 years of litigation under the ADA most court decisions interpreting and applying the ADA have involved physical disabilities and do not translate well to provide protections for mental disabilities. Moreover, although the recently enacted Americans with Disabilities Act Amendments Act (“ADAAA”) broadens the protections of the ADA, we are still in the early stages of truly understanding, and effectively accommodating, mental disabilities in the workplace.

The primary legal barriers to pursuing an ADA claim based on a mental disability are discussed below. According to one commentator,²⁹ mental illness does not fit within the diagnosis/substantial impairment/major life activity paradigm because mental illnesses: 1) are often sporadic and of varying duration; 2) can at times be controlled by medication; 3) may have an overriding impact on an individual’s every day life, but not enough to cause a substantial impairment to any one major life activity; 4) are rarely obvious to an employer; and 5) are commonly suspect due to the self-reporting nature of such illnesses. To these observations I add my own: behavior driven by mental or emotional illness and behavior which is the product of bad character, indifference, non-clinical sociopathic tendencies and other non-covered “causes” are virtually indistinct. Our current employee management system generally functions, except at the highest levels, by using corrective disciplinary action for “bad” behavior. This tool, and punishment in general, is often ill-suited to deal with disabling causes, and in any event deals with symptoms, not underlying drivers.

These legal hurdles to successful assertion of mental disability claims – so seemingly effective in the early days of ADA litigation – are being increasingly overcome in more recent cases. Increased exposure may, and I hope does, result in greater employer investment in proactively preventing discrimination against individuals suffering from mental disabilities, much like vigorous sexual harassment training has reduced the incidence of sexual harassment claims. As we will see, such steps typically include one or more of the following:

- Development of policies and training of decision-makers as to the duty not to discriminate and to make reasonable accommodations;
- Utilizing the ADA’s “interactive dialogue” to communicate with employees about their condition, performance standards, possible accommodations, and the like. (After 2008, this can now be done, at least in some circuits, without admitting that the employee actually has a disability or is protected by the ADA.)³⁰;
- Making accommodations or negotiating resolutions that make sense for both employer and employee. For reasons explained in greater detail below, this can and should be attempted even if there is some question about the applicability of the ADA.

With these thoughts in mind, let us survey recent decisional law under the ADA and ADAAA, and relevant state law.

A. Medical Diagnosis of a Mental Condition, Alone, Has Generally Been Insufficient to Establish Disability Under the ADA.

This was a primary holding of the Supreme Court in its 2002 decision, *Toyota Motor Manuf., Ky, Inc. v. Williams*,³¹ involving a plaintiff who contended (unsuccessfully) that she was substantially impaired in the major life activity of manual labor due to carpal tunnel syndrome. The Supreme Court held that in order to be disabled, a plaintiff must demonstrate that she is substantially impaired in a major life activity that is of central importance to daily life, and not just her particular job, and that a diagnosis of a limiting condition, alone, was not enough. (A portion of *Toyota* has been superseded by the ADAAA, as we will see.)

Both before and after the *Toyota* decision, but prior to the ADAAA, employees with mental or emotional disorders have had difficulty convincing courts that they are disabled under the “substantially limits” and “major life activities” definition in the ADA. Key examples include:

- *Ogborn v. United Food and Commercial Workers Union Local NO. 881*.³² Plaintiff’s major depression, although an impairment, did not render him disabled under the statute because he could still perform his job duties, except during the eight-week period of time he was off work.
- *Hill v. Metropolitan Government of Nashville*.³³ Plaintiff diagnosed as suffering from bi-polar disorder and chronic fatigue syndrome was impaired, but not “disabled,” because sitting and thinking were most likely not major life activities under ADA. (Note: this decision is no longer good law under the ADAAA, infra.)

- *Cartwright v. Lockheed Martin Util. Servs., Inc.*³⁴ Plaintiff's depression was not disabling when caused by his relationship with his coworkers and, therefore, plaintiff not disabled because he was not impaired from performing a broad range of duties.
- *Carroll v. Xerox Corp.*³⁵ Plaintiff was not substantially limited from performing a broad range of jobs due to impairments of anxiety disorder and job-related stress.
- *Kourianos v. Emitris Food & Drug Centers, Inc.*³⁶ Plaintiff, who suffered from anxiety disorder and depression, but who testified she perceived herself as functioning normally, was not disabled because she suffered no substantial impairment to a major life activity.
- *Herschaff v. N.Y. Board of Elections.*³⁷ Schizophrenic plaintiff was not disabled because sporadic lapses do not constitute a substantial impairment.
- *Palotai v. Univ. of Md. At Coll. Park.*³⁸ Learning disorder is not a disability for plaintiff with a history of academic achievements. Additionally, obsessive-compulsive disorder (OCD) did not render plaintiff unable to perform a substantial number of jobs in society.
- *Steele v. Thiokol Corp.*³⁹ Plaintiff with OCD was not disabled because no major life activity was affected. The disorder only affected his ability to get along with his co-workers, not all people.
- *Evans v. Magna Group*⁴⁰: Plaintiff suffering from OCD not disabled when she testified that she was qualified to do her job.
- *Reeves v. Johnson Controls World Services, Inc.*⁴¹ Plaintiff suffering from agoraphobia was not impaired because his inability to cross bridges and go through tunnels was not a major life activity.
- *Francis v. Chem. Banking Corp.*⁴² Plaintiff suffering from panic disorder was not disabled because his affected social functions and inability to think straight did not constitute major life activities.
- *Sherman v. N.Y. Life Ins. Co.*⁴³ Plaintiff with OCD was not impaired in a major life activity when the only activity affected was the ability to work in a stressful environment, such as his current position.
- *Smoke v. Wal-mart Stores, Inc.*⁴⁴ Plaintiff's inability to cope with anxiety and depression did not constitute a substantial impairment in a major life activity.

- *Lloyd v. Washington & Jefferson College*.⁴⁵ Professor with history of agoraphobia and panic attacks was not substantially limited in his ability to think and interact with others and, thus, was not disabled within the meaning of the ADA.
- *Martin v. Northwest Mutual Life Ins. Co.*⁴⁶ Employee, who suffered from anxiety disorder, agoraphobia, social phobia and took prescription medication, did not demonstrate that he was disabled as defined by the ADA by submitting a doctor's diagnosis of his conditions and explaining that he had difficulty focusing even in the presence of a few other people.
- *Littleton v. Wal-Mart Stores, Inc.*⁴⁷ Plaintiff's diagnosis of mental retardation did not suffice to establish that he had a disability that substantially limited a major life activity.

Some cases did, however, make it to the next stage:

- *Duda v. Board of Education of Franklin Park Public School District No. 84*.⁴⁸ A manic depressive plaintiff with bi-polar disorder was held to have stated a claim under the ADA after school employees copied his private journal and distributed it to other employees and forced him to transfer to another school where he was told not to speak to other employees.
- *Taylor v. Phoenixville School District*.⁴⁹ A bi-polar plaintiff was held to have stated claim under ADA when she identified "thinking" as a major life activity that was substantially impaired by her disability.

B. The Catch 22: Mental Impairments Sufficient to "Substantially Limit" a MLA Often Resulted in Findings that Plaintiff Was Not Considered Qualified to Perform the Essential Functions of the Job.

Analytically this string of failed cases derives from several sources. First, plaintiffs claiming discrimination on the basis of a mental disability often cited "work" or "thinking" as the major life activity in which they were substantially limited. However, doing so created something of a Catch-22 situation for them. The very evidence the employee submitted of a substantial limitation on her ability to work or think was used against him or her to show he or she was unable to perform the essential functions of the job, or any of the employer's available jobs. For example:

- *Pabon v. New York City Transit Auth.*⁵⁰ Plaintiff, who suffered a nervous breakdown at work that left him with a limited capacity to interact with people, was found wholly unqualified to perform any job for the employer.
- *Melendez-Santana v. Puerto Rico Ports Auth.*⁵¹ During the reasonable accommodation process, plaintiff underwent a psychiatric exam to

evaluate his anxiety and depression; the exam concluded that plaintiff was unable to perform any essential duties of his job, so plaintiff could not establish a prima facie case of disability discrimination.

- *Spangler v. Fed. Home Loan Bank of Des Moines*.⁵² Plaintiff was not a qualified individual due to absences caused by depression and phobia.
- *Lamb v. Qualex, Inc.*⁵³ Employee suffering from depression which rendered him incapable of full-time work was not a "qualified individual with disability," within meaning of the ADA, where ability to work full-time was an essential function of the account servicing job.
- *Palmer v. Circuit Court of Cook County, IL*.⁵⁴ Plaintiff with delusional paranoid disorder who threatened to kill a co-worker was not otherwise qualified for the position.
- *Hardy v. Sears, Roebuck and Co.*⁵⁵ A bi-polar plaintiff who exhibited threatening and abusive behavior at work was not a qualified individual because no reasonable accommodation was available.
- *Williams v. Tri-County Metropolitan Trans District of Oregon*.⁵⁶ Plaintiff bus driver with bi-polar disorder was not qualified to perform the essential duties due to manifestations of his condition.
- *Johnson v. Maynard*.⁵⁷ Plaintiff suffering paranoid schizophrenia and bi-polar disorder was not qualified to perform essential job functions after she experienced violent outburst at work following decrease in her medications;
- *Williams v. HealthReach Network*.⁵⁸ Chronic depressive plaintiff was not qualified, with or without accommodation, for a home health care position.

C. Even Where a Qualifying Disability Shown, but Which Required Some Reasonable Accommodation to Enable Performance of Essential Functions, Some Cases Found No Reasonable Accommodation Would Have Permitted the Employee to Perform the Job.

An aspect of the inquiry into whether an employee is qualified to perform the essential functions of the position is whether or not there is an accommodation which could be reasonably made to enable such performance. Accommodations often evaluated for an individual suffering from a mental disability include such things as revising the work schedule; allowing flexible work hours; or moving the work area to a place that has fewer distractions or reassigning marginal job functions that involve a great deal of contact with others.

Cases in this area are arrayed much as you would expect. Some find that no accommodation is possible. See, e.g., *Hawana v. City of New York*⁵⁹ [Sleep disorder and depression would not have been better at any other position, so employer's failure to transfer plaintiff was not a failure to accommodate]. Some find that plaintiff's failure to follow medical regimen excused further accommodation. See, e.g., *Tubbs v. Formica Corp.*⁶⁰ [plaintiff suffered from bi-polar disorder and had been granted 14 leaves of absence, but refused to follow prescribed medical regime; held, not qualified because no reasonable accommodation was available]. And some find the employer's efforts to accommodate to be wanting for failure to consider other alternatives. See, e.g., *EEOC v. Chevron Phillips Chemical Co.*⁶¹ [employer failed to reasonably accommodate plaintiff's chronic fatigue syndrome because it did not offer the plaintiff a job opportunity at a work facility closer to home].

D. The Availability of Medication Often Defeated The Claim Under the Old ADA Regime.

In 2002, the Supreme Court held that mitigating measures (such as eye glasses) should be taken into account in determining whether or not an individual suffers from a disability within the coverage of the ADA.⁶² Specifically, the question was whether, notwithstanding the use of a corrective device, is the individual substantially limited in a major life activity?⁶³ The availability of controlling medication, even if the disabled individual did not use them consistently, often precluded claims. Examples:

- *Boerst v. Gen. Mills Operations, Inc.*⁶⁴ Plaintiff suffering from anxiety disorder was not disabled under the ADA because medication alleviated the symptoms and a work restriction to eight hours per day did not preclude plaintiff from working a broad range of jobs.
- *Johnson v. Maynard*⁶⁵ Plaintiff was not disabled because his schizophrenia was controllable by medication and no major life activities were impaired by the disorder.
- *Kemp v. Holder*⁶⁶ Plaintiff was not substantially limited in any life activity when we wore his hearing aids, so no error in district court's conclusion that plaintiff did not have a disability for purposes of ADA protection.

E. Little Success Was Achieved Using the ADA's Alternative Prongs in the Definition of "Disability"---Claims of Discrimination Due to a "Record of" a Disability or Being "Regarded as" Disabled.

The classic "regarded as" claim would involve a satisfactorily performing employee who is discharged because the employer learned that he suffered from schizophrenia. Some plaintiffs have attempted to use this aspect of the ADA to establish a claim based on employer acknowledgement of their mental condition. While these cases have not generally been successful, their existence may unwittingly serve, in my judgment, to chill employer willingness to openly discuss with an employee his or

her condition, its etiology, prognosis and symptomatology, and ways to teach others about it or accommodate it.

Most cases have refused to find the presence of a disability just because of employer awareness or discussion of the condition. Examples:

- *Whitlock v. Mac-Gray, Inc.*⁶⁷ Plaintiff suffering from ADHD was not disabled under ADA when he testified that he was qualified for the position he held and could perform the job. Nor was he “regarded as” disabled by the employer simply because a discussion of possible accommodation had taken place.
- *Ogborn (supra n. 32)*. The employer who suggested that a depressed plaintiff see a doctor did not regard plaintiff as disabled because he only needed to be off work for eight weeks.
- *Macfiovern v. Hamilton Sunstrand Corp.*⁶⁸ Plaintiff suffering from seasonal affective disorder and depression was not “regarded as” disabled by the employer simply because the employer was aware of disorder.
- *Witter v. Delta Airlines, Inc.*⁶⁹ Plaintiff pilot who suffered from bi-polar disorder and narcissistic personality disorder was not regarded as disabled by the employer simply because the employer would not allow him to perform pilot duties when there was no indication that employer believed plaintiff was incapable of performing non-pilot duties.
- *Hoard v. CHU2A, Inc.*⁷⁰ Employee suffering from Graves disease was not “regarded as” disabled by the employer where the employer commented that the employee has “behavioral problems” and acted “inappropriately aggressive.”

However, a few cases seemed more willing to explore whether the employer’s knowledge of the condition, or its willingness to help by making medical or psychiatric referrals, or the employee’s aberrant behavior, meant that the employer “regarded” the employee as disabled, thus satisfying the definition on that prong alone. Consider:

- *Brady v. Wal-Mart Stores Inc.*⁷¹ Issue of fact as to whether the employer regarded an employee as disabled because the employee’s supervisor commented that she “knew there was something wrong” with the employee and he was “slow.”
- *Joesphs v. Pac. Bell.*⁷² Evidence of statements by the employer that the plaintiff was “unfit” for a job because of his mental disorder and his time

in the “medical ward” sufficed to support a jury verdict in favor of the employee on a “regarded as” theory.

F. The Question of Whether the Employee Could Perform the Essential Functions, or Was Regarded as Disabled, are Generally Questions of Fact.

Once plaintiff has shown enough proof to meet the pleading and proof standards under the ADA, disputes generally are headed for jury trial, since issues about “essential functions” or reasons for termination are often fact-based. Examples:

- *Battle v. United Parcel Serv., Inc.*⁷³ Employer’s belief that plaintiff could not perform the essential functions of his job created an issue of fact as to whether the plaintiff’s depression, anxiety and obsessive compulsive disorders substantially limited his ability to think and concentrate.
- *Humphrey v. Mem’l Hospitals Ass’n.*⁷⁴ Issue of fact as to whether employer terminated plaintiff because of his disability where employer terminated plaintiff with OCD for attendance problems that were caused by plaintiff’s OCD.
- *Jacques v. DiMarzio, Inc.*⁷⁵ A bi-polar plaintiff who also suffered from depression was able to create a triable issue of material fact as to her claim that she was terminated due to her inability to get along with co-workers. She asserted that they “regarded her” as disabled, even though she was not substantially limited in any major life activity.
- *Olson v. General Electric Astrospace.*⁷⁶ Plaintiff, who suffered from multiple personality disorder, sleep disorder and depression, was not disabled under ADA because his mental illnesses did not substantially impair any major life activity. However, a genuine issue of material fact existed as to whether he was denied an employment opportunity following a reduction in force due to his employer’s perception of him as disabled.

G. Lessons From The Few Cases That Went to Trial.

The law on mental disabilities is in the formative stage, and jury trials are particularly important to observe, since it is in this context that many important interpretations of the law are made. Here are several very important examples:

- *Gambini v. Total Renal Care.*⁷⁷ Employer terminated plaintiff following her “violent outburst.” The plaintiff received a jury trial and jury

instruction on the basis that her violent outburst was a consequence of her bipolar disorder, and, thus, that her termination was because of her disability. This very important ruling is a matter of great controversy, since elsewhere in the ADA regulations the notion abounds that disability is not an excuse for behavior that violates employer rules.⁷⁸ The *Gambini* case was a federal court construing Washington state law; the very same question is currently pending before a California appellate court.⁷⁹

- *Criado v. IBM Corp.*⁸⁰ A jury rendered a verdict in favor of a plaintiff with ADD, anxiety and depression after she was terminated for failing to return to work following a medical leave of absence necessitated by her mental illness.

III. The ADAAA's Impact on Mental Disabilities.

In the ADAAA, Congress emphasized that the judiciary's systemic narrowing of the ADA's protections ran counter to congressional intent.⁸¹ In an effort to clear the murky waters, the ADAAA clarifies Congress's intent with respect to the ADA's use of "disability" in three significant ways.

First, the ADAAA sets forth a broad non-exclusive list of activities that constitute "major life activities" for purposes of ADA protections. This list includes many activities that mental disabilities generally impair such as thinking, communicating, concentrating and learning.⁸² As such, the ADAAA has the potential to strengthen the ability for employees with mental disabilities to categorize their impairments as protected disabilities.

Second, the ADAAA rejects the *Toyota* court's narrow interpretation of "substantially limits" and calls upon the EEOC to issue regulations more broadly defining the term "substantially limits."⁸³ The EEOC complied, and under its revised definition, courts may be more likely to recognize the unique impairments associated with mental disabilities as "substantially restricting" a major life activity.⁸⁴

Third, and perhaps most significantly, the ADAAA rejects the holding enunciated in *Sutton v. United Air Lines, Inc.* and, instead, requires that the "determination of whether an impairment substantially limits a major life activity shall be made *without regard* to the ameliorative effects of mitigating measures."⁸⁵ Consequently, courts will evaluate impairments in their unmitigated state, so that, for example, anxiety or depression will be assessed in terms of its limitations on major life activities absent corrective medications or behavioral adaptations.⁸⁶

The effect of these changes on mental disability litigation will be profound. No longer will plaintiffs be caught in the Catch-22 of having to show they are so impaired as to have a "substantial limitation" while at the same time showing they can do the essential functions of the job. The concept behind the lower "substantially restricting"

standard is akin to that long used in California, where under the FEHA a disability is defined as an impairment that makes the performance of a major life activity “more difficult.”⁸⁷

In addition, the reversal of the *Sutton* doctrine will enable those with mental impairments to much more easily show the existence of a disability (in the pre-medicated state) but the presence of the ability to perform the essential functions (with medication, and accommodation). Here, again, the ADAAA brings the ADA into line with California’s FEHA, which rejected the *Sutton* doctrine almost immediately after the decision came down.

The effect of these changes will be to bring the national law much more in line with the philosophy and practicality of California’s approach. Simply put, the law as now amended discourages disputation and litigation over the presence of a disability, but rather pushes the analysis much more quickly to the pivotal question of what an employer can do, with the employee, to create a successful working environment. But it also *partially* removes another roadblock to effective accommodation: the lingering fear by employers that if they engage the employee too much in discussion of the condition they will be viewed as “regarding” the employee as disabled, and will somehow lose their ability to make decisions based on behavior and conduct.

IV. Guiding Principles in Developing a Systematic Approach to Handling Potential Mental Disabilities.

Handling any potential ADA claim can be difficult because the law demands a tailored and individual analysis. Whether a mental condition can be accommodated may vary depending on the job, department, the available resources, and other factors. All of this individualized analysis comes in the context of the mantra to employers that their actions be consistent and predictable in order to avoid any perception of unfairness or any claims of bias or favoritism. Given this conundrum, it is best to develop a systematic approach to handling personnel situations that may involve a mental disability.

A. Debunk the myths. Before creating a program, it is useful to simply review and keep in mind several precepts from disability rights advocates that help create a framework of tolerance and avoid unintentional stereotyping. Here are 6 myths about mental illness that should be discarded before even getting underway:

1. Senior managers don’t suffer from depression.
2. Depression is a “woman’s issue”.
3. Return to work is not in the employee’s interest; it is too stressful.
4. Return to work endangers coworkers.

5. People suffering from mental and nervous disabilities are weaker than others.
6. Acknowledging mental and nervous disabilities will open a flood-gate of claims by moody people.

C. Bring a Helpful Spirit to the Effort, at All Levels. I have seen it oft repeated in life and the law that success depends as much on the spirit with which a challenge is faced as on the details of the plan. Here are my personal tips for the 12 most important steps, or states of mind, or guiding ideas, to get the best outcomes from the beautiful minds that can do prodigies of work in the right circumstances:

1. Recognition Comes First: Understand that Mental Health Issues are Simply Diseases Needing Treatment, Not Moral Defects.
2. Openmindedness Pays: Get the Issue Out of the Closet. Never Treat Disabled Employees as “Damaged Goods” or Speak Down to Them.
3. Work with Those Willing to Work: Partner with Your Disabled Employees.
4. Make a List: Be Realistic About What is Needed on Both Sides.
5. A Pain Shared is a Pain Halved: Find Ways to Help Employees Make Safe Self-Disclosures.
6. Working with Others: Promote Understanding by Coworkers and Interaction with Others Similarly Challenged.
7. Give a Little to Get A Lot: Accommodation Works If You Work It.
8. Evaluate Actions, Not Character: Separate the Behavior From the Disease.
9. Keep It Simple: Don't Underestimate the Healing Power of Compassion and Humor.
10. Continue to Monitor Progress and Accommodations.
11. Enlist the Help of Those Who Have Come Before. Nobody is More Helpful Than One Who Has Been There and Recovered a Useful Role.
12. Practice These Principles at All Levels. Lead from the Top. Train. And Share Your Experience with Others.

VI. Based on These Principles, Develop a Detailed Program for Creating Success in Disability Management.

Here are the elements of a good, overall program, essentially developing the principles outlined above in a more formal way:

A. Develop a Checklist to Guide Interactive Accommodation Communication.

As Algebra I high school students are constantly told, it is important to “show your work.” In conducting a reasonable accommodation analysis, it is imperative to be thorough. An employer does not want to leave a stone unturned, or at least none of the obvious stones, in its accommodation analysis. A checklist provides the comfort of knowing that all the usual alternatives have been considered. Additionally, it may foster some creative thinking that may resolve the issue. Combine the 12 principles listed above with practical listings of alternatives. Disability rights advocate websites are very helpful here.

B. Consider *Not* Fighting Whether a Mental Disability Exists.

Employers occasionally get tied in knots trying to determine whether an employee has a condition that meets the legal definition of a disability under the ADA. In the process, the employer may run itself into a “regarded as” problem by the very act of gathering information about the individual’s physical or mental condition.

An alternative approach avoids, or at least reduces, this problem – don’t draw a battle line in an effort to determine whether the individual does, or does not, have a mental disability. Instead, take the approach that we assist (i.e. reasonably accommodate) all of our employees to perform the essential functions of their job. As a result, we don’t need to determine who may have a mental disability. This approach truly focuses on getting the best from all our employees.

C. Focus on Success.

The best defense to a claim that an employer discriminated against an individual is to show all of the actions the employer did to try and help the employee to be successful. Too often, this is forgotten and the focus is on “counseling the employee out.” However, in dealing with mental disabilities it is particularly important to focus on how to help this individual succeed, not on how to demonstrate that they can’t do the job. By doing so, the employer is more likely to mine the best of the employee. If unsuccessful, the employer will have a better record to demonstrate their sincere, non-discriminating efforts.

D. Develop a Method of Identifying True Essential Functions.

Frequently, the fight in a disability case is about what is an “essential function” of the job. Having a method to determine this in advance is often of great assistance. The most common method, job descriptions, are useful. But the usefulness of job descriptions is amplified if they are created by, or with substantial input from, the employees who perform the job. This helps to prevent the assertion later that the job description was unrealistic or inaccurate. If no job descriptions exist for a job that comes at issue, consider using peer input into determining what the job actually required.

E. Treat the Symptom, Not the Problem.

Conventional wisdom instructs us to treat the problem, not the symptom. If we do the reverse, conventional wisdom cautions, the problem will merely reoccur, perhaps in a worsened form. Dealing with disabilities is an exception to this rule. Supervisors should not be trying to resolve their employees’ mental disabilities. Their job is to supervise performance (i.e. deal with the symptom). Any effort to treat the symptom may well create “regarded as” issues because the supervisor has now made it clear that they perceive the employee to be disabled.

F. Protect Confidentiality.

Due to the sensitive and confidential nature of any information about an employee’s mental disability, an employer needs to take steps to protect this information and ensure that it is only available on a need to know basis. It should never be shared based on “concern for the employee” or because “employees are friends.” Moreover, any such information should be carefully parsed out so that information that is legitimately needed for an accommodation analysis is not passed on with confidential information that does not need to be disclosed.

G. Consider Accommodations in the Proper Order.

Periodically, employers jump to the possibility of moving or transferring an employee to another position where it is believed the employee is likely to be successful. However, this should only be done *after* all other accommodations have been considered. Moving the employee prior to fully attempting accommodation in the current position may be viewed as retaliatory.

H. Develop Communication Guidelines.

There are a myriad of communication challenges in dealing with disability issues, particularly mental disability issues. Communication needs to be focused on performance, not medical issues. Communication regarding the any medical condition needs to be kept on a need to know basis to protect the employee's confidentiality. All communication regarding accommodation should be documented to demonstrate the interactive process. In order to consistently accomplish these goals, guidelines should be created that address who has responsibility to communicate with the employee, who should receive what information, who has responsibility to follow up, etc. These guidelines should be just that, not mandates, because they may need to be flexible. However, approaching each situation on an ad hoc basis, particularly in a large organization, is requesting difficulty.

I. Do Not Be Overly-Generous.

One of the most common paths to a problem is the overly generous response to a disability situation. Over time, this generosity begins to wear thin, often aided by some personal conflict or some action by the employee that the employer construes as an effort to take advantage of the situation. Any effort to reduce the level of accommodation at that time is almost certain to be viewed as discrimination or retaliation. To avoid this, it is important to include in the process an evaluation of the long term effects of the accommodation on accomplishing the essential functions of the job.

J. Avoid Paternalism.

Employers, particularly in the educational environment, often forget that it is not their job to look out for the best interests of the employee. Their job is to determine if the employee can perform the essential functions of the job, with or without reasonable accommodation, and without creating a *direct threat* to their own health and safety or the health and safety of others. Any effort to go beyond an assessment of the existence of a direct threat exceeds the employers' rights and responsibilities.

K. Train Supervisors in Recognition and Communication.

An effective approach to handling potential mental disabilities needs to involve supervisor training. Often the situation has taken a hard turn in the direction of litigation by the time Human Resources or counsel has learned of any issue. For example, this may be caused by the supervisor being unaware of any obligation to accommodate or, alternatively, attempting to help the employee solve the problem by providing medical guidance. Many of these problems can be prevented by training the supervisors in advance.

L. Follow up.

It is not uncommon for an employer to take all the right steps at the outset. An accommodation is analyzed, agreed upon and implemented. However, no follow up occurs to see how it works. The employee is then either viewed as untouchable and unacceptable performance or misconduct is tolerated, or, at some point, the supervisor loses patience and simply terminates the employee without any further review of the accommodation issues. Both are mistakes. To really seek success in an accommodation, it is often necessary to follow up and, perhaps, tweak the accommodation. Other times, it is necessary to communicate to the employee that now that barriers have been removed or reduced, the essential functions of the job must be accomplished at a satisfactory level. In either case, follow-up is needed to keep the accommodation tuned.

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