

# Addressing Conduct and Performance of Employees with Mental Illness

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Mental illness is among the leading causes of disability in the United States. According to the National Institute of Mental Health, approximately one in five adults in the United States — 43.8 million — experience mental illness in a given year. The most common mental disabilities include depression and anxiety disorders. Given the prevalence of mental illness, almost all employers will need to confront the thorny issues involved in accommodating an employee with mental illness. One of the most complex challenges for employers when accommodating an employee with a mental illness is addressing performance and conduct standards.

Both the Americans with Disabilities Act (ADA) and New Jersey Law Against Discrimination (LAD) include mental impairments within their definitions of disability. See 29 CFR §1630.2(g)(1) and N.J.S.A. §10:5-5(q). Under both the ADA and LAD, an employer has a legal obligation to reasonably accommodate an individual with a known mental illness, unless the accommodation would present an undue hardship for the employer. Reasonable accommodations include "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 CFR §1630.2(o). An employer is often unaware of an employee's mental illness until the employee specifically discloses the condition and makes a request for an accommodation. Employees suffering from mental illness, however, often do not request accommodations for their disabilities until after they receive poor performance reviews or after they receive discipline for violating workplace conduct rules. This article will address the legal requirements for addressing performance and conduct standards with employees who suffer from mental illness.

## Performance Standards

Guidance promulgated by the EEOC has made clear that employers should evaluate the job performance of individuals with disabilities in the same manner they would evaluate any other employees' performance. See EEOC, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* (Rev. Jan. 2011) (hereinafter "EEOC Performance and Conduct Guidance").

Employees with disabilities must meet the same production standards as other employees with respect to both quantity and quality. *Id.* Notably, an employer is not required to relax, ignore or change a specific performance standard because of an individual's disability, as long as the performance standard is equally applied to all employees. See 29 C.F.R. §1630.

Nevertheless, when an employee's disability contributes to a performance issue, a reasonable accommodation may be required to assist an employee to meet a uniformly applied standard. However, if, for example, an employee first reveals that he/she suffers from depression after receiving a negative performance review and contends that the reason for the decline in his/her performance is that medical condition, the employer is not required to change the employee's performance review even though the decline in performance was potentially related to the employee's disability. In this scenario, the employer would now be on notice of the employee's disability and should start an interactive dialogue with the employee to determine if the employee needs a reasonable accommodation going forward to enable him/her to better perform. Importantly, the employer does not have to change any decisions that were made as a result of the poor performance up to that point in time.

It is clear that, if an employer makes a decision to terminate an employee for poor performance and an employee then reveals a disability, the termination would be proper, and there would be no obligation to engage in the interactive process. The recent case of *Lassiter v. Children's Hosp. of Phila.*, 2015 U.S. Dist. LEXIS 125604 (E.D.Pa. Sept. 21, 2015), is illustrative on this point. In *Lassiter*, the plaintiff first asked for an accommodation during a meeting with his supervisor when he was placed on a performance improvement plan. The district court noted that, while there is no Third Circuit guidance directly on point, it is well settled in other circuits that, when an employee first requests an accommodation after it becomes clear that an adverse employment action is imminent, the ADA does not mandate an employer excuse an employee's previous performance deficiencies, even if the performance deficiencies were precipitated by the employee's disability. *Id.* at \*51 and n. 11. The district court then concluded that the employer was not required, under the ADA, to provide a retroactive accommodation that would have absolved the plaintiff of his previous performance deficiencies, and granted summary judgment to the employer on the plaintiff's failure to accommodate and wrongful termination claims. *Id.* at \*51-\*53.

## **Conduct Standards**

Under the ADA and LAD, employers are given wide latitude to develop and enforce workplace rules and conduct standards. Generally, an employer can discipline or terminate an employee for misconduct, even if the conduct derives from a disability. See *McElwee v. County of Orange*, 700 F.3d 635, 645 (2d Cir. 2012) (holding that "requiring [employers] to tolerate misconduct, however, is not the kind of accommodation contemplated by the ADA"). Specifically, an employer may discipline an employee who violates a workplace conduct rule, even if the employee's disability was the cause of the violation, so long as the conduct rule is job-related and consistent with business necessity, and all employees are held to the same standard. See EEOC Performance and Conduct Guidance, and EEOC, Enforcement Guidance on the American with Disabilities Act and Psychiatric Disabilities (Mar. 1997) (hereinafter "EEOC Psychiatric Disabilities Guidance").

Certain workplace conduct rules will almost always be considered as job-related and consistent with business necessity. These rules include: prohibiting theft and destruction of property; prohibiting violence and threats of violence; prohibiting inappropriate behavior between coworkers; requiring employees to follow safety rules; and requiring that employees show respect for supervisors, managers, clients and customers. *Id.* When an employee with a disability violates one of these workplace conduct rules, even if the employee's disability caused or contributed to the behavior, the employee may be disciplined or terminated. Indeed, the Third Circuit has specifically held that "[t]hrough an employer is prohibited from discharging an employee based on his disability, the employer is not prohibited from discharging an employee for misconduct, even if that misconduct is related to his disability." *Sever v. Henderson*, 220 Fed. Appx. 159, 161-162 (3d Cir. 2007).

In *Sever*, the plaintiff was terminated after he made violent threats against his coworkers. The plaintiff alleged he was suffering from post traumatic stress disorder (PTSD) at the time he made the threats and filed suit for disability discrimination. The Third Circuit upheld summary judgment for the employer, holding that, even when an employee suffers from a disability, an employer can still hold the employee to qualification standards, including the requirement that an employee not pose a direct threat to the health or safety of other individuals in the workplace. *Id.* at 161.

Attendance policies can similarly be enforced. Many employers treat attendance and punctuality as essential job functions. In New Jersey, courts have long held that chronic and excessive absenteeism need not be accommodated, even when an employee's absenteeism is caused by a disability. See *Svarnas v. AT&T Communications*, 326 N.J. Super. 59, 77-78 (App.Div. 1999) (finding that plaintiff's excessive absenteeism caused by a recognized handicap did not need to be accommodated where regular attendance is an essential job requirement). Nevertheless, if there is a request for an accommodation, an employer may be required to modify an attendance policy as a reasonable accommodation to an employee with a disability, unless an employer can show an undue hardship. See EEOC Performance and Conduct Guidance and EEOC Psychiatric Disabilities Guidance. Clearly, when an employee requests an accommodation to an attendance policy after attendance problems have already become an issue, an employer must proceed with caution. While an employer may still impose disciplinary action that is consistent with the company's policies, if the disciplinary action is anything less than termination, the employer must start the interactive process and consider potential reasonable accommodations. *Id.*

## **Conclusion**

In sum, the law is clear that employers have the right to set performance and conduct standards as they see fit and require that all employees, even those suffering from mental illness, meet those standards, as long as the standards are consistently applied to all employees. Yet employers should tread carefully and be sure that they are engaging in the interactive process with employees after they identify disabilities and request reasonable accommodations.