PUBLICATION

Accommodating Mental Health Conditions – The EEOC's Latest Guidance and Some Practical Tips for Complying with the ADA

February 15, 2017

Complying with the Americans with Disabilities Act is not an easy task. Even if an employer does the document dance correctly, determining whether an accommodation is reasonable can be a tough call. Reasonable people can differ, after all.

This is especially true when an employee is seeking accommodation for a mental health condition. These conditions are often under-diagnosed or untreated. Symptoms can present themselves as different behaviors that don't seem to be consistent; they can even disappear for days at a time while the underlying condition remains. They also carry social stigmas and are often unfairly stereotyped. In short, mental health conditions can be nightmares for those who experience them, and the managers and HR professionals who try to accommodate them.

Recently the EEOC provided guidance to employees with mental conditions about their rights under the Americans with Disabilities Act. The guidance, entitled Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights, is not ground-breaking, but employers can pull from it several important reminders about accommodating mental health conditions:

- *A disabled employee must be able to do the job and not be a direct threat to others.*

The ADA still requires that an employee must be able to perform his or her job duties. Importantly, though, this is true only if the employee cannot perform the job duties with a reasonable accommodation. Employers must not make a knee-jerk determination that the applicant cannot do the job without considering all potential accommodations. The EEOC certainly won't.

An employer also does not have to hire or employ an individual who would pose a direct threat to the safety of others even with a reasonable accommodation. For instance, an applicant for a long-haul truck driving job whose lower right leg is amputated may be a direct threat to others if he does not have the proper prosthetic, but with it, he could be the safest driver in the company. Employers should thus rely on the direct threat defense only in extreme, bright-line cases because telling a disabled applicant that he didn't get the job because he is a direct threat to the safety of others usually doesn't go over well.

- *Only act on objective evidence to ensure stereotypes don't influence the decision.*

As a general rule, employers should not rely on stereotypes or rumors when making employment decisions, but they certainly should not do so when they are addressing disabilities. In fact, an employer's perception that an employee is disabled can grant that employee protection under the ADA even if he or she is not actually disabled. The same misguided perceptions can also affect the employer's consideration of whether the employee can do the job. As the guidance explains, "an employer cannot rely on myths or stereotypes" about an employee's mental health condition when deciding whether he or she can perform a job. Employers should rely only on objective evidence – medical opinions, work releases, physical exams and the like – when deciding whether an employee can do the job. Remember, mental health conditions sometimes affect different people differently.

- *Do not ask if an employee is disabled unless there is a really good reason.*

An employer should not ask about an employee's mental health condition unless it has a legitimate, business-related reason to do so. For instance, the guidance outlines only three situations in which the EEOC thinks an employer may ask: (1) After a job offer but before employment begins and then only if others in the same position have been asked; (2) When the employer is engaged in affirmative action for individuals with disabilities; and (3) If there is objective evidence that the employee is not able to do the job or poses a safety risk to others. There are other situations in which an employer has a legitimate reason to ask, but employers should avoid doing so unless absolutely necessary. Even if an employer has a legitimate reason to ask, it may later wish that it did not have the information it asked for.

- *Consider all alternatives when trying to accommodate an employee – be creative.*

The guidance defines an accommodation as a "change in the way things are normally done at work." This is purposefully broad, and an employer's consideration of potential accommodations should be as well. It should include any arrangement that would not cause an "undue hardship" on the employer, which is not easy to prove. An employer must remain open-minded and should not refuse an accommodation simply because it has not been done before.

The guidance provides several examples of what the EEOC considers reasonable accommodations specific to mental health conditions:

- Altering break and work schedules, such as scheduling work around therapy appointments;
- Providing quiet office space or devices that create a quiet work environment;
- Changes in supervisory methods such as written instructions from a supervisor who usually does not provide them;
- Specific shift assignments;
- Permission to work from home; and
- FMLA leave if time off would allow the employee to perform her job when she returned.

An employer should consider all accommodations suggested by the employee. Employers should keep in mind that the more accommodations it considers, the less likely the EEOC is to find that it failed to engage in the interactive process with the employee.

- *Work with the employee's physician to define limitations and identify accommodations.*

The guidance encourages employees to ask for an accommodation and explains that the employer can ask for documentation from a health care provider of the mental health condition. It even provides employees with a guidance document to show their health care providers related to reasonable accommodations. Employers can also ask the employee's health care provider if certain accommodations would meet the employee's needs. This is exactly the objective evidence the EEOC says employers should rely on, and employers often benefit from these communications.

- *Do nothing that could be perceived as harassment or retaliation.*

Once an employer becomes aware of an employee's mental health condition or other potential disability, it must proceed carefully. Any decision that does not go the employee's way could be viewed as harassment or retaliation.