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EMPLOYER BULLETIN:

PSYCHIATRIC AND MENTAL DISABILITIES IN THE WORKPLACE

MUST EMPLOYERS ACCOMMODATE PSYCHIATRIC DISABILITIES?

What is a disability? In order to qualify for protection under the Americans with Disabilities Act (“ADA”) and comparable Michigan Persons with Disabilities Civil Rights Act (“PWDCRA”), an individual must have a “disability.” A “disability” is defined in three ways: (1) a physical or mental impairment that substantially limits one or more of life’s major activities; (2) a record of such impairment; or (3) being regarded as having such an impairment. The ADA defines a qualified individual with a disability as one who “with or without a reasonable accommodation can perform the essential functions of the job.” Essential functions are the fundamental job duties of the employment position.

What is a psychiatric/mental disability? The second most common disability under the ADA is a psychiatric/mental disability. A mental disability under the ADA is defined to include “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.” This list is not exhaustive and conditions such as depression, psychological problems, anxiety, post traumatic stress disorder and bipolar disorder/manic depression have been recognized as mental disabilities.

What can employers do if an employee exhibits abusive conduct to co-workers or customers due to his/her mental disability? The federal courts have held that an employee’s ability to refrain from abusive and threatening conduct towards co-workers is an inherently fundamental function of any employment position. Employees who exhibit abusive or threatening conduct towards co-workers are not qualified individuals under the ADA. If an employer is faced with an employee who exhibits such conduct, it may require the employee to be evaluated, at the employer’s expense, by a

health care professional chosen by the employer if the examination is “job related and consistent with business necessity.” Workplace threats or violence qualify as “job related and consistent with business necessity.”

How to accommodate an employee with a mental disability? Reasonable accommodations for individuals with mental disabilities must be determined on a case by case basis based upon the workplace, job requirements and the people involved. Examples of reasonable accommodations for individuals with psychiatric disabilities include: (1) changes to workplace policies or procedures; (2) physical changes to the workplace; (3) time off or modified work schedules; (4) adjusting supervisory methods; (5) providing a job coach; and (6) reassignment to a different position. Accommodations, however, are not required if they would pose an “undue hardship” on the employer.

What is an undue hardship? Generalized conclusions will not suffice to support a claim of undue hardship. The employer must look at each situation and individually assess its current business circumstances to show that a reasonable accommodation would cause significant difficulty or expense. According to the EEOC, a determination of undue hardship should be based on several factors, including: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the actual facility making the reasonable accommodation, the number of employees at the facility, and the effect on expense and resources of the facility; (3) the type of operation of the employer including the structure and functions of the workforce, the geographic location and the administrative or fiscal relationship of the facility involved in making the accommodation of the employer; and (4) the impact of the accommodation on the overall operations of the facility.

If an employer determines a particular accommodation will cause an undue hardship, but a second type will be effective and not cause such hardship, the employer should provide the second accommodation. An employer may not claim undue hardship based upon an employee's or customer's fear or prejudice towards an individual's disability. However, the EEOC guidelines provide an employer may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees' ability to work.

Are employers required to continue employment of an employee who is a threat to other employees or himself? Under the ADA, an employer may terminate an employee if he poses a "direct threat" to the health and safety of others or himself in the workplace. A direct threat is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

An employer analyzing a possible threat should consider the following factors: (1) the degree of risk; (2) the specificity of the risk; (3) the timeliness of the risk; (4) the medical or other evidence of the risk; and (5) whether the risk can be eliminated or reduced by reasonable accommodation. This determination is made on a case by case basis. An individual assessment as to whether a direct threat exists must be based on reasonable medical judgment that relies upon: (1) the most current medical knowledge; and/or (2) the best available objective evidence. Accordingly, it is recommended that an employer, at its own expense, send an employee who it believes may pose a direct threat, for an independent medical exam to assess the situation.

To justify termination based upon a direct threat exception, an employer must show: (1) there was a significant degree of risk; (2) the risk was identifiable;

(3) the risk was current rather than speculative or remote; (4) there was an individualized assessment yielding factual evidence of a risk by the individual; and (5) the threat could not be eliminated or reduced by a reasonable accommodation. Courts have considered and upheld terminations due to direct threat based upon safety factors and concerns over co-worker violence.

Can we advise our work staff about a co-employee's psychiatric/mental disability and accommodation?

Reasonably accommodating an employee with a psychiatric disability may become noticeable to others. However, employers may not disclose, absent consent from the employee, about how, when or whether they are providing employees with reasonable accommodations. Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA, PWDCRA and HIPAA. In response to co-worker questions, the employer may explain that it is acting for legitimate business reasons or in compliance with applicable law.

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EEOC STATISTICS FOR 2005

In 2005, the EEOC received a total of 14,893 charges of discrimination alleging violations of the ADA. The EEOC found reasonable cause to support 867 of those charges. Employers paid out \$44.8 million in benefits in settling ADA claims at the EEOC level.

In 2005, the EEOC accepted 1,005 charges related to depression, 403 related to manic depression disorder, 191 related to other psychiatric disorders and 84 related to schizophrenia. In connection with these charges, employers paid out over \$4 million in monetary benefits.