Feel Free To Discriminate Against the Mentally Ill: How the ADA Fails Those With Psychiatric Disorders

Under the current environment those with a mental illness are left without any protection at all and the law simply fails to recognize the reality of how mental illness works.

By **Eric Broutman** | May 07, 2020 at 09:30 AM

“Three weeks ago we celebrated our nation’s Independence Day. Today we’re here to rejoice in and celebrate another ‘independence day,’ one that is long overdue. With today’s signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”

Those words were spoken by President George H.W. Bush on July 26, 1990, upon the signing of the Americans With Disabilities Act. There is no arguing that the ADA has been a watershed piece of legislation for many individuals with a disability, allowing them to fully engage in the work force. For those people, the ADA has alleviated the fear that just because you suffer from a disability you may lose your job, or you might not even be hired in the first place. The same, however, cannot be said for those with a mental illness. The ADA, while not purposefully, ignores the struggles of those with a mental illness and often times leaves the mentally ill with no protections whatsoever. This poses a tremendous issue because the Centers for Disease Control estimates that 18.3%, or nearly 44 million Americans, suffer from a mental illness.

This article will explore how the requirements of the ADA make it largely impossible for those with a mental illness to seek many of the statute’s protections including a request for a reasonable accommodation. Unlike other disabilities, such as cancer, blindness, troubles ambulating, etc., mental illness affects one’s ability to even appreciate that they have an illness, let alone to inform an employer of that illness and go through the myriad steps necessary to avail oneself of the law’s benefits. In particular, this article will look at the notice requirement in the ADA, which demand that an employee notify his employer of a disability and the need for an accommodation. Second, it will address the requirement that one engage in an interactive

process to come to an accommodation that is reasonable for both the employee and the employer. Finally, this article will address the fact that many courts refuse to consider the one accommodation that most mentally ill individuals require; ignoring prior bad acts that resulted from the illness.

Notice of the Disability

One of the tenants of ADA law is that the employer must be aware that the individual in question has a disability. This fairly straight forward requirement makes intuitive sense because how can an employer be liable for discriminating against an employee with a disability if the employer never knew in the first place that the person had a disability? In many instances the fact that an employee has a disability is fairly evident—the employee requires a wheelchair or is blind, for example. However, as we focus on those with a mental illness it becomes far less obvious to an employer that someone suffers from a disability.

This is generally true for two reasons. First, those with a mental illness often themselves fail to realize they suffer from an illness. Or, even if they do, when that illness is exacerbated, and a mentally ill person begins to exhibit symptoms, they fail to recognize those symptoms and believe everything is fine. Indeed, this lack of insight into one's illness is not simply ignorance or denial, but rather is a symptom itself of mental illness regularly recognized by clinicians called Anosognosia. Mental illness is the only affliction where a part of the illness is to convince the patient that he does not have an illness.

Second, the stigma associated with mental illness is a tremendous barrier to reporting the disability to an employer. Employees often worry that they will be labeled as "crazy." Employees are rightfully concerned that supervisors and co-worker's alike will avoid them due to a fear that they will "do something

crazy" or just fail to give them challenging or important work projects out of the misguided belief that by taking it easy on someone with a mental illness you are doing him a favor.

Even if the latter reason of stigma could be avoided with appropriate work culture and education of staff, the former issue of lack of insight persists and the general rule that it is the employee's responsibility to inform the employer of a disability remains. Courts that have looked at the matter require a fairly high bar in terms of notice. One court concluded that an employer's knowledge that an employee was seeing a psychiatrist, took prescription medication, and showed signs of depression was insufficient to put the employer on notice. See *Kolivas v. Credit Agricole*, 1996 WL 684167 (S.D.N.Y. Nov. 26, 1996). Yet another court concluded that a note from an employee's doctor mentioning the symptoms the employee suffers, but not mentioning a diagnosis or an accommodation request, was insufficient to put an employer on notice of a disability. See *Zamor v. GC Services, LP.*, 2018 WL 1937088, *7 (W.D. Texas April 24, 2018).

The expectation that those with a mental illness, especially those with severe mental illness where the symptoms include a significant deterioration of one's cognitive abilities, provide notice of their disability to an employer works to shut the mentally ill out from the ADA's protections. It is simply not realistic to expect mentally ill individuals suffering severe symptoms of their illness to be organized enough to provide adequate notice of a disability, including a diagnosis and symptoms.

This does not mean that employers should per se be liable if a mentally ill individual requires an accommodation and the employer has no notice. The ADA should, however, allow for a mentally ill employee to retrospectively provide notice and request an accommodation after the symptoms of their

illness are under control, assuming a reasonable amount of time between the incident and notice. This largely comes into play where the accommodation that is required is to ignore prior bad acts or poor performance due to an exacerbation of one's illness. Moreover, employers should be made to be more mindful of an employee's condition and suggest time off when an employee appears to be acting oddly. This is particularly true if the employer is aware that the employee suffers from a mental illness but is unaware that the employee is currently suffering an exacerbation.

Interactive Process

Assuming an employee can provide notice to his employer of a disability and the need for an accommodation the ADA then requires the employee to engage in an interactive process where the employer and employee have a series of dialogues where, theoretically at least, working together they can arrive at an accommodation that resolves the employee's issues while remaining reasonable to the employer. Often this requires that the employee complete numerous forms, provide medical information, and discuss the employee's precise needs. This is often an overwhelming hurdle for an employee in the throes of an exacerbation of her mental illness.

In the event that an employee fails to adequately engage in the interactive process courts will often dismiss those cases because it is the employee that is responsible for the breakdown in communication. See *Nugent v. St Lukes-Roosevelt Hosp. Ctr.*, 303 F. App'x 943, 945-6 (2d Cir. 2008). Hence, in the majority of cases involving mentally ill employees the employer can simply ignore the employee because she will never be able to adequately engage in the interactive process.

Again, while this is a seemingly reasonable set of rules where the employee suffers from a physical disability, this otherwise benign requirement closes off many mentally ill individuals from being able to request and obtain a reasonable accommodation. A more equitable requirement would be for the employer to seek a surrogate, whether it be a friend, family member, or physician to act on the employee's behalf until the employee's metal state is sufficient to take over herself.

Excusing Prior Bad Acts

Many times the sole accommodation that an individual with a mental illness requires is for an employer to ignore prior bad acts that are the direct result of the illness. This can include poor performance or actual bad acts, such as cursing or acting bizarrely in a public work setting. Unfortunately, few courts recognize this as an accommodation.

Largely this is due to the fact that EEOC guidelines do not contemplate this as an accommodation. The guidelines state that an employer does not need to "excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity." **EEOC Enforcement guideline**, ¶35. Moreover, the guidelines state that reasonable accommodations must always be prospective and that, "an employer is not required to excuse past misconduct even if it is the result of the individual's disability." Id. at ¶36.

Most courts have adopted this guidance and hold hat the ADA does not require an employer to ignore past misconduct as an accommodation, even if that misconduct is the direct result of the disability the person suffers. One such example is where a court upheld the termination of an employee for allegedly sleeping on the job even though the employee claimed that the medication he took for a mental illness made him drowsy. See *Beaton v.*

Metropolitan Transportation Auth'y., 2018 WL 1276863 (March 2, 2018 S.D.N.Y.). Indeed, the Second, Fourth, Fifth, and Sixth, and Seventh Circuits have all held that an employee cannot seek as a reasonable accommodation that an employer ignore past misconduct, based largely on the guidance given by the EEOC discussed above. See *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir. 2012); *Jones v. Am. Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999); *Hamilton v. Sw. Bell Tel. Co.*, 136 F.3d 1047 (5th Cir. 1998); *Brohm v. JH Props*, 149 F.3d 517 (6th Cir. 1998); *Palmer v. Cir. Ct. Cook Cty. Ill.*, 117 F.3d 351 (7th Cir. 1997).

Standing in stark contrast to the majority of other Circuit Courts, the Ninth Circuit has departed from the EEOC guidance and regularly holds that actions deriving from symptoms of a mental illness are considered to be a part of the disability and not grounds for termination. *Humphrey v. Mem'l Hosp. Assoc'n*, 239 F.3d 1128 (9th Cir. 2001). In one case an employee with bipolar disorder was terminated after receiving a performance improvement plan during a meeting with her superiors and then threw it across the table, used profanity, and slammed the door. The court concluded that the jury should have been instructed that disruptive workplace conduct resulting from a disability is a part of the disability and not a separate ground for termination. *Gambini v. Total Care Rental*, 486 F.3d 1087 (9th Cir. 2007).

In line with the Ninth Circuit's holdings the EEOC should withdraw its previous guidance. Moreover, courts should consider a number of factors in determining whether an accommodation request of ignoring past misconduct is reasonable, instead outright refusing to consider such an accommodation request at all. Among the factors to consider are (1) how egregious the conduct was; (2) whether the conduct was the direct result of the person's mental illness; (3) whether the employee, or someone on the employee's

behalf, provided notice to the employer within a reasonable period of time after the conduct in question, that the conduct was non-volitional but rather a symptom of the illness. Taking these factors into consideration will allow the mentally ill access to the protections of the ADA while still protecting employer's from unreasonable requests.

Under the current environment those with a mental illness are left without any protection at all and the law simply fails to recognize the reality of how mental illness works. The ADA was not enacted solely for the protection of those with physical disabilities. This more enlightened view is in line with the ADA's purpose and scope to allow those with a disability to, as President Bush said when the bill was signed into law, enter "into a bright new era of equality, independence, and freedom."

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