Mental Illness Discrimination Claims After the New ADA Amendments
Strategies for Avoiding and Defending Americans With Disabilities Act Claims

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:
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Wednesday, June 10, 2009
The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

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The ADA Amendments Act

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Timeline

- **July 26, 1990**: president George H.W. Bush signs the ADA
- **July 26, 1991**: EEOC issues regulations implementing Title I.
- **June 22, 1999**: Supreme Court issues *Sutton* trilogy
- **January 8, 2002**: Supreme Court decides *Toyota Motor Mfg., Ky. V. Williams*,
Timeline (cont.)

- **July 26, 2007:** On anniversary of ADA’s enactment, legislation to amend the ADA is introduced in the House (H.R. 3195) and Senate (S. 1881)

- **June 25, 2008:** By a vote of 402-17, House passes the ADA Amendments Act, a revised version of the bill introduced on July 26, 2007

- **July 31, 2008:** Senators Harkin and Hatch Introduce S. 3406, the ADA Amendments Act of 2008

- **September 25, 2008:** President George W. Bush signs the ADA Amendments Act of 2008
Compromise Bill

• ADA Amendments Act was negotiated between employer and disability groups

• Employer groups included U.S. Chamber of Commerce, Society for Human Resource Management, and National Association of Manufacturers

• Disability groups included Epilepsy Foundation, American Diabetes Association, American Association of People with Disabilities and National Disability Rights Network
Purpose

• **To restore** the ADA’s broad protections as intended by Congress; and

• **To reject** the Supreme Court’s view in the *Sutton* trilogy that “disability” should be determined by reference to the ameliorative effects of mitigating measures

• **To reject** the Supreme Court’s holding in *Toyota* that the ADA requires a “demanding standard” for establishing coverage and requires that an impairment “severely restrict” major life activities

• **To express** Congress’s expectation that EEOC will revise its regulation defining “substantially limits” as “significantly restricted” (Senate bill)
Findings

• When it first adopted the ADA, Congress intended it to be construed broadly

• The ADA’s definition of “disability” was based on Section 504 of the Rehabilitation Act of 1973, as construed broadly by the Supreme Court in Sch. Board of Nassau County v. Arline

• The Supreme Court’s decisions in the Sutton trilogy and in Toyota Motor Mfg., Ky v. Williams construed the term ‘disability” too narrowly

• The EEOC’s current regulation defining “substantially limits” as “significantly restricted” is inconsistent with congressional intent by expressing too high a standard (Senate bill)
Definition of “Disability”

• A physical or mental impairment that substantially limits a major life activity;

• A record of such an impairment;

• Being regarded as having such an impairment (as described in paragraph (3))
Definition of “Disability” (cont.)

• Definition of “disability” construed broadly

• Mitigating measures (other than ordinary corrective lenses) will not be considered

• Impairment can be disability even if episodic or in remission
Mitigating Measures

Mitigating measures include:

(1) Medication, medical supplies and equipment, low vision and hearing devices, prosthetics, mobility devices, etc.

(2) Use of assistive technology

(3) Reasonable accommodations

(4) Learned behavioral or adaptive neurological modifications
Major Life Activities

• Include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
Major Life Activities/Major Bodily Functions

• The term “major life activities” also includes the operation of major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
“Regarded As” Disabled

• Broader definition of “regarded as” disabled now includes anyone subjected to an action “prohibited by this Act” because of a real or perceived physical or mental impairment

  – Excludes impairments that are transitory (less than six months) and minor

  – Key: “subjected to an action ‘prohibited by this Act’”

• Individuals “regarded as” disabled are not entitled to reasonable accommodation
Other Provisions

- Term “qualified individual” replaces “qualified individual with a disability”

- In general prohibition of discrimination, the phrase “discriminate on the basis of a disability” replaces “discriminate against a qualified individual with a disability because of the disability of such individual”

- Effective date was January 1, 2009
I. DIRECT THREAT

Haynes v. City of Montgomery, 2008 WL 4495711 (M.D. Ala. October 6, 2008). The city’s physician would not release a firefighter to perform safety-sensitive duties, or for driving, due to the possible side effects of medications for generalized anxiety disorder. The city physician knew that the firefighter did not experience any side-effects from the medications and did not use them while on duty, and the city physician had access to the psychiatrist’s files. The city physician also acknowledged that side effects vary from person to person; that he did not conduct further testing on the employee; and that he did not attempt to discuss the employee’s possible reactions to the medication with the treating psychiatrist. There was no evidence that the city determined that the firefighter posed a direct threat based on an individualized assessment. The court denied the city’s motion for judgment as a matter of law after trial.

II. DISCRIMINATION ANALYSIS – DISPARATE TREATMENT

Lowe v. Hamilton County Job & Family Serv., 2009 WL 818960 (S.D. Ohio Mar. 27, 2009). Upon her return from extended leave, a plaintiff with ADHD and depression was issued a notice of removal based on gross misconduct and insubordination. While the employer characterized plaintiff’s altercation with a supervisor as misconduct so extreme it warranted bypassing the disciplinary steps before termination, one manager’s deposition stated that the incident did not constitute gross misconduct. In addition to this discrepancy, the removal order listed only two incidents as reasons for the termination, not all of the incidents added in management affidavits. The court thus found that a jury could conclude that the proffered reasons for termination were pretext for discrimination.

McClinton El v. Potter, 2008 WL 511182 (N.D. Ill. Dec. 4, 2008). On summary judgment the court found that there remained a triable issue of whether the disciplinary and removal actions taken against a letter carrier were due to his depression. The letter carrier provided evidence that his performance issues were related to his disability. When managers were apprised of medical reports on his condition, which caused reduced concentration and slow movement, some continued to comment on his slow performance, called him “crazy” and recommended a fitness-for-duty evaluation. The letter carrier provided evidence that another employee with a similar performance deficiency was not disciplined.

Parker v. American Airlines, 2008 WL 2811320 (N.D. Tex. July 22, 2008). A medical board evaluating an aircraft maintenance technician’s fitness for duty identified certain cognitive impairments caused by his medication for depression. The airline employer permanently restricted the technician from duties requiring sign off on mechanical flight releases. The
employee successfully bid on a parts washer position, which involved tasks approved by his physician, but the company revoked the placement due to the permanent restriction. While the employer argued on summary judgment that the revocation was based on a comprehensive labor agreement and practice with the union, the court concluded that reliance on the bargaining agreement was insufficient as a legitimate, nondiscriminatory reason.

Stokes v. City of Montgomery, 2008 WL 4369247 (M.D. Ala. Sept. 25, 2008). The City discharged a police officer who had depression and attempted suicide because, by virtue of her suicide attempt, they asserted that she violated the city rule requiring her to stay fit. The City also justified her termination on the basis that she posed a risk of future liability if she continued to serve as a police officer. In her ADA case challenging the termination, the police officer argued that there was direct evidence of discrimination based on her disability of depression. The court concluded, however, that an inference was necessary to associate her suicide attempt with her depression and that the analysis for circumstantial evidence controlled. Summary judgment was denied to the City in light of remaining factual questions.

III. REASONABLE ACCOMMODATION

Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121 (1st Cir. 2009). A jury had sufficient evidence to find that an insurance company failed to provide reasonable accommodation to a sales representative with a bipolar disorder. The jury properly found that assignment of a different type of account to the salesman would have enabled him to meet his sales quotas and thus perform the essential functions of his job. The employer argued that such accommodation could pose an undue hardship since at times the salesman exhibited problems coping and representatives of one major client were sensitive to any sign of incompetence. The court noted, however, employer testimony that these accounts were usually easy to manage and that in previous instances where sales staff and clients experienced difficulties, another sales representative could be reassigned.

Tully –Boone v. North Shore-Long Island Jewish Hosp. Sys., 588 F.Supp.2d 419 (E.D. N.Y. 2008). The plaintiff alleged that when her anxiety and depression worsened, she requested medical leave through different managers to address her difficulty in completing tasks. As an interim accommodation, she sought a later start time due to sleep disruptions caused by her medications. She was issued disciplinary warnings for her lack of punctuality and was eventually terminated. The court found that, while the employer argued that the plaintiff’s requests were unreasonable because the leave seemed indefinite and the later arrival time meant a random schedule, such accommodation requests could not be found to be unreasonable as a matter of law.
With increasing frequency, employees are claiming that their employers are discriminating against them on the basis of a mental disability. In 2005 and 2006, anxiety disorders, depression, trauma disorders, bipolar disorder, schizophrenia, and “other” psychological disorders constituted, in the aggregate, approximately 13 percent of the charges resolved on their merits by the Equal Employment Opportunity Commission (EEOC). See http://www.eeoc.gov/stats/ada-merit.html.

No single physical impairment equaled or exceeded this amount.

There is no shortage of potential claimants. The U.S. Surgeon General estimates that, in any given year, one out of five Americans are affected by mental disorders.1 As the stigma associated with mental illness lessens, more employees are willing to request that their employers afford them workplace accommodations under the Americans with Disabilities Act (ADA) and similar state laws.

Employers well-versed at offering a panoply of reasonable accommodations to employees with physical disabilities often are perplexed by their employees’ mental impairments. Many regard accommodating an employee with an obvious physical problem as relatively straightforward, compared with accommodating an employee with an anxiety disorder, depression or a “hidden” mental impairment. Neither the ADA nor the EEOC, however, regard physical impairments as more important than mental impairments. Although Congress deemed a very limited number of mental conditions unprotected, the ADA generally affords equal protection to covered mental and physical impairments.

The EEOC and the courts offer some guidance as to when and how to accommodate employees with protected mental impairments. While the guidance is far from comprehensive, it provides a useful starting point.

**Guidance and Confusion**

The ADA prohibits employers from discriminating against a “qualified individual” with a disability, because of that disability, with respect to the terms, conditions, and privileges of employment. An individual is “qualified” if he or she is able to perform the essential functions of the job he or she holds or desires, with or without reasonable accommodation. Not all impairments qualify as protected “disabilities” under the ADA. Rather, an impairment must “substantially limit” one or more of the employee’s major life activities.

Not every mental impairment is protected under the ADA. Traits and behaviors (e.g., irritability and chronic lateness) are not protected. Nor are relatively brief conditions such as a grief reaction to the loss of a loved one.

Congress also specifically excluded the following conditions, among others, from the ADA’s definition of “disability”: kleptomania, pyromania, exhibitionism, voyeurism, and psychoactive substance use disorders resulting from current illegal drug use.

But neither the EEOC nor the ADA itself provide a comprehensive list of which impairments do qualify as protected disabilities. The EEOC regulations, for example, define mental impairments broadly, to include “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotion or mental illness, and specific learning disabilities.” Courts have found that the following conditions, among others, may qualify, depending on the facts: depression, bipolar disorder, post-traumatic stress disorder, anxiety disorder, obsessive compulsive disorder, and schizophrenia.

As for the major life activities that mental impairments may substantially limit in order to qualify for protection, the list continues to evolve well beyond just working. Learning, thinking, reading, concentrating, interacting with others, and caring for oneself are among the major life activities recognized by various courts. The vague and subjective nature of these major life activities, coupled with the hidden nature of many mental impairments, often leaves employers uncertain about two key questions:

- How proactive must they be in working with employees to accommodate mental disabilities?; and
- What types of accommodations will the courts and the EEOC consider sufficient?

**Interactive Process: A ‘Hobson’s Choice’?**

The ADA requires that employers engage in good faith in an interactive process of exploring possible accommodations that will permit disabled employees to perform the essential functions of their jobs. While it is typically the employee’s duty to initiate the interactive process by requesting an accommodation, this may not hold true with certain mental disabilities. The EEOC’s position (and some courts have agreed) is...
that the employer should initiate the interactive process if: (1) it knows that the employee has a disability; (2) it knows, or has reason to know, that the employee is experiencing workplace difficulties because of the disability; and (3) it knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

Early case law interpreting the ADA suggests that an employer’s burden in exploring reasonable accommodations may be heavier in the case of mental disabilities. In Bultemeyer v. Fort Wayne Community Schools, for example, the U.S. Court of Appeals for the Seventh Circuit recognized that in cases of mental illness, the communication process “becomes more difficult,” and that the onus is on the employer to be aware of the difficulties and to “help the other party determine what specific accommodations are necessary.” Bultemeyer, 100 F.3d 1281, 1285 (7th Cir. 1996) (citations omitted). The employee in Bultemeyer suffered from paranoid schizophrenia and bipolar disorder.

Other courts have agreed. In Taylor v. Phoenixville School District, for example, the U.S. Court of Appeals for the Third Circuit rejected an employee’s claim that it was not liable for failing to engage in the interactive process because the employee had not provided sufficient details regarding her condition (bipolar disorder), and because she had not requested a specific, feasible accommodation. Taylor, 184 F.3d 296, 314 (3d Cir. 1999). The court explained that “an employee with a mental illness may have difficulty effectively relaying medical information about his or her condition, particularly when the symptoms are flaring and reasonable accommodations are needed.”

Employers: Delicate Positions

This line of cases, coupled with the EEOC’s position, place employers in a delicate position. Consider a hypothetical employee who appears agitated and distracted and quietly cries off and on while trying to attend to his job duties, which have suffered. He neither acknowledges a problem nor requests an accommodation. A well-intentioned supervisor approaches the employee and says, “Why don’t you take some time off so you can rest. You seem depressed.” The employee denies any mental impairment or emotional condition, but after receiving a poor performance review and decrease in pay, claims that his employer violated the ADA because it incorrectly regarded him as disabled and subjected him to an adverse employment action because of a perceived disability.

While the employer has compelling arguments in response, the employee will be able to rely on guidance from the EEOC stating that an employer’s adoption of myths, fears and stereotypes, including those relating to concerns about productivity, may satisfy the “regarded as” component of the definition of “disability”—even when an employee is not actually disabled.\(^5\)

Convoluted though it may seem, the employee may assert a two-pronged argument. First, regardless of his appearance and behavior, he was not depressed. Second, the employer’s adverse employment action was based on its erroneous perception of him as depressed and therefore violates the ADA. A number of courts have allowed employees to proceed with claims that they were discriminated against because they were regarded as disabled as a result of employers’ misperceptions.\(^6\)

Now consider the same employee whose supervisor does not tell him he seems depressed, but says instead, “You seem distracted. Let’s talk about how we can help you to meet your expectations and ours.” The supervisor has neither ignored the employee’s obvious distress nor fallen into the “regarded as” trap. The supervisor found the acceptable middle ground between two unacceptable extremes: playing armchair psychologist and ignoring the problem. If the employee wants to engage in the interactive process and help to identify reasonable accommodations, the supervisor has properly opened the door.

In this delicate arena, this much is clear: • The hidden nature of some mental impairments does not always excuse employers from engaging in the interactive process with employees. Nor does poor or reluctant communication, or an employee’s failure to openly acknowledge the ways in which a mental impairment is affecting his or her job performance. At the same time, employers should proceed cautiously when adopting a proactive approach to the interactive process. Employees may neither welcome the employer’s overtures, nor even acknowledge that they suffer from a mental impairment.

• Some indication that an employee suffers from a mental impairment that affects his or her ability to perform essential job duties is what typically triggers the employer’s duty to engage in the interactive process. Courts do not expect employers to be mind readers.

• Employers should not rely on assumptions or stereotypes about mental impairments. Nor should they confuse unilateral decision making with the interactive process. If an employer suspects that an employee is having trouble at work due to a mental impairment, it should initiate a dialogue that focuses on the employee’s job duties and performance, and what can be done to help the employee succeed at work. Playing armchair psychologist is risky.

Reasonable Accommodations

The ultimate goal of the interactive process is to arrive at reasonable accommodations that will allow individuals protected by the ADA to succeed at work without imposing an undue hardship on the employer. Whether an accommodation poses an undue hardship may be determined by considering, among other factors, the financial resources of the facility and company, the nature of the accommodation, the type of operations at the facility, the effect of the accommodation on operations, and the cost of the accommodation. Employers are well-advised to consult with counsel when considering an undue hardship response to an employee’s request for accommodation.

The good news is that mental disabilities often can be accommodated in the same way as physical disabilities. The accommodations recommended by the EEOC and advocacy groups are largely the same for both categories of disabilities. While the reasonableness of a particular accommodation and a determination as to whether it constitutes an undue hardship always will depend on the specific request, possible accommodations include: providing organizational and time-management aids; allowing more frequent breaks; allowing leaves of absence; permitting flexible start times; eliminating nonessential job functions; relo-
cating or restructuring employees’ workspaces; creating sound barriers; adjusting methods of supervision; and, in some cases, transferring employees to different positions.

There is some disagreement as to whether work-at-home is a reasonable accommodation. While some courts have held that work-at-home is simply not a reasonable accommodation, others have looked closely at whether the employee’s essential job duties can be performed at home. Employers faced with a work-at-home request are well within their discretion to determine first whether there is another accommodation that will enable the employee to work on-site. After all, an employer is not obligated to provide the precise accommodation the employee requests or even the “best” accommodation. Rather, it is free to select any accommodation that is effective, including those that are less cumbersome or less expensive than the one requested by the employee.

There are commonly requested accommodations that courts have rejected. While changing supervisory methods may be a reasonable accommodation, changing an employee’s supervisor generally is not. In Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-123 (2d Cir. 1999), an employee asserted that interactions with her supervisor triggered her depression. The U.S. Court of Appeals for the Second Circuit held that requests to change supervisors are presumptively unreasonable and that the burden of overcoming that presumption lies with the plaintiff.

In Williams v. New York State Dept. of Labor, 2000 WL 31375735 (SDNY 2000), an employee requested a transfer away from rude coworkers and a supervisor with whom she did not get along as an accommodation for her anxiety and depression. Citing Kennedy, the court found the employee’s request untenable. Similarly, in Potter v. Xerox Corp., 88 F.Supp2d 109 (WDNY 2000), the U.S. District Court for the Western District of New York found that an employee’s alleged anxiety and depression was attributable to his inability to work under one supervisor, and therefore was not a “disability” under the ADA. The court also held that the employee’s request to transfer to a different department under a different supervisor was not a “reasonable” accommodation. Potter, 88 F.Supp2d at 112-114.

Courts are similarly skeptical of requests for accommodation that amount to requests for a “second chance” or a pardon for misconduct. Following the general rule that reasonable accommodation is always prospective, not retrospective, courts generally agree that mental disabilities do not excuse past workplace misconduct. Courts have not been particularly sympathetic to employees who claim that their misconduct was directly caused by their mental disabilities and is therefore excusable.

Attendance rules are frequently at issue in requests for accommodation of mental impairments. An employee who arrives late to work repeatedly without notice because of psychotherapy appointments need not be excused from uniformly applied rules regarding tardiness. On the other hand, if the employee requests a modified work schedule before her appointments, the employer may need to grant the request in order to help her abide by the workplace attendance rules. While the timing of the request is not everything, it is crucial.

A Balanced Approach

Mental disabilities in the workplace can present unique challenges for many employers. Supervisors, coworkers and management may be wary of employees who behave or appear emotionally disturbed. Ignoring the problem is not the best approach.

The challenges certainly are not insurmountable. While employers may at times be required to take a more proactive approach to accommodating mental disabilities, the law has always required a thoughtful interactive process when any kind of disability is at issue.

In the final analysis, the accommodations required for mental disabilities will be familiar to employees and managers because they often are the ones afforded to those with physical disabilities. The principal challenge for employers is to avoid traps posed by fears and stereotypes, and to approach mental disabilities with the same tact and diligence that they utilize in responding to employees with physical disabilities.

2. 29 CFR §1630.2 (g).
6. See, e.g., Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006) (supervisor believed employee with severe depression was “crazy” and a safety risk); Josephs v. Pacific Bell, 443 F.3d 1050 (9th Cir. 2006) (employer considered service technician unemployed because he had spent time in a mental facility and might “go off” on a customer); Doeble v. Sprint/United Mgmt. Co., 342 F.3d 1117 (10th Cir. 2003) (employer erroneously assumed financial analyst with bi-polar disorder posed a threat to her coworkers).
June 2009

AMERICANS WITH DISABILITIES ACT:
SELECTED ISSUES

by

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I. DISCIPLINE OR ACCOMMODATION: RESPONDING TO MISCONDUCT OR PERFORMANCE PROBLEMS OF DISABLED EMPLOYEES

May an employer discipline or terminate a disabled employee despite the employee’s plea for accommodation? Or, does the ADA require an employer to excuse an employee’s performance problem or misconduct because of the employee’s physical or mental impairment?

A. General Rule

1. An employer generally need not excuse misconduct or performance problems, even if an employee subsequently requests reasonable accommodation for a disability that caused the misconduct.

2. A fact-specific analysis is necessary to determine whether the general rule applies and to minimize the possibility of liability under the ADA. Several key questions are common to the analysis:
   a. Does the employee have a protected disability?
   b. If so, is the employee “qualified” for his or her position with or without a reasonable accommodation?
   c. Did the employee engage in conduct for which the employer typically would impose discipline?
   d. Did the employee notify the employer of the disability before or after engaging in misconduct or performing poorly?
   e. Is the conduct rule job-related and consistent with business necessity?

B. Hypothetical

1. FACTS: Following an employee’s intermittent and unexplained absences, his employer notifies him that he has exceeded the permissible number of non-leave absences and will receive a written disciplinary warning. The employee informs the employer, for the first time, that he suffers from a recently diagnosed mental illness, depression. He explains that the absences were due to the depression and, therefore, requests that the employer not issue the warning. The employee also requests an accommodation in the future regarding his work schedule due to his depression. He subsequently provides a psychiatrist’s certification to support his request. The psychiatrist
states only that the employee’s diagnosis is “major depression - single episode,” and that the employee needs to “work fewer hours.”

2. ISSUE: How can (or must) the employer respond?

C. Question 1: Does the employee have a protected disability?

1. Is depression a disability under the ADA?

   a. Certain conditions, no matter how “disabling,” are not disabilities for the purpose of the ADA.

   b. The ADA does not expressly exclude depression, although it expressly excludes a number of other conditions (e.g., kleptomania, pyromania, exhibitionism, voyeurism, other sexual behavior disorders, and psychoactive substance use disorders resulting from current illegal drug use) from the ADA's definition of “disability.” 42 U.S.C. §§12211(b), 12114(a) (2008).

   c. Case law: Many courts have held that depression may constitute a mental impairment protected under the ADA.


2. But the analysis only begins there.

   a. Depression may be an excluded condition if it constitutes a mere personality trait, rather than a mental impairment.

b. The employee’s mental impairment must limit a major life activity to be a protected condition under the ADA. The EEOC states that an impairment “substantially limits” a major life activity if the person is:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner or duration under which he performs the activity as compared to the condition, manner or duration under which the average person in the general population performs the activity. 29 C.F.R. §1630.2(j)(1) (2008).


a. The employee claimed that she was laid off because of her disability (depression) in violation of the ADA. The employee claimed she had been depressed for years and that her depression prevented her from getting out of bed early enough to work the early morning hours required by her employer.

b. Her two treating psychiatrists testified that the employee’s chronic lateness was a function of her “personality style” and “a personality thing.”

c. The court concluded that any depression suffered by the plaintiff did not substantially limit her ability to work and that she was not “disabled” under the ADA.

d. See also Richter v. Monroe County Dept. of Social Servs., 01-CV-6409 CJS, 2005 U.S. Dist. LEXIS 5800 (W.D.N.Y. Feb. 11, 2005); Lewis, 2005 U.S. Dist. LEXIS 1747, *9 (noting that “depression arguably constitutes a ‘mental impairment’ under the ADA” but that the plaintiff’s alleged depression did not limit him in the major life activity of working).

4. Determining protected disability vs. unprotected personality trait

a. If an employee requests accommodation and the need for an accommodation is not obvious (as in the first part of the hypothetical where the employee merely states that he is “depressed”), an employer may ask an employee for
reasonable documentation about the employee’s disability and functional limitations.

(i) If the employee refuses to provide the requested documentation, no accommodation is required.

(ii) If the employee provides insufficient information to substantiate that he has an ADA disability and needs a reasonable accommodation, the employer may also require the employee to visit a health professional of the employer’s choice, at the employer’s cost.

(a) That does not mean that the employer has free rein to engage in an unrestricted medical inquiry, however; the examination must be job-related and consistent with business necessity.

(iii) In the hypothetical, the employer would incur heightened risk of an ADA violation by requiring the employee to visit another mental health professional. The employee did not simply provide the employer with his vague self-diagnosis; he provided the employer with a psychiatrist’s note diagnosing him as suffering from “major depression - single episode,” and requesting a specific accommodation on the employee’s behalf.

(a) While the doctor’s note is cursory, it constitutes sufficient information to substantiate an ADA protected disability.

(b) The employer may request that the employee provide written consent for further information and/or consultation with the employee’s psychiatrist about the extent and nature of the employee’s depression and the need for the requested reasonable accommodation.

(c) If the employee consents, the employer must be careful not to broaden the inquiries into the employee’s entire mental health history. Rather, inquiries should be temporally and substantively limited to the impairment.
certified by the psychiatrist and the need for the requested accommodation.


D. **Question #2: Is the employee “qualified” for his or her position with or without a reasonable accommodation?**

1. Even if the hypothetical employee has a protected disability, he will not be protected under the ADA unless he is “qualified.”

2. To be qualified, the employee must have the education, experience, and skills required for the job and be able to perform the essential functions of the job with or without reasonable accommodation. 42 U.S.C. § 12111(8) (2008); 29 C.F.R. § 1630.2(m) (2008).

3. Three questions typically arise in determining whether an individual is “qualified”:
   a. Does the employee pose a safety threat?
   b. Is the employee unable to meet the employer’s performance standards, with or without a reasonable accommodation?
   c. Is the employee unable to meet the employer’s attendance standards?

4. An affirmative answer to the first two questions generally renders an employee unqualified under the ADA. The answer to the third question, which clearly applies to the hypothetical, requires further analysis.

5. Courts consider regular attendance an essential function of most jobs. Many courts have held that an inability to meet this requirement renders the employee unqualified.
   a. From Within Second Circuit: Ramirez v. N.Y. City Board of Educ., 481 F. Supp. 2d 209, 221 (E.D.N.Y. 2007) (concluding that teacher who was absent for one-third of school year could not perform the essential function of showing up for work); Micari v. Trans World Airlines, Inc., 43 F. Supp. 2d 275, 281 (E.D.N.Y. 1999) (“[A]ttendance has been found to be a prerequisite to performing essential functions of a job.”).
b. From Outside Second Circuit: Byrne v. Avon Prods., Inc., 328 F.3d 379, 381 (7th Cir. 2003) (“Spotty attendance by itself may show a lack of qualification.”); Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999) (“[I]n most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs.”); Tyndall v. Nat’l Educ. Ctrs. Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994); (“Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee ‘who does not come to work cannot perform any of his job functions, essential or otherwise.’ . . . Therefore, a regular and reliable level of attendance is a necessary element of most jobs.”); Barnes v. GE Security, Inc., No. 06-1632-AA, 2008 U.S. Dist. LEXIS 34049 (D. Ore. Apr. 23, 2008) (under state law, plaintiff, who suffered from depression and anxiety, was not a “qualified individual” because of her “numerous unexcused absences and tardies in violation of defendants’ attendance policies”); see also Barclay v. AMTRAK, 240 Fed. Appx. 505 (3d Cir. 2007) (affirming summary judgment in favor of employer where plaintiff, who was terminated for repeated unexcused absences caused by his irritable bowel syndrome, offered no evidence that his absences had any medical justification; the court noted that the employer did not discipline the plaintiff until confirming his absences were not medically justified); Wisbey v. City of Lincoln, No. 4-08CV3093, 2009 U.S. Dist. LEXIS 30819, at *24 (D. Neb. Apr. 10, 2009) (granting employer’s motion for summary judgment on plaintiff’s ADA claims because “[a]lthough the plaintiff believes she should be allowed to decide, on a night-by-night basis, whether she is capable of working, her need to actually do so implies that she is not qualified for a position where reliable attendance is a bona fide requirement”); Cooley v. Bd. of Sch. Comm’rs of Mobile County, Ala., No. 07-0822-KD-M, 2009 U.S. Dist. LEXIS 12793, at *21–26 (S.D. Ala. Feb. 17, 2009) (holding that because “[a]ttendance is an essential function” of duties as a teacher, plaintiff who was totally disabled for nearly six years did not meet the definition of a “qualified individual”).

6. An employee who claims that a physical or mental impairment prevents him from maintaining regular attendance and requests an accommodation may be entitled to that accommodation.
a. At least three key factors to consider in determining whether the employer must grant an accommodation request from an employee who cannot, as in the hypothetical, adhere to its attendance policy:

   (i) The employer’s prior record of responding to similar requests from other employees;

   (ii) The timing of the employee’s request; and

   (iii) The nature of the requested modification to the employee’s schedule.

b. These factors are discussed in Sections E through G below.

E. Question #3: Did the employee engage in conduct for which the employer typically would impose discipline?

1. Courts and the EEOC agree: an employer does not have to excuse misconduct that results from a disability, so long as it does not excuse similar misconduct from its other employees.

2. If the employer in the hypothetical gives the employee a written warning and rejects his request for a modified work schedule, but responds favorably to similar requests from non-disabled employees with similar attendance problems, it substantially increases its exposure to disability discrimination litigation. In short, consistency is crucial.

   a. Consistency is not just crucial with respect to how the employer treats non-disabled employees versus disabled employees; it also may be crucial with respect to how the employer treats a disabled employee over time. See Holly v. Clairson Industries, LLC, 492 F.3d 1247 (11th Cir. 2007) (concluding that employer was not entitled to summary judgment when it began enforcing new “no fault” attendance policy against employee who was tardy due to his disability, including because employer had excused that employee’s tardiness for seventeen years).

3. See EEOC, The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, http://www.eeoc.gov/facts/performance-conduct.html (last modified October 14, 2008) (explaining that, “[i]f an employee’s disability causes violation of a conduct rule,” the employer may discipline the individual “if the conduct rule is job related and
consistent with business necessity and other employees are held to the same standard” because the “ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability”); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under The ADA [Oct. 17 2002] N:914.002 (“An employer may discipline an employee with a disability for engaging in . . . misconduct if it would impose the same discipline on an employee without a disability.”); EEOC Enforcement Guidance: Psychiatric Disabilities and The Americans with Disabilities Act, [Mar. 25 1997] 3 EEOC Compl. Manual (BNA) N:2340 (3/97) (same).

4. See also Sista v. CDC IXIS N. Am. Inc., 445 F.3d 161, 172 (2d Cir. 2006) (citing to the EEOC’s Enforcement Guidance on the ADA and Psychiatric Disabilities and stating that the ADA does not “require that employers countenance dangerous misconduct, even if [it] is the result of a disability”); Jones v. Am. Postal Workers Union, 192 F.3d 417, 429 (4th Cir. 1999) (“The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee’s misconduct, even if the misconduct is related to a disability.”); Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998) (“The holding that [disability]-related misconduct is a legitimate, non-discriminatory reason for termination is supported by [the ADA], under which an employer may hold [a disabled] employee to the same qualification standards for employment job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the [disability] of such employee.”) (citations omitted).

F. **Question #4: Did the employee notify the employer of the disability before or after engaging in misconduct or performing poorly?**

1. Reasonable accommodation is prospective, not retrospective.
   a. In the hypothetical, the employee notified his employer of his depression after he violated rules regarding non-leave absences and after he was notified that he would be disciplined for these absences. Therefore, the employer likely may discipline him for misconduct.
2. An employer is not required to ignore poor performance that precedes disclosure of a disability.

a. Accordingly, our hypothetical employer may proceed with disciplining the employee; it need not excuse the employee’s previously unexcused absences just because he revealed he suffers from depression.

b. From Within Second Circuit: Van Ever v. N.Y. State Dep’t. of Correctional Servs., No. 99 Civ. 12348 (SAS), 2000 U.S. Dist. LEXIS 16960, *12 (S.D.N.Y. Nov. 21, 2000) (“[I]t is the responsibility of the disabled individual to inform the employer of the need for an accommodation. . . . [A]sking for a second chance or to be absolved of past misconduct is not a request for accommodation.”).

c. From Outside Second Circuit: Burch v. Coca-Cola Co., 119 F.3d 305, 320 n.14 (5th Cir. 1997) (“[A] ‘second chance’ or a plea for grace is not an accommodation as contemplated by the ADA.”); Beck v. Univ. of Wis., 75 F.3d 1130, 1135 (7th Cir. 1996) (“[A]sking for a ‘second chance’ is not an ADA accommodation.”) (citation omitted).

(i) See also Enica v. Principi, No. 06-2187, 2008 U.S. App. LEXIS 21186, at *23–24 (1st Cir. Oct. 6, 2008) (holding that “an employer will not be held liable if it makes ‘reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed’ and indicating that when a breakdown in the interactive process occurred, courts should consider whether the parties participated in good faith and made reasonable efforts to determine what specific accommodations are necessary) (quoting Beck v. Univ. of Wis., 75 F.3d 1130, 1137, 1135 (7th Cir. 1996)).

3. Employers, however, should be aware of recent case law in the Ninth Circuit indicating that, after learning an employee is disabled, an employer may not deny an accommodation request because of disability-related performance problems that occurred before the employer was aware of the disability. In Humphrey v. Memorial Hospitals Ass’n, 239 F.3d 1128 (9th Cir. 2001), the plaintiff, a
medical transcriptionist, had difficulty getting to work on time, if at all. This difficulty was due to obsessive rituals, such as the plaintiff’s compulsive need to wash her hair for three hours. As a result of her absenteeism and tardiness, her employer issued her two warnings in a six-month period. The plaintiff otherwise was an excellent employee. After receiving her second warning, the plaintiff was diagnosed with obsessive compulsive disorder (“OCD”). Her doctor concluded that the OCD caused the plaintiff’s attendance problems. The plaintiff requested that she be allowed to work from home as an accommodation for her OCD. The employer did allow other employees in the plaintiff's position to work from home; however, the employer denied the plaintiff’s request because of its policy against allowing at-home work by any employee who previously had attendance problems. The employer eventually terminated the plaintiff for excessive absenteeism and tardiness. The plaintiff sued for failure to accommodate and wrongful termination, both under the ADA. The Ninth Circuit concluded that the plaintiff may have been able to perform the essential functions of her job if the employer had allowed her to work from home. With respect to the plaintiff’s failure to accommodate claim, the court rejected the employer’s contention that the plaintiff was not eligible to work from home because of her previous warnings: “It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated.” The plaintiff had submitted sufficient evidence to raise an issue of fact as to whether she could perform the essential functions of her job, and thus whether she was a qualified individual under the ADA. With respect to the plaintiff’s wrongful termination charge, the court rejected the employer’s stated reason for the plaintiff’s termination – her excessive absenteeism and tardiness. The court explained, “conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination is particularly strong where it is the employer’s failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability.” Therefore, the court concluded that a jury could find a causal connection between the plaintiff’s OCD and her attendance problems, and thus, summary judgment was inappropriate.

a. See also Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007): The plaintiff brought suit under the Washington Law Against Discrimination and the FMLA. The plaintiff suffered from bipolar disorder and began experiencing performance problems at work. Representatives
of the employer met with her to discuss a performance improvement plan. During the meeting, the plaintiff threw the performance plan across a desk and, using several profanities, stated that the plan was unfair and unwarranted. She slammed the door as she left the meeting, and may have told people present that they “will regret this.” Later, while in her cubicle, the employee kicked and threw things. The employer finally sent her home after she expressed suicidal thoughts. As a result of this behavior, the employer terminated the plaintiff’s employment. The plaintiff argued that her behavior in the meeting was a result of her bipolar disorder. Because the Washington Supreme Court previously relied on the Ninth Circuit’s Humphrey decision, the Ninth Circuit relied on that case in analyzing the plaintiff’s state law disability discrimination claim. Noting that the “facts in Humphrey are substantially analogous to Gambini’s situation,” the Ninth Circuit concluded the Gambini trial court erred by not instructing the jury that “a decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws.” Because the jury was entitled to infer that the plaintiff’s violent outburst was a result of her bipolar disorder, the Ninth Circuit remanded the plaintiff’s state law disability claim.

4. If the employee notified his employer that he needed a modified work schedule as an accommodation before he had the unexcused absences, the employer may be obligated to grant the request, so long as it does not constitute an undue hardship.

a. Similarly, the employer may be obligated to accommodate an employee who requests a future accommodation regarding his work schedule.

(i) The employer’s future obligation will depend, in large part, on the nature of the requested accommodation.

b. From Within Second Circuit: Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 143 (2d Cir. 1995) (noting that an employer’s “[f]ailure to consider the possibility of a reasonable accommodation for [known] disabilities, if it leads to discharge for performance inadequacies resulting from the disabilities, amounts to a discharge solely because of the disabilities”, concluding teacher who was denied tenure because of her performance problems, which resulted from
her disabilities, may have been denied tenure solely because of her disabilities); see also Parker v. Sony Pictures Entm’t, Inc., 260 F.3d 100, 107-08 (2d Cir. 2001)

c. From Outside Second Circuit: Humphrey, 239 F.3d at 1139-40 & n.9 (“For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability.”; “The text of the ADA authorizes discharges for misconduct or inadequate performance that may be caused by a ‘disability’ in only one category of cases—alcoholism and illegal drug use.”).

G. Question #5: Is the conduct rule job-related and consistent with business necessity?

1. EEOC Guidance: “Whether an employer’s application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee’s conduct, the frequency of the occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be especially critical when the violation concerns “disruptive” behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable.” EEOC, The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, http://www.eeoc.gov/facts/performance-conduct.html (last modified October 14, 2008).

2. See also Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087 (10th Cir. 1997) (permitting “employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA’s protection of the mentally disabled”).

H. Question #6: What is the nature of the requested modification to the employee’s work schedule?

1. The hypothetical employee’s request for a future accommodation “regarding his work schedule” is not specific.

a. The employee may be requesting that the employer excuse any future unplanned absences whenever and however often they result from his depression.
b. Or the employee may be requesting that his work schedule be modified to an abbreviated but regular schedule.

(i) For example, he may be requesting a four-day workweek, a shortened workday once weekly, or an extended daily break period.

c. A third possibility is that the employee is requesting a leave of absence.

2. In response to the employee’s vague request for accommodation, the employer must engage in an “interactive process” to determine the nature of the requested accommodation, the employee’s functional limitations, and the appropriate accommodation under the circumstances. 16. 29 C.F.R. § 1630.2(o), 1630.9, Appendix.

a. This is an informal process which should take place promptly after the employer learns of the disability.

b. As a general rule, an employer need not provide the specific accommodation requested by an employee. Rather, the employer is obligated to provide an effective and reasonable accommodation.

c. From Within Second Circuit: Raffaele v. City of N.Y., Civ. No. 00-CV-3837 (DGT)(RLM), 2004 U.S. Dist. LEXIS 17786 (E.D.N.Y. Sept. 7, 2004) (“[T]he employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation.”) (citation omitted); Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 655 (S.D.N.Y. 2001) (same).

d. From Outside Second Circuit: Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996) (“[T]he employer need only provide [the employee] some reasonable accommodation,” rather than “the accommodation he requests or prefers.”).

3. The employer need not accommodate a request that it excuse future unplanned absences of an unknown frequency and duration.

a. Numerous courts have held that even when the request is prospective, an employer need not accommodate a schedule that entails unreliable or unpredictable attendance. The request must be one that enables the employee to work a regular schedule.
4. **Employer may be required to make accommodation of a reduced but regular schedule.**

   a. The EEOC states that adjusting arrival or departure times, providing periodic breaks, or altering when certain job functions are to be performed, may be reasonable accommodations, unless they would cause an employer undue hardship.

   b. Even if an employer does not provide modified schedules for other employees, it must do so for a qualified individual with a disability, unless the current work schedule is an essential job function or the modification constitutes an undue hardship.

   c. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under The Americans...

d. **Burch v. Coca Cola**, 119 F.3d 305, 318 n. 11 (5th Cir. 1997) (concluding employer was not required “to create a part-time position if the essential functions of the area service manager’s position demanded a full time manager”); **Jackson v. Veterans Admin.**, 22 F.3d 277, 279 (11th Cir. 1994) (no reasonable accommodation in the form of job restructuring or modified work schedule was available, where “[u]nlike other jobs that can be performed off site or deferred until a later day, the tasks of a housekeeping aide by their very nature must be performed daily at a specific location”).

5. **If the employee is requesting a leave of absence, the employer most likely will need to grant the request.**

a. Numerous courts have held that unpaid leave is a reasonable accommodation.

(i) **From Within Second Circuit:** **Powers**, 40 F. Supp. 2d at 201 (S.D.N.Y. 1999) (concluding that leaves are reasonable except “in unusual circumstances”).

(ii) **From Outside Second Circuit:** **Hudson v. MCI Telecomm. Corp.**, 87 F.3d 1167, 1169 (10th Cir. 1996) (“[A] reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation.”); **Haschmann**, 151 F.3d at 600-01 (concluding “there was sufficient evidence from which a reasonable juror could conclude that the second medical leave, as requested, would have been a reasonable accommodation,” where requested leave was for 2-4 weeks and plaintiff’s doctor was optimistic that the aggravation of plaintiff’s medical condition would be short-lived).
Many courts, however, have held that an employer is not required to provide an employee with an *indefinite* leave.


I. Additional Case Law Addressing Misconduct of Disabled Employees

1. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003): In 1991, the plaintiff tested positive for cocaine, in violation of the employer’s workplace conduct rules. He resigned to avoid being terminated. Three years later, the plaintiff was in recovery from his cocaine addiction and reapplied to his former employer. The employer rejected his application because it had a policy against rehiring anyone it previously terminated for violating a workplace rule. The plaintiff sued under the ADA. Initially, the plaintiff sued only on a disparate treatment theory: he alleged the employer rejected his application because of his record of drug addiction or because the employer regarded him as an addict. In response to the employer’s motion for summary judgment, the plaintiff suggested an alternative theory: the employer’s neutral policy violated the ADA because it had a disparate impact on recovering drug addicts. The district court rejected the disparate impact claim because the plaintiff failed to timely raise that issue. The district court also granted the employer summary judgment with respect to the disparate treatment claim. The Ninth Circuit, however, applied disparate impact analysis to conclude that the employer’s no-rehire policy violated the ADA, at least with respect to individuals forced to resign for illegal drug use but who had been rehabilitated. The Supreme Court granted *certiorari* to determine “whether the ADA confers preferentially rehire rights on disabled employees lawfully terminated for violating workplace conduct rules.” *Id.* at 46. The Court, however, did not reach that question because it determined that the Ninth Circuit incorrectly used disparate impact analysis in what was actually a disparate
treatment case. The Supreme Court noted, “[b]y improperly focusing on these factors, the Court of Appeals ignored the fact that petitioner’s no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules. If petitioner did indeed apply a neutral, generally applicable no-rehire policy in rejecting respondent’s application, petitioner’s decision not to rehire respondent can, in no way, be said to have been motivated by respondent’s disability.” *Id.* at 54 (emphasis added).

a. On remand, the Ninth Circuit concluded that there was a genuine issue of material fact regarding whether the employer failed to rehire the plaintiff because of his status as an addict or because of its neutral no-rehire policy. *Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564 (9th Cir. 2004).

b. See also *Smith v. MABSTOA/NYCTA*, No. 02 Civ. 220 (PKC), 2005 U.S. Dist. LEXIS 8888 (S.D.N.Y. May 11, 2005) (finding employer’s no-rehire policy was legitimate, non-discriminatory reason for refusing to rehire former employee who had tested positive for drugs).

2. *Daft v. Sierra Pacific Power Co.*, 251 Fed. Appx. 480 (9th Cir. 2007): The employer terminated the employee for being intoxicated at work, in violation of a “Return to Work” agreement between the employer and employee. The employee brought suit under the ADA. The Ninth Circuit upheld the district court’s grant of summary judgment in favor of the employer. The court pointed out that “the ADA specifically permits employers to prohibit alcohol-related misconduct at the workplace.” *Id.* at 482. Noting a “distinction between termination of employment because of misconduct and termination of employment because of a disability,” the court concluded that employers must be able to terminate employees who violate workplace rules, regardless of whether the employee is disabled. *Id.*

3. *Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007): The employee claimed he suffered from posttraumatic stress disorder and therefore did not like people coming up behind him or touching him. The employee was involved in several incidents of violence at work, including on two separate occasions striking a coworker who startled him. The employer terminated him because of these violent incidents, all of which violated the employer’s code of conduct. The employee brought suit under the ADA. The employer argued that it did not violate the ADA by terminating the employee because he was a direct threat to the safety of his coworkers. Noting the employee’s multiple violent incidents and the fact that he could become violent if
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AMERICANS WITH DISABILITIES ACT

inadvertently startled, the court held that the employer was objectively reasonable in concluding the employee was a direct threat. Therefore, the court affirmed summary judgment in favor of the employer.

4. **Dark v. Curry County**, 451 F.3d 1078 (9th Cir. 2006): The plaintiff, whose job required him to operate construction vehicles, suffered from epilepsy. Prior to having a seizure, the plaintiff typically experienced an “aura.” One morning before leaving for work, the plaintiff experienced an aura, but nonetheless went to work. While driving one of the county’s trucks, he suffered a seizure and became unconscious. In response, the county asked the plaintiff to undergo a medical exam; a doctor subsequently concluded that the plaintiff should not work around moving machinery. The county placed the plaintiff on administrative leave and ultimately terminated him. The county’s board of commissions later upheld the termination decision. The plaintiff then brought suit under the ADA. The county argued that it fired the plaintiff not because of his disability, but because of his misconduct – namely, reporting to work and operating a truck when he had warning that he would experience a seizure. The court disagreed, noting that the county initially wrote to the plaintiff that it was terminating him because of lack of fitness to perform his job; other subsequent statements similarly suggested the county terminated the plaintiff because it was concerned he would suffer another seizure while operating heavy machinery. The “misconduct” explanation did not surface until the board of commissions reviewed the plaintiff’s termination and concluded termination was justified because of the misconduct. The court said that generally, “conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.” (citing **Humphrey v. Mem’l Hosps. Ass’n**, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). The court therefore concluded that “misconduct” was not a legitimate, nondiscriminatory motive for terminating the plaintiff.

5. **Simon v. Bellevue School District**, No. C06-0708RSL, 2007 U.S. Dist. LEXIS 45509 (W.D. Wash. June 22, 2007): The employer fired the plaintiff, a bus driver, for repeated tardiness. The plaintiff argued that her disability – attention deficit disorder – caused her tardiness. The employer explained that being on time was important because bus drivers had to conduct a pre-trip safety check and depart the bus yard in time to pick up school children on schedule without speeding. If an employee was late, the employer had to find a replacement, which was often difficult, especially in the early morning. The court concluded that being on time was an essential function of the plaintiff’s job. Therefore, even if the plaintiff was disabled, she was
unable to show that she could perform the essential functions of her job.

6. Macy v. Hopkins Board of Education, 429 F. Supp. 2d 888 (W.D. Ky. 2006), aff’d by Macy v. Hopkins Board of Education, 484 F.3d 357 (6th Cir. 2007), cert. denied by Macy v. Hopkins Board of Education, 128 S. Ct. 201 (2007): The plaintiff, a teacher, suffered a severe closed head injury and as a result, post concussive syndrome. One afternoon, the plaintiff encountered a group of unsupervised students outside of the school. She lectured them on playing outside unsupervised and instructed them to go back inside. Each student testified that she also repeatedly threatened to “kill” them if she again heard them making fun of female students. The school district conducted an investigation and terminated the plaintiff. An administrative review panel upheld the termination, and noted that threatening to kill students was a sufficient ground for termination but that the termination was further supported by other incidents in which the teacher acted inappropriately. According to the court, “if an employer fires an employee because of the employee’s unacceptable behavior or misconduct, the fact that the behavior or misconduct was precipitated by a disabling condition does not present an issue under the ADA.” Id. at 899. The court further noted that “[t]he ADA does not require an employer to retain a potentially violent employee” or to accommodate a teacher when those accommodations posed a direct threat to students. Id. The court concluded that the employer had a legitimate, nondiscriminatory reason for terminating the teacher.

J. Conclusion

The hypothetical employer’s response to the employee’s request for a change “regarding his work schedule” will turn on the nature of the requested change. Only by eliciting further information from the employee through the interactive process can the employer determine its obligation under the ADA.

Employers have ample discretion, under many circumstances, to discipline or discharge disabled employees who engage in misconduct, perform poorly, or fail to meet company attendance standards. Employers must, however, tread carefully in this area. They should consider, among other factors, whether the employee is a qualified individual with a disability under the ADA, the timing of the employee’s disclosure of the disability, and the company’s track record in responding to similar situations with other employees. Absent a careful analysis and a clear understanding of the particular facts involved in each situation, employers can run afoul of the ADA prohibitions on disability discrimination.
On the next page, please find Ten Tips for Employers who are facing the question of whether to discipline or accommodate a disabled employee.
(1) Resist the temptation to play armchair psychologist, particularly when addressing the deficiencies of an employee with a conduct problem or attendance problem. An employee with such a problem will find it easier to claim disability discrimination if a supervisor questions whether the employee’s attendance difficulties or temper outbursts stem from “too much stress” or are symptomatic of “a nervous breakdown.”

(2) Instruct managers to document an employee’s attendance or conduct problem by specifically describing the behavior at issue, without attributing the behavior to an underlying emotional or medical problem. For example, an inappropriate altercation with a co-worker may be documented as follows: “[employee] engaged in a five-minute verbal outburst shouting numerous obscenities and twice threatening to punch [co-worker].” There is no need to include an opinion as to whether the employee engaged in the inappropriate conduct because of stress, depression or troubles at home.

(3) Generally, if an employee first discloses that he or she purportedly suffers from a disability after engaging in misconduct and requests a second chance, treat the request no differently than a second-chance request from a non-disabled employee. Before denying the request, be certain that the Company has not previously afforded second chances to employees who have not claimed a disability. Consistent application of employer standards is critical.

(4) An employer is entitled to expect that employees who suffer from a disability maintain reliable attendance, but beware of inconsistent application of the Company’s attendance and schedule requirements. An employer is not entitled to hold a disabled employee to a standard that is otherwise inconsistently applied.

(5) Consistent application of conduct and attendance standards does not mean employers should adopt a cookbook approach in responding to employees who claim to suffer from a disability. The best approach is one in which the employer conducts a careful individualized assessment of the facts in each situation.

(6) Carefully review decisions to delay counseling or confronting an employee who has attendance or performance deficiencies, particularly if the delay results from a manager’s concern about the employee’s mental state. In some circumstances, delaying such a confrontation may be the most sensitive and humane approach. In other circumstances, a delay may complicate what otherwise would have been a straightforward performance counseling or termination.

(7) If an employee suggests that he or she has an emotional condition that requires accommodation, elicit information from the employee about the nature of the desired accommodation. Do not assume, however, that an employee suffering from a disability has a duty to spell out the precise accommodation he or she needs.
(8) Carefully listen to employees and their family members or representatives and consider even vague requests for accommodation as triggering a duty to engage in an interactive process with the employee. Remember that a request for a change at work which is related to a medical condition may be deemed an accommodation request under the ADA.

(9) Persons with mental impairments are afforded the same protection under the ADA as persons with physical impairments. The nature of a mental impairment, however, may not be obvious or may be ill defined by the employee and his medical provider. Employers should familiarize themselves with the legal restraints on their right to request independent medical examinations and additional psychiatric information. If a request for additional information is lawful, employers should avail themselves of additional information. Well informed employers will be better able to formulate appropriate responses to requests for accommodation.

(10) Misconduct, performance problems, or attendance difficulties associated with an employee’s impairment raise particularly thorny privacy issues. Ensure that medical records are obtained and handled in accord with confidentiality provisions included in the ADA and other federal and state laws. Disclosure of sensitive medical information regarding employees should be limited to only those managers who are specifically authorized to receive such information.
II. DISCOVERY OF PSYCHOLOGICAL HISTORY IN ADA CASES

When an employee claims a mental disability and sues under the ADA, a defendant often wants to obtain the plaintiff’s psychological history.

A. Is A Defendant Employer Entitled To Psychological Records In An ADA Disability Case?

1. Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007): The plaintiff brought claims under the ADA against his former employer. He claimed he suffered from cardiovascular disease, hypertension, gout, and obstructive sleep apnea. He did not seek damages for emotional distress. The employer attempted to subpoena confidential records regarding communications between the plaintiff and his psychotherapist, pointing to the fact that the plaintiff testified in his deposition that he suffered from depression. The plaintiff moved to quash the subpoena. The district court ordered the plaintiff to produce the documents because the plaintiff placed his mental state in issue and therefore waived the psychotherapist-patient privilege. The appeals court rejected that conclusion, noting that the plaintiff “neither alleges nor claims damages for emotional distress, nor even for more generic ‘stress.’” Thus, the court held that “a plaintiff does not put his mental state in issue merely by acknowledging that he suffers from depression, for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff’s mental state in issue.”

2. Iwanejko v. Cohen & Grigsby, P.C., No. 2:03cv1855, 2005 U.S. Dist. LEXIS 22563 (Oct. 5, 2005): In a case involving a claim that the plaintiff was a qualified individual with a disability because of his mental condition, the defendant moved to compel disclosure of the plaintiff’s medical and/or mental health records. The defendant argued that the plaintiff waived the psychotherapist-patient privilege and his expectation of privacy by placing his mental condition at issue and by consenting to the release of his records to another defendant. According to the court, “while federal courts recognize the existence of the psychotherapist-patient privilege, said privileged is waived when a plaintiff places his mental condition at issue by alleging that due to his mental condition he is a ‘qualified individual with a disability’ under the Americans with Disabilities Act.” Id. at *3 (citation omitted). The court ordered the plaintiff to disclose the records of his medical and/or mental health treatment. The court, however, also entered a confidentiality order to protect the records.
B. Is A Defendant Employer Entitled To Psychological Records In An ADA Perceived Disability Case?

1. **Ruhlman v. Ulster County Department of Social Services**, 194 F.R.D. 445 (N.D.N.Y. 2000): The plaintiff suffered from depression and bipolar mood disorder. He took a leave of absence from work in order to adjust to a new regimen of medications. When he returned to work, the plaintiff claimed that his employer put various restrictions on his work, allegedly because his supervisors perceived him as disabled. The plaintiff also claimed that another employee of his employer caused him to be involuntarily committed in the hospital unit of a hospital. Finally, the plaintiff alleged that his employer placed him on involuntary paid leave and disciplined him for making threats to other employees. Based on these incidents, the plaintiff resigned. He then brought suit under the ADA against both his employer and the hospital. With respect to his employer, the plaintiff alleged discrimination on the basis of a perceived disability. The court noted that his employer was not entitled to the plaintiff’s psychiatric records because an employer “need not explore the plaintiff’s psychiatric history in order to defend against an allegation of perceived disability.” As a result, the court concluded that the plaintiff did not waive the psychotherapist-patient privilege by asserting a perceived disability ADA claim.

   (noting that when plaintiff claimed perceived disability, case law finding allegation of actual disability puts mental condition in issue is not applicable).

3. **But see Parker v. University of Pennsylvania**, 128 Fed. Appx. 944 (3d Cir. 2005): The district court had previously ordered the plaintiff, who was bipolar, to submit to a psychiatric examination. The plaintiff, however, withdrew his ADA claim predicated on actual disability as well as his emotional distress claim. The remaining cause of action was his ADA claim predicated on perceived disability. The plaintiff contended he no longer had to undergo a Rule 35 exam. The district court disagreed, and again ordered the plaintiff to undergo the psychiatric evaluation. The plaintiff refused and did not attend the exam, prompting the employer to move for sanctions. The district court awarded the employer monetary sanctions to compensate for its costs and attorneys’ fees incurred as a result of the plaintiff’s refusal to attend the appointment. The district court also dismissed the plaintiff’s ADA claim as a further sanction. The plaintiff appealed, arguing that the district court erred in ordering him to undergo a Rule 35 exam after he withdrew certain ADA claims.
The Third Circuit, however, concluded that “[b]ecause a specific cause of action remained under the ADA concerning whether [the plaintiff] was regarded as disabled because of a major psychiatric illness, and he had previously been diagnosed as suffering from a major psychiatric illness, his mental health was in controversy and good cause existed for an examination by a psychiatrist.” Id. at 948. The court affirmed the district court’s judgment.

C. Is A Defendant Employer Entitled To Psychological Records When The Plaintiff Seeks Emotional Distress Damages?

Generally, courts in the Second Circuit hold that a plaintiff has not placed his mental conditional at issue if he claims only “garden variety” emotional distress. When plaintiffs allege more significant emotional distress, courts have allowed discovery of psychiatric records.

1. **Brown v Kelly**, 2007 WL 1138877 (S.D.N.Y. Apr. 16, 2007): The court granted the plaintiffs’ motion for protective order preventing further discovery of their medical records. According to the court, the plaintiffs did not waive their psychotherapist-patient privilege because they were “not seeking damages for permanent or long-lasting emotional distress” arising from the alleged unlawful conduct. The court distinguished cases holding that by seeking emotional distress damages the plaintiffs placed their medical conditions in issue; in those cases, the plaintiffs voluntary waived the privilege, sued for negligent or intentional infliction of emotional distress, or alleged that defendant’s actions caused them to seek treatment for an ongoing or permanent medical condition. The court found that for a garden-variety emotional distress claim with no long-term effect, there is no need to examine the plaintiff’s full medical history or waive the privilege.


3. **Rainone v Potter**, 388 F. Supp. 2d 120 (E.D.N.Y. 2005): The court noted that awards of $5,000 to $35,000 fall into the “garden-variety” emotional distress. According to the court, damages for garden-variety emotional distress are awarded where the evidence of harm is primarily presented through the plaintiff’s testimony and in vague or conclusory terms without evidence of any severity or consequences of the injury. The court concluded that the plaintiff’s emotional distress was not severe because it did not cause any physical
manifestations or alternations in his lifestyle. The court therefore rejected the jury’s award – $175,000 as damages for emotional distress caused by the defendant’s failure to promote the plaintiff – on the ground that such a high sum shocked the conscience.

4. **Kuper v. Empire Cross & Blue Shied**, No. 99 Civ. 1190, 2003 WL 359462 (S.D.N.Y. Feb. 18, 2003): The court stated that evidence that a plaintiff sought medical or psychiatric treatment generally entitles him to greater damages for mental anguish and emotional distress. In *Kuper*, because the plaintiff sought help from a psychologist for nine months, the court found his emotional distress was not garden variety. In addition, the court noted that the plaintiff cried during testimony, had significant weight loss, and testified he relived his emotional distress every Sunday when looking at the classifieds.

5. **Ruhlman v. Ulster County Department of Social Services**, 194 F.R.D. 445 (N.D.N.Y. 2000): The plaintiff alleged ADA violations against his employer, and also sued the defendant hospital for committing him against his will. The court rejected the claim of the defendant hospital that the plaintiff put his mental condition in issue by seeking emotional distress damages. According to the court, the hospital was not entitled to his psychiatric records because “he has not placed his mental condition at issue, and has not waived the psychotherapist-patient privilege, by seeking [garden-variety] emotional distress damages incidental to federal constitutional and statutory law violations.”

6. **But see Cohen v. City of New York**, 2006 WL 2789272 (S.D.N.Y. Sept. 25, 2007) (noting that “a number of courts within the Second Circuit have taken the view that ‘a party does not put his or her emotional condition in issue by merely seeking incidental, garden variety, emotional distress damages’” but nonetheless holding that the magistrate judge’s decision ordering production of mental health records was a permissible reading of the law based on other courts’ broad view of waiver of the privilege).
III. RULE 35 MENTAL EXAMINATIONS: THE AVAILABILITY OF THE MENTAL EXAMINATION IN ADA CASES

When a plaintiff sues under the ADA and claims he or she suffers from a mental disability, the defendant may want to conduct a mental examination under Federal Rule of Civil Procedure 35 ("Rule 35"). Below are examples of how courts have dealt with requests for Rule 35 mental examinations in ADA cases.

A. Federal Rule of Civil Procedure 35

1. Once litigation commences, an employer may request a mental examination of plaintiff pursuant to Federal Rule of Civil Procedure Rule 35 ("Rule 35") or analogous state laws. The ADA does not prohibit such exams. Rule 35(a) provides, in pertinent part:

   When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party’s custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

2. Rule 35, as contrasted with the other discovery provisions, is distinct in its requirements that the condition as to which the examination is sought be "in controversy," and that the movant affirmatively demonstrate "good cause" for the examination. Schlagenhauf v. Holder, 379 U.S. 104, 117, 85 S. Ct. 234, 242 (1964); Lahr v. Fulbright & Jaworski, LLP, 164 F.R.D. 196, 198 (N.D. Tex. 1995), aff’d, 164 F.R.D. 204 (N.D. Tex. 1996).

3. Federal courts will usually order a mental examination where the case involves a claim of emotional distress and one or more of the following: (i) a cause of action for intentional or negligent infliction of emotional distress; (ii) an allegation of a specific mental or psychiatric injury or disorder; (iii) a claim of unusually severe
emotional distress; (iv) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or (v) plaintiff’s concession that his or her mental condition is “in controversy” within the meaning of Rule 35(a). Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D. Cal. 1995).

4. See also Parker v. Univ. of Penn., 128 Fed. Appx. 944, 948 (3d Cir. 2005) (holding Rule 35 exam of bipolar plaintiff was justified; “[b]ecause a specific cause of action remained under the ADA concerning whether [the plaintiff] was regarded as disabled because of a major psychiatric illness, and he had previously been diagnosed as suffering from a major psychiatric illness, his mental health was in controversy and good cause existed for an examination by a psychiatrist.”); Greenhorn v. Marriott Int’l, Inc., 216 F.R.D. 649, 651 (D. Kan. 2003) (ordering plaintiff to submit to mental exam where she alleged permanent emotional injury causing insomnia, severe depression, suicidal ideation, and other symptoms); EEOC v. Grief Bros. Corp., 218 F.R.D. 59, 61 (W.D.N.Y. 2003) (ordering Rule 35 examination because the plaintiff, who brought sexual harassment claims, sought damages for emotional pain and suffering; adding that “[d]epression . . . often require[es] professional medical assistance and prescribed medications, [and] is hardly a ‘garden variety’ form of emotional distress in all cases”); Pozefsky v. Baxter Healthcare Corporation, 194 F.R.D. 438, 439 (N.D.N.Y. June 27, 2000) (plaintiff claiming negligence against maker of silicone breast implants must submit to a mental examination, even though she withdrew her claim for emotional injury, given the possible nexus between the physical symptoms of which plaintiff complained and her alleged psychological disorders); McKitis v. DeFazio, No. Civ.A.S-98-3027, 1999 WL 346006, at *1-2 (D. Md. May 26, 1999) (defendant allowed to conduct additional mental examinations although it had previously conducted one examination where plaintiff placed her mental condition in controversy and planned to call multiple experts to testify regarding her mental condition); Chiperas v. Rubin, No. CIV.A.96-130TPJ/JMF, 1998 WL 765126, at *2-5 (D.D.C. Nov. 3, 1998) (discrimination plaintiff placed his mental condition in controversy when he claimed damages for severe emotional harm); Lemon v. Kilbert, No. CIV.A.97-2347, 1998 WL 788779, at *1 (E.D. La. Sept. 11, 1998) (allegations of intentional infliction of emotional distress from sexual harassment are an appropriate basis for allowing an order to compel a psychiatric examination); Thiessen v. General Elec. Capital Corp., 178 F.R.D. 568, 569-71 (D. Kan. 1998) (defendant was entitled to conduct mental examination of plaintiff who claimed in his deposition that specific injuries, including depression and fatigue, were caused by defendant); EEOC v. Danka
Indus., Inc., 990 F. Supp. 1138, 1143 (E.D. Mo. 1997) (allegations of severe emotional distress from sexual harassment entitled defendant to mental examination of plaintiff); Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 131 (E.D. Pa. 1997) (ADA plaintiff placed her mental condition in controversy to the extent that she alleged that her depression “has had a long term impact on her mental state”); Musselman v. Phillips, No. WMN-96-4075, 1997 U.S. Dist. LEXIS 16889 (D. Md. June 5, 1997) (plaintiff, who brought claims for intentional infliction of emotional distress and violation of the ADA, conceded her mental condition was in issue but objected to Rule 35 exam on grounds that the defendant obtained sufficient information from documents produced by discovery and from an evaluation by a medical doctor; court rejected the argument and concluded that “the nature of the damages sought by the plaintiff, and her allegations of emotional injury” provided good cause for a Rule 35 mental examination); Fischer v. Coastal Towing, Inc., 168 F.R.D. 199, 200-01 (E.D. Tex. 1996) (Jones Act plaintiff placed his mental condition in controversy by alleging mental pain and anguish and submitting to his own vocational-rehabilitation expert for evaluation); Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984) (allegations of emotional distress from sexual harassment are an appropriate basis for allowing an order to compel a psychiatric examination); Everly v. United Parcel Services, Inc., No. 89 C 1712, 1991 WL 18429, *1 (N.D. Ill. 1991) (plaintiff placed mental condition in controversy by specifically alleging in her sexual discrimination complaint a claim of intentional infliction of emotional distress).

5. But see Jarrar v. Harris, Civ. No. 07-3299 (CBA) (JO), 2008 U.S. Dist. LEXIS 57307, *1-2 (E.D.N.Y. July 25, 2008) (denying Rule 35 mental exam when plaintiff alleged only garden variety emotional distress and noting that “[s]uch intrusive discovery . . . is generally not available in comparable cases where a plaintiff claims to have been subjected to illegal discrimination and other civil rights violations by an employer”); EEOC v. Consol. Resorts, Inc., No. 2:06-cv-01104-LDG-GWF, 2008 U.S. Dist. LEXIS 67799 (D.Nev. Apr. 7, 2008) (denying motion to compel Rule 35 exam based on plaintiff’s representation that she was not “making any claim for ongoing, severe emotional distress as a result of the alleged sexual harassment”); EEOC v. First Wireless Group, Inc., No. 03-CV-4990 (JS) (ARL), 2007 U.S. Dist. LEXIS 11893 (E.D.N.Y. Feb. 20, 2007) (denying motion for Rule 35 mental exam when plaintiffs alleged only garden variety emotional distress; “[t]earful eyes, loss of sleep, and a desire for counseling do not disable people from working” and were within the realm of garden variety distress); Bowen v. Parking Auth., 214 F.R.D. 188 (D.N.J. 2003) (denying Rule 35 mental exam
when plaintiff alleged only emotional distress; also noting that denial of Rule 35 exam did not preclude defendant from obtaining discovery of plaintiff’s psychiatric history); Ricks v. Abbott, No. Civ.A.WMN-00-1290, 2001 WL 92377, at *1-4 (D. Md. Jan. 29, 2001) (plaintiff alleging age discrimination and retaliation did not place her mental condition in controversy because she did not assert a specific cause of action for infliction of emotional distress but merely included emotional distress as an element of her damages, did not allege a specific mental injury or disorder or claim unusually severe emotional distress, and did not intend to introduce expert testimony on her mental state); Houghton v. M & F Fishing, Inc., No. Civ.99CV2276-BTM(JF), 2001 WL 128015, at *1-4 (S.D. Cal. Jan. 10, 2001) (plaintiff did not place his mental condition in controversy and did not seek to recover damages for mental injury caused by a shipboard injury other than “garden-variety” emotional distress despite alleging that he is permanently disabled); Shumaker v. West, 196 F.R.D. 454, 456-457 (S.D. W. Va. Sept. 29, 2000) (motion for mental examination denied because the motion was untimely and defendant did not show good cause because there was “ample evidence” already available from which defendant could obtain the information sought); Ford v. Contra Costa County, 179 F.R.D. 579, 580 (N.D. Cal. 1998) (plaintiff alleging gender discrimination did not place her mental condition in controversy when she claimed damages for emotional and mental distress); Fox v. The Gates Corp., 179 F.R.D. 303, 307-08 (D. Colo. 1998) (ADA plaintiff did not place her mental condition in controversy by asserting “garden variety” claim for emotional distress damages); Burrell v. Crown Cent. Petroleum, Inc., 177 F.R.D. 376, 380 (E.D. Tex. 1997) (damages for mental anguish in a Section 1981 or Title VII action are incident to work-related economic damages resulting from discrimination and therefore asking for such damages does not place a plaintiff’s mental condition in controversy so as to justify a psychological examination); O’Sullivan v. State of Minnesota, 176 F.R.D. 325, 327-28 (D. Minn. 1997) (plaintiff did not place her mental condition in controversy when she alleged mental anguish, emotional distress, embarrassment and humiliation given she also testified that she was in good mental health and was not seeking to recover for diagnosable psychological conditions or disorders); EEOC v. Old Western Furniture Corp., 173 F.R.D. 444, 445-46 (W.D. Tex. 1996) (plaintiff alleging sexual discrimination did not place her mental condition in controversy when she sought compensatory damages for mental anguish); Neal v. Siegel-Robert, Inc., 171 F.R.D. 264, 266 (E.D. Mo. 1996) (plaintiff who requested damages for emotional distress did not place his mental condition in controversy because he did not complain of any definable psychological symptoms); Robinson v. Jacksonville
Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) (plaintiff did not place her mental condition in controversy even though she claimed back pay for days lost due to stress and alleged serious effect on her psychological well-being); Cody v. Marriott Corp., 103 F.R.D. 421, 422 (D.C. Mass. 1984) (plaintiff did not place her mental condition in controversy by claiming damages for emotional distress).


IV. RULE 35 MENTAL EXAMINATIONS: THE PARAMETERS OF THE MENTAL EXAMINATION IN ADA CASES

Even if the court grants a Rule 35 mental examination, questions arise as the scope of that examination. Below are examples of how courts have dealt with requests for Rule 35 mental examinations.

A. The scope of inquiry

1. The examiner will generally review the plaintiff’s symptoms and belief regarding causation. The examiner will also take a history (including previous treatment, hospitalizations and medications), and assess the plaintiff’s mental status. The defense expert will pay particular attention to preexisting symptoms, mental disorders, and life stressors. Plaintiff may attempt to limit the scope of inquiry during the exam to the time period or events contemporaneous with the alleged unlawful conduct by defendant. Defendant should strenuously resist such limits.

2. See Grief Bros. Corp., 218 F.R.D. at 61 (denying sexual harassment plaintiff’s request to limit scope of and tape record Rule 35 mental examination); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 624 (D. Kan. 1999) (denying sexual harassment plaintiff’s request to impose conditions on the examination and refusing to order that (1) the examination take place in a “nonthreatening” location; (2) a third party of plaintiff’s choosing be allowed to attend the examination; (3) an audio recording of the examination be made; (4) plaintiff be allowed to take breaks and make telephone calls as she deems necessary; (5) the examiner be informed and his assurance obtained that the examination be conducted in as sensitive,
nonthreatening, nonoverbearing manner as possible; (6) the examiner disclose prior to the examination the nature of the questions he intends to ask and what tests he plans to administer; and (7) the examiner be prohibited from inquiring into plaintiff’s private, non-work related sexual activities; Chiperas, 1998 WL 765126, at *5 (stating that the court would yield to the examiner’s expertise in determining what tests are necessary); Lemon, 1998 WL 788779, at *1 (the examination’s scope would include a full battery of psychological tests commonly used to evaluate and diagnose a patient’s mental condition); Sarko, 170 F.R.D. at 131 (the scope of the exam must be limited to the alleged long-term impact of plaintiff’s depression on her current mental state); Fischer, 168 F.R.D. at 200-01 (defendant’s vocational rehabilitation expert would be limited to evaluating plaintiff’s abilities and interests as these relate to conclusions traditionally offered by such experts); George v. Frank, 761 F. Supp. 256, 262-63 (S.D.N.Y. 1991) (defendant’s three-hour evaluation and review of plaintiff’s medical records revealed that plaintiff’s symptoms had no relation to her employment; rather, two unrelated medical conditions accounted for the majority of plaintiff’s symptoms in addition to personality disorders that influenced plaintiff’s perceptions); Lahr, 164 F.R.D. at 201-02 (a psychologist needs to inquire into the plaintiff’s personal life history to assess the particular symptomatology and standardized psychological tests may assess the presence or severity of symptoms; the court relied, in part, on the psychologist’s statement that, “[i]n order to determine if an event or series of events have had a psychological impact on a person, the psychologist conducting the interview needs to learn about events that occurred prior to that time. Furthermore, inquiring into a full longitudinal history enables the interviewer to understand how the subject handled other stressors in her life in order to better assess how the matter of which she complains may have affected her.”); Tomlin v. Holecek, 150 F.R.D. 628, 632-33 (D. Minn. 1993) (the scope of the Rule 35 mental exam may include any diagnosis of plaintiff’s condition and psychological state or evaluation of plaintiff’s complaints); Morton v. Haskell Co., No. 94-976-CIV-J-20, 1995 WL 819182, at *2-3 (M.D. Fla. 1995) (defendant’s mental exam sought to “test the veracity of plaintiff’s claim that he suffered from clinical depression, to probe its severity, and to shed light upon the issue of reasonable accommodation”; plaintiff tried to limit the scope of the examination to the actual year of plaintiff’s clinical depression allegedly caused by defendant’s action, but the court rejected such a limitation and noted that a “physician is able to provide a retrospective opinion of plaintiff’s condition even though he did not examine plaintiff until after the relevant date”); Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 299 (E.D. Pa. 1983) (mental exam
may consist of “searching questions of the plaintiff as to her past physical and mental and emotional problems”; the psychologist will then study plaintiff’s answers and reactions as a basis for forming an expert opinion).

B. Limits on the psychological tests to be administered

1. Generally, courts will allow defense experts to use non-invasive psychological tests commonly used by clinical psychologists, such as the Minnesota Multiphasic Personality Inventory (“MMPI”).

2. See Rodriguez v. Pictsweet Co., Civ. No. B-070113, 2008 U.S. Dist. LEXIS 38008, *8 (S.D. Tex. May 9, 2008) (ordering plaintiff to undergo mental examination and allowing examiner to “perform a general diagnostic battery and neuropsychological evaluation, a mental status evaluation, a neuropsychological evaluation, and a general psychiatric examination”); Chiperas, 1998 WL 765126 at *4 (the court stated it “would be loath to interfere with a conscientious determination by a medical professional that a test should be repeated to reach a sound scientific conclusion”); Shirsat v. Mutual Pharm. Co., Inc., 169 F.R.D. 68, 71-72 (E.D. Pa. 1996) (“Each request for an independent medical examination must turn on its own facts, and the number of examinations to which a party may be subjected depends solely upon the circumstances underlying the request.” A test previously administered by plaintiff’s expert may be duplicated if previous results were uncertain or warranted additional testing. Rule 35 does not limit the number of examinations.”) (citation omitted); Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609 (C.D. Cal. 1995) (“Because the mental examination provides one of the few opportunities for a defendant to have access to a plaintiff, . . . some preference should be given to allowing the examiner to exercise discretion in the manner and means by which the examination is conducted, provided it is not an improper examination”; the examiner “sets forth the nature of the examination to be conducted, including the types of psychological tests he may choose to administer”); Peters v. Nelson, 153 F.R.D. 635, 639 (N.D. Iowa 1994) (examinations and tests by two specialists – a psychiatrist and a neuropsychologist – allowed; “The tests they apply and the manner in which they evaluate their results are not identical and are not even likely to be based on the same data, such that one doctor could rely on data gathered by another, and arrive at an expert opinion without a personal examination of the plaintiff.”). See also Simonelli v. Univ. of California - Berkley, No. C 02-1107 JL, 2007 U.S. Dist. LEXIS 44373 (N.D. Cal. June 4, 2007) (refusing to set artificial time limits for Rule 35 mental exam when doctor conducting
the exam could not know the length of the exam until he met the plaintiff); Gavenda v. Orleans County, 174 F.R.D. 272, 274 (W.D. N.Y. 1996) (the court refused to place a time limit on the examination absent a justified basis for such limitation); but see Usher v. Lakewood Eng’g & Mfg. Co., 158 F.R.D. 411, 413 (N.D. Ill. 1994) (the court did not permit a battery of psychological tests after plaintiff supplied evidence that demonstrated the inadequacy of correlation and validity factors of all of defendant’s proposed tests; the potential rate of error was a major consideration).

C. The examiner need not disclose tests or questions beforehand.

1. See Hertenstein, 189 F.R.D. at 626 (“Prior disclosure of questions to be asked ‘is unworkable.’ An examiner cannot reasonably determine all questions beforehand, including follow-up questions.”) (citations omitted); Ragge, 165 F.R.D. at 609 (it would serve no purpose to require the examiner to select and disclose the specific tests to be administered in advance of the examination; pursuant to Rule 35(b), after the exam the examiner must provide a detailed report including the tests that were administered); Tomlin, 150 F.R.D. at 631 (the defendant does not have to supply the plaintiff with the examiner’s questions prior to examination; such a proposal is unworkable).

D. Plaintiff’s attorney is often prohibited from attending the mental exam, in part, because the attorney may inhibit the examiner or plaintiff.

1. See Hodge v. City of Long Beach, No. CV 02-5851 (TCP) (AKT), 2007 U.S. Dist. LEXIS 72871 (E.D.N.Y. Sept. 28, 2007) (imposing sanctions when attorney attended exam); Grief Bros. Corp., 218 F.R.D. at 64 (W.D.N.Y. 2003) (denying plaintiff’s request to have attorney present during exam); Reyes v. City Of New York, No. 00Civ.2300(SHS), 2000 WL 1528239, at *1-3 (S.D.N.Y. Oct. 16, 2000) (holding that when the need for a mental examination has been established then the party seeking the attendance of a third party at the examination bears the burden of showing “good cause” for such attendance under FRCP 26(c); the court further ruled that the plaintiffs failed to meet their burden under this standard); Bethel, 2000 WL. 197255, at *4 (noting that “the presence of the observer interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry[,] . . . [and that] it is recognized that psychological examinations necessitate an unimpeded, one-on-one exchange between the doctor and the patient”) (citations omitted); Hertenstein, 189 F.R.D. at 630 (presence of third party may invalidate the results of the mental examination while destroying the “level playing field” contemplated by Rule 35, and inject a greater
degree of the adversarial process into an evaluation that is intended to be neutral, where plaintiff failed to present any evidence that the examiner would improperly question her or use harmful techniques in the examination, and failed to demonstrate that she had a compelling need for support during the examination); McKitis, 1999 WL 346006, at *2 (stating that “absent a compelling determination of need, a party’s counsel should not be allowed to attend a Rule 35 examination.” If a plaintiff’s counsel were permitted to attend, “fairness would require the presence of the defense counsel as well”); Chiperas, 1998 WL 765126, at *5 (plaintiff’s attorney could not attend examination because it would inhibit the “candor and frankness of the examinee’s discussion”); Shirsat, 169 F.R.D. at 70-71 (plaintiff’s request for the presence of an independent observer to counteract the purported bias of the defendant’s expert and the plaintiff’s lack of fluency in English denied; “an observer, court reporter, or recording device would . . . diminish the accuracy of the process” as third parties “contaminate” a mental examination; defendant’s examiner did not propose any unorthodox or harmful techniques and the mere fact that defendants hired their own examiner is not sufficient to prove bias; the addition of an observer interjects an adversarial atmosphere that has no place in the objective exam); Tomlin, 150 F.R.D. at 632 (“Given the apparent sensitivity of the subject matter which may well be explored in this interview, the need for a private and personal interchange, between the Plaintiff and [the examiner], would seem self-obvious. In our view, the presence of third parties would lend a degree of artificiality to the interview technique which would be inconsistent with applicable, professional standards.”); Neumerski v. Califano, 513 F. Supp. 1011, 1016-17 (E.D. Pa. 1981) (a party has no right to have an attorney present during a Rule 35 mental examination; “This is especially true in psychological examinations which depend on ‘unimpeded one-on-one communication between doctor and patient.’”) (citation omitted); see also Tirado v. Erosa, 158 F.R.D. 294, 297-300 (S.D.N.Y. 1994) (civil rights action against city by arrestee; defendant not allowed to have attorney and stenographer present at her examination by defendant’s psychiatrist; “The introduction of a human or mechanical presence – whether a lawyer, a stenographer, a tape recorder, or other instrumentality – changes the nature of the proceeding . . .”); Duncan, 155 F.R.D. at 26-27 (absent evidence of unorthodox or harmful techniques, the plaintiff’s physician or other mental health expert may not be present at the mental health exam); Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543, 546 (S.D.N.Y. 1978) (“[T]he presence of even the party’s own physician at a psychiatric examination has been denied, undoubtedly in view of the particular nature of a psychiatric examination, which relies . . . upon
unimpeded, one-on-one communication between doctor and patient.”).

2. But see Jefferys v. LRP Publications, Inc., 184 F.R.D. 262, 263 (E.D. Pa. 1999) (plaintiff’s counsel “or other representative” may be present during the examination); Gensbauer v. May Dep’t Stores Co., 184 F.R.D. 552, 553 (E.D. Pa. 1999) (plaintiff’s attorney would be allowed to attend examination since the court, sitting in diversity, would look to the forum state’s law which allowed attorney’s presence); Fischer, 168 F.R.D. at 201 (plaintiff’s counsel could attend the evaluation by defendant’s expert); Zabkowicz, 585 F. Supp. at 636 (“The defendants argue with some force that the presence of a third party or a recording device may create inhibitions detrimental to a psychiatric interview. However, in the context of an adversary proceeding, the plaintiffs’ interest in protecting themselves from unsupervised interrogation by an agent of their opponents outweighs the defendants’ interest in making the most effective use of their expert.”); Vreeland v. Ethan Allen, Inc., 151 F.R.D. 551, 551-52 (S.D.N.Y. 1993) (“There is a legitimate purpose to be served by the presence of the attorney. The attorney can observe and take notes of the procedures followed, in order to have that information available for cross-examination.”); Lowe, 101 F.R.D. at 299 (plaintiff may have a psychiatrist or other medical expert present solely for observational purposes but attorney barred from mental exam).

E. Depending on the jurisdiction, the court may allow the plaintiff to tape record the examination.

1. Rule 35 is silent as to whether examinations may or should be recorded.

2. See Grief Bros. Corp., 218 F.R.D. 59 at 64 (W.D.N.Y. 2003) (denying sexual harassment plaintiff’s request to tape record the examination); In re Falcon Workover, No. CIV. A. 972628, 1999 WL 721945, at *1 (E.D. La. Sept 15, 1999) (denying plaintiff’s request that the examination be audio taped: “The Court finds that taping the psychiatric examination would be tantamount to allowing counsel for the claimant to be present in the room.”); Chipcras, 1998 WL 765126, at *5 (the court stated that “in the absence of some reason to believe that competent medical professionals can be expected to misrepresent what occurred during a psychiatric evaluation, the need for a perfect record yields to the potential harm to be done if the presence of a stenographer or tape records [sic] inhibits the interviewee’s discussion”).
3. But see Sidari v. Orleans County, 174 F.R.D. 275, 291 (W.D.N.Y. 1996) (defendant’s argument that the use of a tape recorder would “destroy any candor” by the plaintiff was not persuasive since a mental examination is an interpersonal exchange containing a large subjective component); Gavenda 174 F.R.D. at 274 (plaintiff was entitled to have her mental examination tape recorded).
V. PREFERENTIAL TREATMENT OF DISABLED EMPLOYEES: AN ANALYSIS OF FEDERAL COURT DECISIONS

A thorny issue which arises under the ADA is whether an employer must give disabled employees preferential treatment over non-disabled employees. In particular, an issue may arise when a disabled individual meets the minimum qualifications for a position, but a non-disabled individual is better qualified. In 2002, the U.S. Supreme Court addressed the issue in *US Airways, Inc. v. Barnett*. Below is an analysis of the *Barnett* decision, as well as an analysis of how courts in each circuit have ruled on this issue.

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<td>U.S. Supreme Court</td>
<td>• <em>US Airways, Inc. v. Barnett</em>, 535 U.S. 391, 398 (2002) (explaining that although an employer will sometimes need to give disabled employees preferential treatment to meet the mandate of the ADA, an employer is not required to give a disabled employee superseniority to retain his job when a more senior non-disabled employee is entitled to the job under the terms of the established seniority program).</td>
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| 1st Circuit | • At least one post-*Barnett* case states that “[t]he ADA is not a mandatory preference act, and thus, an employer is entitled to select better qualified employees for vacant positions instead of a disabled employee.” *Castro-Medina v. Procter & Gamble Commercial Co.*, Civ. No. 04-2274 (PG), 2008 U.S LEXIS 53408, at *78 (D.P.R. June 28, 2008).
| 2nd Circuit | • Several 2nd Circuit courts hold that the ADA “does not authorize a preference for disabled people generally.” *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003); see also *Pender v. State of N.Y. Office of Mental Retardation and Developmental Disabilities*, No. 02-CV-2438 (JFB) (LB), 2006 WL 2013863, at *8 (E.D.N.Y. July 18, 2006) (“A contrary holding that an employer is required to promote an employee as an accommodation, where he is no longer able to perform his current position, would place disabled persons on a higher
playing field than non-disabled persons, contrary to the objectives of the ADA.”), aff’d, 225 Fed. Appx. 17 (2d Cir. 2006), cert. denied, No. 07-5023, 2007 WL 20052666; Picinich v. United Parcel Serv., No. 5:01-CV-01868 (NPM), 2005 WL 3542571, at *23 (N.D.N.Y. Dec. 23, 2005) (“Because the intent of the ADA is not to give disabled employees preferential treatment, reassignment of a disabled employee to another facility is a reasonable accommodation only where it is the regular practice or policy of the employer to transfer employees between facilities or where the employer is contractually obligated to do so.”), aff’d in part, vacated in part, 236 Fed. Appx. 663 (2d. Cir. 2007); Hartnett v. Fielding Graduate Inst., 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) (in a case outside of the employment context, the court explained that, “[the ADA and Rehabilitation Act] mandate[] reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; [they] do[] not authorize a preference for disabled people generally.”), aff’d, 198 Fed. Appx. 89 (2d Cir. 2006).

- In Stamos v. Glen Cove Sch. Dist., 78 Fed. Appx. 776, 778 (2d Cir. 2003), however, the 2d Circuit held that extraordinary circumstances must exist in order for a disabled employee to trump the entitlements of other non-disabled employees.

### 3rd Circuit


- Johnson v. McGraw-Hill Cos., 451 F. Supp. 2d 681, 707 (W.D. Pa. 2006) (“It is clear that an accommodation which requires the displacement of another employee would not be reasonable ‘ordinarily or in the run of cases.’ In this case, however, Johnson has called the Court’s attention to special circumstances which may warrant a finding that his proposed transfer was reasonable.”).


of a vacant, available position").

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<th>Circuit</th>
<th>Case</th>
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<td>4th Circuit</td>
<td>• No post- <em>Barnett</em> cases on point. See <em>Evans v. UDR, Inc.</em>, No. 07-CV-136, 2009 U.S. Dist. LEXIS 31844, at *25–26 (E.D.N.C. Mar. 24, 2009) (holding that plaintiff was not entitled to preferential treatment in housing discrimination case where the requested accommodation required defendant to ignore plaintiff’s criminal history, even if the criminal conviction is the result of a mental disability). The court added, however, “Plaintiffs also cite a series of cases in which courts have found that conduct resulting from a disability may form the basis of a reasonable accommodation requirement. However, each of these cases deals with a situation different from the one before the court in that they all apply to non-criminal conduct resulting from a mental disability.” <em>Id.</em> at *29, n.16. In support of this proposition, the court cited several cases from outside of the Fourth Circuit.</td>
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<td>5th Circuit</td>
<td>• <em>Medrano v. City of San Antonio, Texas</em>, 179 Fed. Appx. 897 (5th Cir. 2006) (citing <em>Barnett</em> to hold “the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement”).</td>
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<td>6th Circuit</td>
<td>• <em>Hedrick v. Western Reserve Care Sys.</em>, 355 F.3d 444, 459 (6th Cir. 2004) (“Finally, contrary to Hedrick’s argument, her disability did not provide her with a preference in WRCS’s hiring practices. Although WRCS may have had an obligation to reassign her to a vacant position for which she was qualified, the ADA does not mandate that she be afforded preferential treatment.”), <em>cert. denied</em>, 543 U.S. 817 (2004).</td>
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<td>7th Circuit</td>
<td>• <em>Hammel v. Eau Galle Cheese Factory</em>, 407 F.3d 852, 867 (7th Cir. 2005) (“In this regard, let us make clear that the ADA ‘is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee’s disability,’ . . . Accommodations which require special dispensations and preferential treatment are not reasonable under the ADA . . . “), <em>cert. denied</em>, 546 U.S. 1033 (2005).</td>
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<td>• <em>Mays v. Principi</em>, 301 F.3d 866, 872 (7th Cir. 2002) (citing <em>Barnett</em> to support its conclusion that, even if the plaintiff was qualified for a position, the employer did not violate the ADA by hiring better qualified applicants).</td>
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### AMERICANS WITH DISABILITIES ACT

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<th>8th Circuit</th>
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<td><strong>Huber v. Wal-Mart Stores, Inc.</strong>, 486 F.3d 480, 483 (8th Cir. 2007) (“We agree and conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate . . . the ADA does not require Wal-Mart to turn away a superior applicant for the router position in order to give the position to Huber. To conclude otherwise is ‘affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group.””), cert. dismissed by, <strong>Huber v. Wal-Mart Stores, Inc.</strong>, 128 S. Ct. 1116 (2008); citing <strong>EEOC v. Humiston-Keeling, Inc.</strong>, 227 F.3d...</td>
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### Case Holdings

- **EEOC v. Humiston-Keeling, Inc.**, 227 F.3d 1024, 1028 (7th Cir. 2000) (“The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.”).

- **King v. City of Madison**, No. 07-cv-295-bbc, 2008 U.S Dist. LEXIS 19311, at *10 (W.D. Wis. Mar. 11, 2008) (“Defendant’s obligations under the [ADA] do not extend to overriding the terms of the governing labor contract and treating plaintiff more favorably than it would be required to treat individuals without disabilities.”).

- **Germano v. International Profit Association, Inc.**, No. 06 CV 5638, 2007 U.S. Dist. LEXIS 80940 (E.D. Ill. Nov. 1, 2007) (plaintiff failed to state a *prima facie* case under the ADA when defendant decided to pursue more qualified candidates).

- **Cohen v. Ameritech Corp.**, No. 02-C-7378, 2003 WL 23312801, at *5 (N.D. Ill. Dec. 23, 2003) (“An employer is not required to give a disabled employee preferential treatment over other employees . . . In accommodating an employee, an employer must consider the feasibility of assigning an employee to a different job in which his or her disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory.”).
1024 (7th Cir. 2000), which states “the ADA does not mandate a policy of affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled person be given priority in hiring or reassignment over those who are not disabled.”


- **Willnerd v. First Nat'l of Nebraska, Inc.**, No. 8:05-CV-482, 2007 WL 2746866, at *15 (D. Neb. Sept. 19, 2007) (“In light of the recent decision in Huber, the court finds that First National had no duty to accommodate plaintiff by automatically awarding him a position for which he met the minimum requirements. As to the positions for which plaintiff was actually interviewed, First National has provided evidence that other candidates were hired because first National determined they were more qualified for the jobs. . . In any event, the ADA does not require First National to turn away superior applicants in order to award any particular position to the plaintiff, and it is the employer’s role— not the court’s role—to identify the strengths that constitute the best qualified applicant.”).

- **Chapple v. Waste Mgm’t, Inc.**, Civ. No. 05-2583 (ADM) (JSM), 2007 WL 628361, at *10 (D. Minn. Feb. 28, 2007) (“The Eighth Circuit Court of Appeals has yet to hold that an employer’s policy of hiring the most qualified applicant for a job must give way when a disabled employee seeks reassignment to that job.”).

- **Wood v. Crown Redi-Mix, Inc.**, 218 F. Supp. 2d 1094, 1106 (S.D. Iowa 2002) (“An employer is not required to accommodate a handicapped individual in a manner that would violate the rights of other employees under a legitimate collective bargaining agreement.”) (quoting Mason v. Frank, 32 F.3d 315, 319 (8th Cir. 1994)), aff’d, 339 F.3d 682 (8th Cir. 2003).

- **Gambini v Total Renal Care**, 486 F.3d 1087, 1095 (9th Cir. 2007) (addressing plaintiff’s argument that her misconduct was protected because it was caused by her disability, the court noted that “the law often does provide more protection for individuals with disabilities” and “identical treatment is often not equal treatment with respect to disability discrimination”).
### 10th Circuit

- **Roberts v. Cessna Aircraft Company**, Civ. No. 07-3133, 2008 U.S. App. LEXIS 17645, *1228* (10th Cir. Aug. 14, 2008) (holding that employer does not have to give a disabled employer a vacant position if, under a collective bargaining agreement, other employees have a right to the vacant position), aff’d 289 F. App’x 321, 326–27 (10th Cir. 2008).

- **E.E.O.C. v. Dillon Cos., Inc.**, 310 F.3d 1271, 1277 (10th Cir. 2002) (quoting Barnett, the court held that “the simple fact that an accommodation would provide a preference — in the sense that it would permit the worker with a disability to violate a rule that others must obey — cannot, in and of itself, automatically show that the accommodation is not reasonable”).


- **Smith v. Midland Brake, Inc.**, 180 F.3d 1154, 1169 (10th Cir. 1999) (en banc) (“[R]quiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.”).

- **Roberts v. Cessna Aircraft Co.**, Civ. No. 05-1325 (MLB), 2007 WL 1100206, at *6 (D. Kan. Apr. 11, 2007) (“The ADA does not require an employer to provide an accommodation that would violate a CBA.”) (citing Dilley v. SuperValu, Inc., 296 F.3d 958, 963 (10th Cir. 2002)).

### 11th Circuit

- **Holly v. Clairson Indus., L.L.C.**, 492 F.3d 1247, 1263 (11th Cir. 2007) (in a case addressing whether the employer had to treat a disabled employee preferentially under a “no fault” attendance policy, the court noted “preferences will sometimes prove
necessary to achieve the Act’s basic equal opportunity goal. The Act requires preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy. By definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer’s disability-neutral rule cannot by itself place the accommodation beyond the Act’s potential reach.”) (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 397-98 (2002)).

- **Galloway v. GA Technology Authority**, 182 Fed. Appx. 877, 881 (11th Cir. 2006) (finding that employer articulated legitimate reason for not promoting disabled employee: he was not as qualified as the individual who received the promotion).

- **Woodruff v. School Board of Seminole County**, No. 6:06-cv-1937-Orl-22KRS, 2008 U.S. Dist. LEXIS 22179 (M.D. Fla. Mar. 20, 2008) (rejecting plaintiff’s ADA claim because (1) accommodation that would violate CBA was not a reasonable accommodation; (2) ADA does not require an employer to promote a disabled employee as a reasonable accommodation; and (3) plaintiff was not as well-qualified as other applicants; noting “the ADA does not require preferential treatment for the disabled over equally or better-qualified individuals”).

**DC Circuit**

- **Aka v. Washington Hosp. Ctr.**, 156 F.3d 1284, 1304-05 (D.C. Cir. 1998) (en banc) (“[T]he ADA’s reference to reassignment would be redundant if permission to apply were all it meant . . . .”).


- **But see Adeyemi v. District of Columbia**, 525 F.3d 1222, 1227-28 (D.D.C. 2008) (noting that courts must “respect the employer’s unfettered discretion to choose among qualified candidates” and that the superior qualifications of candidates actually hired “tends to undermine any suggestion of discrimination” under the ADA).
Mental Illness Discrimination Claims Against Employers

Strategies for Avoiding and Defending Americans with Disabilities Claims

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TABLE OF CONTENTS

Mental Disability Discrimination -
Recent Developments in Case Law Under the ADA.......................................................1

Accommodation of Individuals with Psychiatric Disabilities ..................................................14

Defendant's Outline for Discovery of
Plaintiff's Case Based on Disability Discrimination ........................................................28

Checklist for Discovery of Defendant's
Expert Witness in Disability Discrimination Case..............................................................36
I. What Is a Disability

A. Cases Where Plaintiff Was Disabled or Jury Issue

1. Actual Disability

- In Doe v. Salvation Army in the United States, 531 F.3d 355 (6th Cir. 2008), John Doe (the pseudonym for an individual who suffers from paranoid schizophrenia disorder) applied for a truck driver position with the Salvation Army. When Doe was asked what kind of medication he took, he responded “psychotropic medication.” At that point, the interviewer stopped the interview and said that his insurance would not cover me." Subsequently, Doe filed a lawsuit alleging that the Salvation Army had engaged in disability discrimination in violation of the federal Rehabilitation Act of 1973 and Ohio state law. The district court granted the Salvation Army’s motion for summary judgment on the basis that Doe had failed to establish the elements of a prima facie disability discrimination case, including showing that he was disabled under the terms of the applicable statutes.

On appeal, the Sixth Circuit Court of Appeals reversed. The appeals court concluded that Doe had presented sufficient evidence that he had a record of a disability because Doe had submitted numerous doctor reports and evaluations to support his claim that he had a history of paranoid schizophrenia disorder “which caused substantial limitations to his major life activities of self care, thinking, learning, and working.” Additionally, the Sixth Circuit found that Doe had sufficiently demonstrated that the Salvation Army knew about his purported disability when Doe had informed the interviewer that he took “psychotropic drugs.” Although the Salvation Army argued that the interviewer had rejected Doe because of safety concerns, the interviewer never sought to check whether the Salvation Army’s insurance would allow Snider to hire a driver who took psychotropic drugs and “[a]n employer may not base a hiring decision on a
perceived notion that the applicant's disability renders him incapable to perform the job."

- In *Battle v. United Parcel Service, Inc.*, 438 F.3d 856 (8th Cir. 2006), the Eighth Circuit Court of Appeals concluded whether there was sufficient evidence for a jury to have found that the plaintiff's depression, anxiety and obsessive-compulsive disorders substantially limited his ability to think or concentrate so as to rise to the level of an ADA disability. In so ruling, the court pointed to testimony by the plaintiff's treating physician that his depression and anxiety substantially limited his ability to think and concentrate as compared to the average person in the general population. Although the plaintiff was aided by psychiatric counseling and medication, the plaintiff's doctor opined that he "would continue to suffer similar limitations in his ability to think and concentrate in the foreseeable future." 438 F.3d at 856. In addition, the court pointed to the testimony of both the plaintiff and his wife as to the effects of the plaintiff's depression and anxiety on his daily life activities. Even with counseling and medication, the plaintiff no longer made “household or financial decisions, or discipline[d] his children because he [did] not have the ability to deal with extraneous or unexpected issues, conflicts or demands outside of work.” *Id.* at 862. In light of this evidence, the circuit court concluded there was sufficient evidence from which a jury could determine that the plaintiff was disabled under the ADA.

- In *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2d Cir. 2008), the plaintiff, Patrick Brady ("Brady"), was a young man with cerebral palsy, which manifests itself in his noticeably slower walking with a shuffle and limp, recognizably slower and quieter speech, not looking directly at people when talking to them, weaker vision, and a poor sense of direction. Brady was hired as a part time pharmacy assistant at a Wal-Mart store. His boss became unhappy with his performance, and Brady was transferred to a job collecting shopping carts and garbage in the parking lot. Subsequently, Brady was transferred to a job in the food department where he was asked to stock shelves. Brady was given no training or instruction for the food department job, and was given a work schedule that conflicted with his community college schedule that had been noted on Wal-Mart's availability forms. "Frustrated," Brady quit.

Brady filed suit against Wal-Mart under the ADA and New York human rights law. A jury found that Brady was disabled or regarded as disabled within the meaning of the ADA and that Wal-Mart had discriminated against him on the basis of his disability by transferring him from the pharmacy to the parking lot job. The jury also found that Wal-Mart had subjected Brady to a hostile work environment and that the company had failed to reasonably
accommodate him and made impermissible pre-employment inquiries in its job description. The jury awarded Brady $2.5 million in compensatory damages, approximately $9,000 in economic damages, $2 in nominal damages, and $5 million in punitive damages. The district court struck the economic damages award because Brady did not prevail on his constructive discharge claim and reduced the punitive damages award to $300,000 in accordance with federal statute. The district court also ordered a new trial on the issue of compensatory damages unless Brady accepted a remittur of the compensatory damages award from $2.5 million to $600,000, which Brady did.

Wal-Mart appealed, but the Second Circuit Court of Appeals affirmed the district court’s judgment and award of $900,000 in favor of Brady. The court concluded that the description of the impact of Brady’s cerebral palsy upon his life activities was sufficient to permit the jury to find that he was “in fact disabled under the ADA.” Additionally, the court found that Brady was perceived to be disabled, especially given the fact that his supervisor in the pharmacy department had testified she regarded Brady to be slow, that “there was something wrong” with him, and that Brady “wasn’t fit for the job.” Even though Brady never requested an accommodation from Wal-Mart, the appeals court said it was reasonable for the jury to find that “Wal-Mart was obligated to engage in the . . . [reasonable accommodation] interactive process,” but failed to do so. Finally, the appeals court concluded there was sufficient evidence to justify an award of punitive damages because there was “ample evidence” that Wal-Mart “discriminate[d] in the face of a perceived risk that its actions w[ould] violate federal law.”

2. Regarded As Disabled

- In Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006), the First Circuit upheld a jury verdict that an employer had regarded an employee who had sought psychiatric help for anxiety and depression as substantially limited in the major life activity of working. In so ruling, the circuit court found there to be sufficient evidence “for the jury to conclude that the [employer] regarded [the plaintiff] as disabled because his superiors erroneously believed that he was unable to perform a broad class of jobs due to his mental impairment.” 439 F.3d at 7. The court of appeals noted that the plaintiff’s supervisors remarked that he posed a “great risk” to other employees and that the plaintiff should “not be working” in the post office because he was “crazy.” Id. at 4. The First Circuit reasoned that “[i]f [the plaintiff’s] disability truly made him a safety risk to coworkers, it would preclude him from holding most jobs in our economy.” Id. at 6.

- In Walsh v. Bank of America, 2009 U.S. App. LEXIS 6587 (3rd Cir. March 30,
2009) (unpublished), the plaintiff, Michael Walsh, suffered from post-traumatic stress disorder (“PTSD”) stemming from his military service in Vietnam and worked as a customer service representative at a Bank of America call center. In late 2004 and early 2005, Walsh received low performance scores and was issued a performance improvement plan. Walsh, informed his supervisor, Patricia Schultz, that some of his performance problems were due to changes in his medication, and he provided her with an excerpt from a medical analysis of his PTSD symptoms indicating that his condition was “50% disabling,” as well as a pamphlet about PTSD. From this point on, Walsh perceived that Schultz’ attitude towards him changed for the worse.

Subsequently, Schultz gave Walsh a final written warning stating that failure to improve his performance could result in further disciplinary action, up to and including termination. When Walsh's performance did not improve, he was terminated.

Walsh filed suit claiming disability discrimination in violation of both the ADA and the Pennsylvania Human Rights Act. The district court granted summary judgment in Bank of America’s favor on the basis that Walsh failed to show that he satisfied the statutory definition of disability.

Walsh appealed to the Third Circuit, which reversed the district court. The appeals court concluded that Walsh had raised a jury issue as to whether Bank of America regarded him as disabled. The appeals court noted that the bank's personnel records listed Walsh as a “disabled Viet Nam veteran.” Additionally, in opposing summary judgment, Walsh had submitted an affidavit stating that once Schultz saw the documentary evidence of his PTSD, “her whole attitude changed, she was just looking for a chance to get rid of me.” "Viewed in its totality and in the light most favorable to Walsh," the appeals court concluded that the evidence was "sufficient for a reasonable factfinder" to determine that Bank of America regarded Walsh as disabled.

Note: Walsh was decided under the ADA as originally enacted in 1990. The ADA Amendments Act, which took effect January 1, 2009, provides that in order to be regarded as disabled, a plaintiff need only show that an adverse job action was taken due to an actual or perceived impairment whose expected duration is six months or more. A plaintiff is not required to additionally demonstrate that the employer regarded the person's impairment as substantially limiting a major life activity.

B. Cases Where Plaintiff Was Not Disabled

1. Not Actually Disabled
In *Winsley v. Cook County*, 2009 U.S. App. LEXIS 8261 (7th Cir. April 22, 2009), the plaintiff, Marsalette Winsley, worked as a public health nurse for Cook County, Illinois. In March, 2004, Winsley was involved in an automobile accident which resulted in her developing panic attacks and an inability to sleep. She was diagnosed with PTSD and her psychiatrist informed the County that Winsley could return to work part-time with only minimal work related driving.

Initially, the County allowed Winsley to work part-time at an office closer to her home, but in June, 2004, the County informed her that she could not continue in her part-time work and gave her various options. Winsley chose to go on a disability leave of absence until December, 2004. Upon returning to work, Winsley drove to and from work but did not drive to visit clients. Winsley stopped coming to work in March, 2005. In early May, she returned to work and the County did not require her to drive during the day and let her work a part-time schedule, but during this period, she received unsatisfactory evaluations.

Winsley went on another leave of absence, and in June, 2005, filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and retaliation. Subsequently, the County requested that Winsley and her physician complete an analysis to determine whether she could perform the essential functions of her job. In late November, 2005, Winsley returned to work, but over the next year and a half Winsley had numerous attendance problems. In May, 2007, she stopped going to work and resigned from her position in October, 2007.

Winsley filed a lawsuit in federal district court for the Northern District of Illinois alleging that the County, *inter alia*, violated the ADA. The district court granted summary judgment to the County, and the Seventh Circuit affirmed. The appeals court concluded that Winsley had failed to establish that she had an ADA covered disability.

Although Winsley had difficulty driving due to her PTSD, the court explained that driving did not constitute an ADA major life activity. In reaching this conclusion, the Seventh Circuit contrasted driving with major life activities listed in the ADA regulations of the Equal Employment Opportunity Commission ("EEOC"), which include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I). Unlike driving, the court noted that "the importance of the listed activities [in the EEOC regulations] does not vary depending upon where a person lives."
Although *Winsley* was decided under the statutory provisions of the ADA in effect prior to the ADA Amendments Act, which took effect January 1, 2009, the Seventh Circuit noted that the language of the ADAAA bolstered its conclusion that driving did not constitute a major life activity. As the circuit court explained, the ADAAA includes a list of major life activities similar to those set forth in the EEOC's regulations. Hence, to the extent that the EEOC's regulations indicate that driving does not constitute a major life activity, the appeals court reasoned that the language of the ADAAA, likewise, supports the correctness of its analysis.

- In *Cassimy v. Bd. of Educ.*, 461 F.3d 932 (7th Cir. 2006), the Seventh Circuit upheld the district court's determination on summary judgment that a former administrator and teacher, who had been diagnosed with major depression and claimed that his problems with stress and anxiety rendered him unable to work as the principal of a public school, was not disabled under the ADA. In so ruling, the court noted that the plaintiff still was able to work as an administrator and a teacher elsewhere and that his problems were limited to the one school at issue.

- In *Andreoli v. Gates*, 482 F. 3d 641 (3d Cir. 2007), the Third Circuit Court of Appeals upheld the district court's dismissal of a federal employee's Rehabilitation Act claim in which she argued that the Department of Defense had engaged in disability discrimination. Although the plaintiff had been diagnosed with depression and post-traumatic stress disorder and had been approved and was receiving workers' compensation benefits based upon her mental impairments, the court of appeals emphasized that the "standard for receipt of workers' compensation benefits under the Federal Employees' Compensation Act ("FECA") is different than the standard for whether a person is 'disabled' within the meaning of the Rehabilitation Act." *Id.* at 651. Because the plaintiff had failed to show that her mental impairments substantially limited any of her major life activities, including the major life activity of working, the court of appeals concluded that the plaintiff had failed to establish that she was disabled in order to overcome the government's motion for summary judgment.

NOTE: The result in these cases could be different under the ADAAA, if the plaintiffs could show that without taking medication they would be substantially limited in a major life activity.

2. **Not Regarded As Disabled**

- In *Kozisek v. County of Seward*, 539 F.3d 930 (8th Cir. 2008), the plaintiff, Frederick Kozisek ("Kozisek"), was employed by the Seward County Board as an administrator. He was a Vietnam war veteran and
suffered from post traumatic stress disorder (“PTSD”) as a result of his military service. Following an incident in which Kozisek was arrested for making terroristic threats and for using a firearm to commit a felony, the Board and Kozisek agreed that he would obtain a psychological evaluation and a substance abuse evaluation. A mental health practitioner from the Veterans Administration (“VA”) wrote to the Board recommending that Kozisek complete in-patient alcohol treatment and arranged for Kozisek to be admitted to a VA residential rehabilitation treatment center. Kozisek refused, and as a result, he was terminated for failure to “follow the treatment recommendations.”

Kozisek brought suit contending inter alia, that he was disabled due to his PTSD and that in terminating his employment, the county had regarded him as a disabled alcoholic. The district court granted summary judgment, dismissing Kozisek’s claims. On appeal, the Eighth Circuit Court of Appeals affirmed. The appeals court rejected Kozisek’s argument that because the Board had insisted he complete in-patient alcohol treatment, the Board regarded him as disabled. The appeals court reasoned that the Board’s insistence upon in-patient treatment was not based upon misconceptions, myths or stereotypes about Kozisek’s possible drinking problem, and hence, there was no evidence that the Board regarded him as disabled. The Eighth Circuit also rejected Kozisek's claim of disability discrimination based upon his PTSD. The appeals court reasoned that even if his PTSD had affected his major life activity of thinking, the Board had articulated a legitimate, non-discriminatory reason for the termination, i.e., Kozisek’s failure to complete in-patient alcohol treatment.

- In *Pittari v. Am. Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006), the Eighth Circuit reversed a jury verdict in favor of a flight attendant who suffered from depression and anxiety and was being treated with medications that the employer believed, based upon the assessment of an independent psychologist, could adversely affect the flight attendant's ability to perform in emergency situations. The court of appeals found that the employer's decision to restrict the plaintiff from "safety sensitive duties" was based upon the results of two screening tests and the recommendations of an independent physician. In this respect, the court stated that "[r]estrictions based upon the recommendations of physicians are not based upon myths or stereotypes about the disabled and thus do not demonstrate a perception of disability." *Id.* at 1063.

which her treating psychiatrist stated that she suffered from depression and anxiety, which interfered with her sleep, energy level, motivation and concentration. The psychiatrist advised that due to Wisbey's condition, she would need to take leave from work intermittently, over the following six months or longer.

Given the contents of the medical certification, the City questioned whether Wisbey was capable of performing the functions of her job, which required a high level of concentration and the need to make split-second decisions that might have life and death implications. The City scheduled a fitness-for-duty examination, and the doctor who evaluated Wisbey concluded that Wisbey was not fit for duty as described in her job description, especially as it related to “tiredness, her ability to concentrate and her ongoing propensity to likely miss work.” After receiving the report, the City placed Wisbey on administrative leave. Wisbey requested that she work part-time, but the City rejected the request and terminated her employment.

Wisbey filed suit against the City in federal court for the District of Nebraska contending that her termination violated the ADA and the FMLA. The City moved for summary judgment, which was granted by the district court. The court rejected Wisbey's contention that the City had regarded her as disabled. The court explained that the regarded as prong of the ADA definition of disability was directed to situations in which an employer undertakes a job action “based on archaic attitudes, erroneous perceptions, myths, and stereotypes” about the person's actual or perceived physical or mental impairment. In the case at hand, there was no evidence that the City's decision to terminate Wisbey was based upon any stereotyping; rather, the City's decision was based on the report of a psychiatrist who examined Wisbey and concluded that she was not able to perform her duties as an emergency dispatcher. Accordingly, the court held that Wisbey's claim for recovery under the ADA “must be denied as a matter of law.”

The district court also dismissed Wisbey's claim that the City interfered with her rights under the FMLA. As the court explained, “[t]he plaintiff's employment was terminated because she was unable to perform her job, not because she requested family medical leave.”

NOTE: Although the events that gave rise to Wisbey's lawsuit occurred prior to January 1, 2009, the effective date of the ADA Amendments Act (“ADAAA”), the district court found that Wisbey failed to meet her burden of proof under either the pre- or post-ADAAA versions of the
II. Who Is a Qualified Individual With a Disability

A. Cases Where Plaintiff Was Qualified or Jury Issue

- In Wishkin v. Potter, 476 F.3d 180 (3d Cir. 2007), the Third Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the United States Postal Service with respect to the claim of a mentally disabled employee who had been declared unfit for duty and not permitted to return to work. Although the plaintiff had represented that he was eligible for disability retirement benefits and had obtained a letter from his physician to that effect, there was evidence that the plaintiff had been pressured to procure the letter from his physician and that he did not want to take disability retirement. Also, the court emphasized that the plaintiff “had been performing the essential functions of the job for nearly twenty years, and there was no evidence of recent changes to his health status or ability to work.” 476 F.3d at 187. Given this evidence, the Third Circuit ruled that “a jury could accept [plaintiff’s] evidence supporting his contention that USPS’s efforts to force him to take permanent disability were motivated by discrimination against its disabled employees.” Id.

B. Direct Threat Defense

- If an employee threatens other employees with physical violence and is terminated for making such threats, does this mean that the direct threat defense applies? In Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161 (2nd Cir. 2006), the Second Circuit answered “no.” The case involved an employee who had been diagnosed with a major depressive disorder and who had made threats of physical violence to co-workers and his supervisor. Following a threat to his supervisor, the plaintiff was placed on administrative leave and, later, was terminated when he failed to provide a letter from a mental health professional stating that he was able to perform his job duties in an appropriate manner. The plaintiff filed suit alleging that he had been discriminated against in violation of the ADA. Although the Second Circuit found that the employer had not presented sufficient evidence that the employee was a “direct threat,” the circuit court still affirmed the district court's dismissal of the case, finding that the plaintiff had failed to demonstrate that the reason given by the employer for his discharge, i.e., the plaintiff's threats of violence, was a pretext for discrimination.

III. What Constitutes Unlawful Disability Discrimination?
A. Disability Harassment

- In *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006), the First Circuit Court of Appeals upheld a jury verdict that an employee of the post office had been subjected to unlawful disability harassment. The case involved a former Postal Service employee who suffered a panic attack and sought psychiatric help for anxiety and depression. After returning to work, the plaintiff complained to his other managers that his immediate supervisor was interfering with his work, and, on one occasion, the supervisor reportedly drove her truck at him while he was crossing the street outside of the post office. After entering a state of “acute anxiety,” the plaintiff’s condition worsened and his psychiatrist prescribed a week-long leave of absence and reassignment from his cashier duties. When the plaintiff presented a sealed envelope containing the medical certificate from his psychiatrist, his immediate supervisor read the certificate and laughingly exclaimed “[h]e is crazy!” *Id.* at 4. Subsequently, the plaintiff’s immediate supervisor and other managers within the postal facility started calling the plaintiff “crazy” and saying that he was a “risk to the floor” because he was undergoing psychiatric treatment. *Id.* Although the Postal Service contended that the type of conduct to which the plaintiff had been subjected was “common in blue collar workplaces such as a post office,” the First Circuit Court of Appeals concluded that the evidence was sufficient for a jury to conclude that the plaintiff had been subjected to a hostile work environment. As pointed out by the court, “[t]here was testimony that [the plaintiff] was subject to such constant ridicule about his mental impairment that it required him to be hospitalized and eventually to withdraw from the workforce.” *Id.* at 7.

- In *Wenigar v. Johnson*, 712 N.W.2d 190, 205-207 (Minn. Ct. App. 2006), the state court found that employer was liable for the harassment of a plaintiff with a mental impairment and a low IQ, where coworkers and owner of business made derogatory comments to plaintiff pertaining to his disability that were severe and pervasive and created an abusive working environment (decided under Minnesota Human Rights Act).

B. Retaliation

- In *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006), the First Circuit Court of Appeals found there to be sufficient evidence for a jury to conclude that the plaintiff had been retaliated against for filing an EEO complaint, based upon the fact that after the complaint was filed, his supervisor’s harassment “expanded to include, *inter alia*, threats by [his immediate supervisor], screaming tirades directed at [the plaintiff] by both
[plaintiff's supervisors], and efforts by [a supervisor] to interrupt pursuit of a union grievance." *Id.* at 8. As explained by the court, "[t]he proof that the intensified harassment commenced shortly after [the plaintiff] filed his EEO complaint is sufficient evidence from which the jury could infer causation." *Id.* at 9.

C. Accommodation

- In *Tobin v. Liberty Mutual Insurance Company*, 2009 U.S. App. LEXIS 1278 (1st Cir. Jan. 23, 2009), the First Circuit Court of Appeals held that there was sufficient evidence in the record to support a jury verdict that Liberty Mutual had denied reasonable accommodations to an employee with bipolar disorder. The plaintiff’s condition impaired his concentration and his ability to prioritize and complete his work tasks. These impairments made it difficult for the plaintiff to find prospective customers in sufficient numbers to meet Liberty Mutual’s sales goals. During the time that he was employed by Liberty Mutual, however, the plaintiff repeatedly asked the company to help him achieve his performance goals by providing him with increased support staff to respond to customer service calls and also to assign him to what are known as mass marketing ("MM") accounts which offer access to a large volume of potential clients in a single location. Although Liberty Mutual did provide the plaintiff with the support staff he requested, it determined that he was not qualified to handle an MM account. Because the plaintiff failed to meet his sales quota after several opportunities, he was terminated for consistent poor performance.

The plaintiff then sued contending that Liberty Mutual’s failure to allow him to handle an MM account constituted failure to reasonably accommodate his disability and a violation of the ADA. The jury agreed specifically finding that the accommodation requested by Tobin would not have changed the essential functions of his job and being assigned an MM account would have enabled him to perform his job despite his disability. The jury awarded the plaintiff more than $800,000 for economic loss and $500,000 in emotional distress.

Liberty Mutual appealed, but the First Circuit affirmed the jury award. The court reasoned that there was sufficient evidence that the plaintiff could have competently handled an MM account and it would not have constituted an undue hardship for Liberty Mutual to have assigned him one. The circuit court also rejected the company’s challenge to the jury’s award of damages and specifically found that the jury could have concluded that Liberty Mutual’s denial of accommodations to the plaintiff caused him to become totally disabled and unable to work.
In *Mobley v. Allstate Ins. Co.*, 531 F.3d 539 (7th Cir. 2008), the Seventh Circuit Court of Appeals, in a two-to-one panel decision, held that the employer had reasonably accommodated an employee with a neurological illness by providing her with an accommodation (working in a small, quiet conference room) that proved effective to accommodate her limitations. Although the court acknowledged that "it was an admittedly laborious process for [plaintiff] to obtain the accommodation she finally received . . ., the fact that [the employer] may have failed to engage in an interactive process prior to that time is by itself insufficient to establish a failure to accommodate claim when, in the end, [the plaintiff] was provided with a reasonable accommodation." The decision was not unanimous, however, and the dissenting judge took the position that the employer’s "failure to accommodate [the plaintiff] more promptly both violated the ADA provision defining the term “discriminate” to include failure to accommodate and laid the groundwork for the problems that led to [plaintiff’s] eventual termination.

**IV. Other ADA Issues: Who Is an Employee?**

In *Wojewski v. Rapid City Regional Hospital, Inc.*, 450 F.3d 338 (8th Cir. 2006), the Eighth Circuit Court of Appeals upheld the district court’s determination that a surgeon who was a member of the medical staff of the defendant hospital was not an employee of that hospital, but rather an independent contractor. The surgeon had contended that the requirements and limitations placed upon him by the hospital following his diagnosis with bipolar disorder rendered him an employee for ADA purposes. These restrictions included subjecting the surgeon to periodic monitoring by another physician, requiring the surgeon to take mandatory vacations, limiting the time he was on call, and requiring him to participate in therapy, take prescribed medications, reduce alcohol consumption, and submit to review of his surgical cases. The court of appeals, however, rejected the surgeon’s argument that these restrictions created an employer-employee relationship with the hospital. Although the court acknowledged that the hospital “certainly subjected [the surgeon] to a heightened level of personal control,” the court found that the hospital “could take reasonable steps to ensure patient safety and avoid professional liability while not attempting to control the manner in which [the surgeon] performed operations.” *Id.* at 344.
Accommodation of Individuals with Psychiatric Disabilities

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In general, accommodating employees with mental or psychiatric disabilities is no different from accommodating persons with physical disabilities. The process of
accommodation is the same as are the types of reasonable accommodations that should be considered by an employer, such as job restructuring and reassignment, part-time or modified work schedules and reassignment to a vacant position. Nonetheless, practical differences may arise between accommodating persons with physical disabilities and those with mental disabilities. Individuals with psychiatric disabilities also may be more reluctant than individuals with physical disabilities to request accommodation because of the fear of being stigmatized or misunderstood. In order to address some of the specific issues raised by the accommodation of individuals with psychiatric disabilities, the Equal Employment Opportunity Commission (EEOC) has issued an Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.¹

I. Requesting Accommodations

A. What Is an Accommodation Request?

1. Requests from Employees

As an initial matter, the need to accommodate an employee with a psychiatric disability oftentimes is not as apparent to an employer as the need to accommodate an individual with a physical disability. In order to trigger the reasonable accommodation process, the EEOC takes the position that a person with a psychiatric disability need only let the employer know that an adjustment or change at work is needed and is related to a medical condition. In making this request, the EEOC advises that an individual may use “plain English” and need not mention a specific psychiatric diagnosis nor even the Americans with Disabilities Act. Thus, if an employee asks for time off because he or she is “depressed and stressed,” according to the EEOC, that employee has made a statement sufficient to put the employer on notice that the employee is requesting a reasonable accommodation. If an employee, after the completion of a major project, however, asks for a few days off to rest and does not link the request to a medical condition, then the statement would not be sufficient to put the employer on notice.

The Eighth Circuit, on the other hand, has established a fairly stringent standard for finding a request for accommodation by individuals with mental disabilities. Under the Eighth Circuit’s view, as articulated in Wallin v. Minnesota Dep’t of Corrections, where “the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.”

In Rask v. Fresenius Med. Care N. Am., the Eighth Circuit applied this standard to a situation involving an employee who had a long history of depression and who worked as a patient care technician at two kidney dialysis centers. After having a number of unpredictable absences, the employee informed her supervisors that she was having problems with her medication and that she might “miss a day here and there because of it” and, also, asked her supervisors to “stand by me.” The Eighth Circuit found, that even if the employee's statement could be construed as a “suggestion of what a reasonable accommodation might be,” the court of appeals held that “no reasonable person could find that what [the employee] ‘specifically identifie[d]’ her ‘resulting limitations,’” as required under the Eighth Circuit’s standards. As explained by the appeals court, “[t]he point of requiring an employee to provide this kind of

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3 Id. at 20.


5 Rask v. Fresenius Med. Care N. Am., 509 F.3d 466 (8th Cir. 2007).

6 Id. at 470.

7 Id.
information is to allow the employer to understand that the employee suffers from a disability. Without this information, the employer is unable to engage in the interactive process required to determine what accommodations might be appropriate and available. Because [the employee] did not inform [the employer] of the specific limitations that her depression gave rise to, [the employer] had no duty to find an accommodation for her.\(^8\) Id. (citation omitted).

2. Requests from Others

The EEOC takes the position that someone other than an employee with a mental or psychiatric impairment may request a reasonable accommodation on behalf of the disabled individual. Thus, according to the Commission, a family member, friend, health care professional, or any other representative may request a reasonable accommodation on behalf of an individual with a disability.

The EEOC's position, however, is in conflict with the decision of the Eighth Circuit Court of Appeals in Miller v. National Casualty Company, 61 F.3d 627 (8th Cir. 1995). In that case, the circuit court held that an employer was not alerted to an employee's mental disability and the need for accommodation when the employee's sister telephoned the employer and informed it that the employee was falling apart mentally and that the family was trying to get the employee into a hospital.

B. Documentation of Disability

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\(^8\) Further, the court found that even if the employer had been put on notice that the employee was disabled, the employee failed to suggest a reasonable accommodation because the court determined that allowing the employee to be absent, as a matter of law, could not be a reasonable accommodation given the nature of her employment. Id.
In dealing with requests for accommodation by employees with psychiatric disabilities, it may be the case that the employee's status as an individual with a disability is not obvious. In this situation, an employer may ask an employee for “reasonable documentation” about the disability and the functional limitations resulting from the disability. Thus, where an employee asks for time off because he is “depressed and stressed,” the employer may ask the employee to provide documentation of any mental disability and, in addition, the need for time off as a reasonable accommodation. A variety of health care professional may provide such documentation with regard to an employee's psychiatric disability.

1. Limits on Documentation

In requesting documentation about an employee's need for a reasonable accommodation for a mental disability, an employer should limit its request to medical information pertaining specifically to the accommodation requested. According to the EEOC, an employer may request only “reasonable” documentation.

Thus, an employer would violate the ADA by requiring the employee to submit all of the records from his or her health care professional regarding the employee's entire mental health history, including materials that are not relevant to determining whether the employee has a disability under the ADA and needs a reasonable accommodation.

In order to properly focus the request for reasonable documentation, an employer may ask the employee to sign a limited release allowing the employer to submit to the employee's health care provider a list of specific questions about the employee's condition and the need for reasonable accommodation.

2. Medical Examination by Employer's Doctor

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In addition to requesting existing medical documentation from an employee's own health care provider, an employer also may require an employee to be examined by a health care professional of the employer's choice for purposes of determining whether the employee has an ADA covered disability and needs a reasonable accommodation to perform the job. The EEOC, however, cautions that such a request should be made only if the employee “initially provides insufficient information to substantiate” that the employee has an ADA disability and needs a reasonable accommodation.\(^{10}\)

Where the employee does provide insufficient information, and the employer requires the employee to be examined by a health care professional, it is important that any examination be limited to a determination of the employee's disability and the need for reasonable accommodation. A medical examination of a general nature would be prohibited under the ADA because it would not be job-related and consistent with business necessity. Also, if an employer requires an employee to be examined by a health care professional of its choice, the employer must pay all costs associated with the visit.

3. Employee's Failure to Provide Information

If an employee fails to provide reasonable documentation of his or her mental disability in order to allow an employer to assess the need for reasonable accommodation, the employer may not be held liable for any alleged failure to comply with the requirements of the ADA.\(^{11}\)

In *Thomas v. Corwin*, 483 F. 3d 516 (8th Cir. 2007), the Eighth Circuit Court of Appeals upheld the district court's grant of summary judgment in favor of the Kansas City Police Department, which had terminated an employee in its juvenile unit for failure to provide a medical release for her medical records. The department had requested the records so that it could determine the employee's ability to safely perform her job duties after an extended three week leave of absence for stress and anxiety. In dismissing the employee's suit, the court noted

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\(^{10}\) EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 23.

\(^{11}\) See, e.g., *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001) (where plaintiff refused to release medical records to company in order to help devise alternative appropriate reasonable accommodations, the company was not liable “for failure to design a perfect accommodation”).

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that the employee had gone to a hospital emergency room experiencing job related stress and was diagnosed with stress and anxiety due to work related pressures. Thereafter, she took a three week leave of absence. Prior to returning to work, the police department requested that the employee undergo a fitness for duty evaluation. During the course of the evaluation, the police department's physician learned that the plaintiff previously had been treated with antidepressive medications. In light of this information, the department physician requested that the employee provide medical records pertaining to the past treatment of her mental health condition. When the employee refused to provide a release for her medical records, she was terminated.

Although in her ADA suit the plaintiff argued that the police department violated the statute by requesting a fitness for duty evaluation and requiring that she release her records for treatment of anxiety and depression, the court of appeals concluded otherwise. The court determined that the request for the employee to undergo a fitness for duty evaluation comported with the ADA's requirement of being “job related and consistent with business necessity,” inasmuch as the plaintiff interacted with the parents or guardians of troubled children, assisted detectives and served in a backup security capacity. Given the fact that the plaintiff had gone to the emergency room for an anxiety attack caused by her “work related stress and anxiety” which necessitated a three week leave of absence, the appeals court reasoned that the police department had legitimate reasons to doubt the plaintiff's capacity to perform her work duties without being overcome by anxiety and stress. Hence, the court found that a fitness for duty examination was justified in order to ensure that the plaintiff could safely perform her job.

Importantly, the Eighth Circuit found that the fitness for duty evaluation “was no broader or more intrusive than necessary.” Id. at 528. As the court explained, "examining [the plaintiff] was vital to operating the [police department's] Juvenile Unit, and the focused request for a limited portion of [plaintiff’s] medical records [pertaining to her treatment] was no broader or more intrusive than necessary." Id. Accordingly, the court of appeals held that the police department did not discriminate against the plaintiff on the basis of disability by terminating her when she refused to release her medical records.

4. Employer's Failure to Engage in Interactive Process

If the employee provides sufficient information that he or she suffers from a disabling psychiatric condition and requires a reasonable accommodation in order to perform the essential job functions, then the employer must engage in a good faith interactive process with the employee to attempt to identify an appropriate reasonable accommodation. If the employer fails to do so, the employer can be held liable for causing a breakdown in the reasonable accommodation interactive process.

In Battle v. United Parcel Service, Inc., 438 F.3d 856 (8th Cir. 2006), the Eighth Circuit Court of Appeals upheld a jury finding that the employer had failed to engage in a good faith interactive process and had failed to provide the plaintiff with an appropriate reasonable accommodation after he suffered a nervous breakdown. In so ruling, the court explained there was sufficient evidence for the jury finding since the plaintiff submitted a physician's report and
ADA accommodation form indicating that the plaintiff could perform the essential functions of the job, but needed accommodation to perform the “marginal” job function of “memorizing intricate information from the daily operations report.” 438 F.3d at 863-864. The circuit court reasoned that the jury could have concluded that this was only a “marginal function that easily could have been eliminated” by the employer and “necessitating [the plaintiff’s] reinstatement” at that time.

II. Types of Reasonable Accommodations

As with other types of accommodations, reasonable accommodation for individuals with psychiatric disabilities must be determined on a case-by-case basis. In ascertaining effective accommodations, the EEOC suggests that the employer contact mental health professionals, including psychiatric rehabilitation counselors, and request that they make suggestions about particular accommodations.12 Listed below are selected types of reasonable accommodations that may be effective for certain individuals with psychiatric disabilities.

A. Modified Work Schedules and Time Off From Work

Some persons with psychiatric disabilities may need time off from work for inpatient treatment of their mental condition, for example, hospitalization for treatment of schizophrenia. Under the ADA, permitting an employee to use accrued or paid leave, or providing additional unpaid leave, is a reasonable accommodation, unless the employee's absence would impose an undue hardship on the operation of an employer's business.13


13 In Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447 F.3d 105 (1st Cir. 2006), the First Circuit found that the employer had adequately accommodated an employee who suffered from major depression by providing the employee with a number of medical leaves and by allowing the employee to work four hours per day for the first two weeks upon returning from leave and by allowing her to be absent one afternoon every two weeks to see her physician. The employer additionally had accommodated the plaintiff by removing her from contact with her prior supervisor, who made the employee nervous.
Also, some medications taken for the treatment of psychiatric disabilities, such as depression, can cause extreme grogginess and lack of concentration in the morning. In this situation, a reasonable accommodation may be to allow the employee suffering from depression to change his or her regularly scheduled working hours to a later start time, for example, starting work at 10:00 a.m., rather than 8:00 a.m. In order to accommodate a later starting time, the employer may request that an individual work later in the day to make up for the hours missed in the morning.

However, an employer need not allow an employee to have a work-when-able schedule. In Rask v. Fresenius Med. Care N. Am., 509 F.3d 466 (8th Cir. 2007), the Eighth Circuit held that allowing a patient care technician at a kidney dialysis center to take sudden, unscheduled absences due to problems with her medication for depression, as a matter of law, was not a reasonable accommodation because the absences “would not have assisted [the employee] in performing the duties of her particular job; they would have been for her personal benefit.”

B. Physical Changes to the Workplace and Providing Adaptive Equipment or Devices

As with the accommodation of individuals with physical disabilities, physical changes to the workplace may be effective accommodations for some individuals with psychiatric disabilities. For individuals who have disability-related limitations in concentration, an employer, as a reasonable accommodation, may install room dividers, partitions, or other sound proofing or visual barriers between work spaces. Relocating an individual's work station away from noisy machinery or reducing other workplace noise, likewise, may be effective. The EEOC has suggested allowing an individual to wear headphones to block out noisy distractions.14

In addition to these physical changes to the workplace, it may be effective for an employer to provide a tape recorder to an employee with a psychiatric impairment that limits the person's ability to concentrate. The employee can tape record such workplace events as training sessions and meetings and, later, review the tape recording when there are fewer distractions.

C. Modifying Workplace Policies

Adjusting workplace policies pertaining to work schedules and leave may be reasonable accommodations for individuals with psychiatric disabilities. These adjustments could include, for example, modifying a policy that requires the scheduling of vacation time in advance to allow an individual with bipolar disorder to use accrued vacation time for emergency hospitalization to stabilize the employee's medication.

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D. Changing Supervisory Methods

Persons with psychiatric disabilities especially may have difficulty interacting with others, including supervisors. Accordingly, the EEOC has taken the position that changes in supervisory methods may be an appropriate form of reasonable accommodation to persons with psychiatric disorders. Thus, as a reasonable accommodation, the supervisor of an employee with a psychiatric disability may need to communicate in writing or by electronic mail information about work assignments, evaluations, and training. Supervisors additionally may need to provide or arrange for additional training or modified training materials for persons with psychiatric disabilities.

The EEOC also advises that adjusting the level of supervision or structure may be required. In accommodating an individual with a psychiatric disability who experiences limitations in concentration, an employer may need to ensure that the individual's supervisor provides detailed day-to-day guidance and feedback.\(^{15}\) The law is clear, however, that an employer need not create a stress-free environment for an employee with a psychiatric disability, nor does an employer need to immunize the employee from any criticism in order to accommodate his or her disabling condition.\(^{16}\)


\(^{16}\) See Marino v. United States Postal Serv., 25 F.3d 1037 (1st Cir. 1994) (“it would be unreasonable to require that [the employer] place plaintiff in a virtually stress-free environment and immunize him from any criticism in order to accommodate his disability.”)
(quoting Pesterfield v. Tennessee Valley Auth., 941 F.2d 437, 442 (6th Cir. 1991)).


In Cohen v. Ameritech Corp., 2003 U.S. Dist. LEXIS 23166, *19-21 (N.D. Ill. Dec. 23, 2003), the court considered the case of a customer service associate who suffered from anxiety disorder, which stemmed primarily from the remote monitoring by his managers to ensure that sales associates were performing their jobs properly and, if such were not the case, to take disciplinary measures. The court found that “[i]t would be unreasonable for [the employer] to exempt [the plaintiff] from remote monitoring or its disciplinary measures; in fact, that would be showing preferential treatment to [the plaintiff] and his disability.” Id. at *19.
In accommodating individuals with psychiatric disabilities, does an employer need to consider transferring the disabled employee to a different supervisor? The Seventh Circuit has indicated that an employer's reasonable accommodation obligation would not encompass having to make such a transfer. The EEOC's Enforcement Guidance also indicates that a request for a change of supervisor would be unreasonable per se. Nevertheless, the Second Circuit has refused to adopt a per se rule and has taken the position that whether transfer to a different supervisor may be a reasonable accommodation is to be evaluated on a case-by-case basis. The Second Circuit recognizes, however, that "there is a presumption . . . that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable), therefore lies with the plaintiff."18

17 See Weiler v. Household Finance Corp., 101 F.3d 519, 526 (7th Cir. 1996) ("the ADA does not require HFC to transfer Weiler to work for a supervisor other than Skorupka or to transfer Skorupka."). Other courts have taken a similar position that the duty to reasonably accommodate a disability under the ADA does not extend so far as to require an employer to provide an employee with a new supervisor. See Taylor v. Phoenixville School District, 184 F.3d 296, 319 n. 10 (3d Cir. 1999) ("we would hasten to add that a disabled employee is not entitled to a supervisor ideally suited to his or her needs"); Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 581 (3d Cir. 1998) (holding that request to be transferred away from individuals causing an employee stress is unreasonable as a matter of law under the ADA and its New Jersey counterpart). See also Snyder v. Medical Services Corp., 145 Wn. 2d 233, 35 P.3d 1158 (Wash. S. Ct. 2001) (there is no duty under the Washington Law Against Discrimination to accommodate employee's disability by providing employee with new supervisor).


20 Id. at 123.

In Calero-Cerezo v. United States Department of Justice, 355 F.3d 6, 24-25 (1st Cir. 2004), the First Circuit Court of Appeals considered whether the Department of Justice was required to honor the request of an employee, who suffered from major depression to be transferred to a work site where she would not be supervised by those whom she claimed discriminated against and harassed her. In ruling that the request might have constituted a reasonable accommodation, the court of appeals noted, "a fact finder could find that [plaintiff's] suggestion of a transfer to a [different] work site . . . was 'at least on the face of things' feasible." Id. at 24, quoting Reed v. Lepage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001). In addition, the Second Circuit found that the employer, in moving for summary judgment before the district
E. Transfer to Different Work Environment

court, had “failed to offer a sufficient ‘modicum of evidence’ showing that the accommodation proposed by plaintiff would constitute a hardship.” *Id.*, quoting *Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 37 (1st Cir. 2000).
In *Tyler v. Ispat Inland, Inc.*, the Seventh Circuit Court of Appeals dealt with a situation involving an employee with paranoia and delusional disorder who was afraid of his co-workers and who believed that they were harassing him.\(^{21}\) Specifically, the plaintiff alleged that his co-workers sabotaged his work, falsely accused him of stealing a computer, threatened to burn down his house and threatened to poison him by putting asbestos in his food. In order to address the situation, the plaintiff’s employer transferred him to a different plant with the same salary and benefits. The plaintiff, however, “soon came to believe that his co-workers at the new plant ‘were harassing him as well.’”\(^{22}\) Unable to resolve his fears, the plaintiff requested that he be transferred back to the old plant. The company refused his request and the plaintiff, then, sued claiming that the company had failed to reasonably accommodate his disabling mental illness.

The Seventh Circuit Court of Appeals rejected the claim. The court found that the company’s decision to transfer the plaintiff to another plant was "entirely reasonable" given the plaintiff’s medically diagnosed paranoia and delusions of persecution. As explained by the circuit court, “we can think of no better way to allay [the plaintiff’s] fears, short of psychological treatment for his underlying condition, than to physically separate him from the individuals he thinks were harassing him.”\(^{23}\) The court rejected the plaintiff’s argument that as a reasonable accommodation, the company was required to “investigate his concerns” and “ensure his safety.”

The court pointed out that the company knew that the plaintiff “experienced delusions of persecution, so reason did not require the company to expend resources to investigate his accusations or to take unnecessary safety precautions on his behalf.”\(^{24}\) Accordingly, the Seventh Circuit ruled that the company had fulfilled its obligation under the ADA by transferring the plaintiff to another plant. As the circuit court explained, “old fashioned common sense dictated that he be kept away from the original source of his stress.”\(^{25}\)

### F. Providing a Job Coach

The EEOC has taken the position that an employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability. Public or private social service agencies also may provide job coaches to individuals with psychiatric disabilities. In this circumstance, an employer may be required to allow a job coach obtained through a social service agency to accompany the employee at the job site.\(^{26}\) Importantly, the

\(^{21}\) *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001).

\(^{22}\) *Id.* at 971.

\(^{23}\) *Id.* at 973.

\(^{24}\) *Id.* at 974.

\(^{25}\) *Id.*

\(^{26}\) See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 27.
EEOC has not taken the position that an employer must provide a permanent job coach or a job coach on an indefinite basis.

G. Conduct and Performance Issues

Reasonable accommodation of individuals with psychiatric disabilities, in general, does not require altering workplace conduct and performance standards. According to the EEOC, an employer may discipline an individual with a psychiatric disability for violating a workplace conduct standard, even though the misconduct may have resulted from or been caused by the psychiatric impairment.27 Thus, an employer may set standards to maintain a workplace free of violence or threats of violence and to prohibit stealing and the destruction of company property. An employer may discipline an employee with a psychiatric or other disability for engaging in such workplace misconduct, as long as the employer would impose the same discipline on an employee without a disability.28

In *Sista v. CDC Ixis N. Am., Inc.*, the Second Circuit Court of Appeals found that the employer had presented a legitimate, non-discriminatory reason for terminating an employee who was diagnosed with severe depression and had attempted to commit suicide because the employee had made threats of violence to his co-workers and his supervisor.29 In so ruling, the

27 Id. See also *Brundae v. Hahn*, 57 Cal. App. 4th 228, 66 Cal. Rptr. 2d 830 (Cal. Ct. App. 1997) (employer did not violate ADA by terminating manic depressive employee because she abandoned her job for six-week period despite employee’s contention that her manic depression had caused her absence).

28 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 29. The one limitation on this general rule is that conduct standards must be “job-related for the position in question and consistent with business necessity.” If the conduct standards do not meet this requirement, the EEOC cautions that imposing discipline under them could violate the ADA. *Id.*

29 445 F.3d 161 (2d Cir. 2006).
court noted that the plaintiff could "point to no evidence from which a reasonable jury could conclude that he was terminated on account of his mental illness rather than his past behavior." *Id.* at 173.

Similarly, in *Valentine v. Standard & Poors*, the federal District Court for the Southern District of New York considered the claim of a former stock analyst with bipolar disorder who alleged that he had been discriminatorily terminated in violation of the ADA. The plaintiff had been terminated by his employer, Standard & Poors, for leaving a threatening voicemail message for a co-worker, despite having received a warning less than a year earlier about threatening a fellow employee's reputation. The court determined that by threatening a fellow employee's "professional reputation and well-being in the workplace," the plaintiff was not "otherwise qualified to perform his job" and, hence, his termination was not discriminatory. This was the case whether or not the plaintiff's misconduct could be characterized as a manifestation of his disability. As pointed out by the district court, "the ADA does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace."  

A like result was reached by the Sixth Circuit in *Macy v. Hopkins Cty. Sch. Bd. of Educ.*, where a school board terminated a teacher for threatening students and making inappropriate

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30 50 F. Supp. 2d 262 (N.D.N.Y. 2000).

31 *Id.* at 289.

See also *Husowitz v. Runyon*, 942 F. Supp. 822, 834 (E.D.N.Y. 1996) (judgment for employer based on evidence that plaintiff, diagnosed with bipolar affective disorder, was uncooperative, disruptive and "engaged in threatening conduct with his co-workers") (decided under Rehabilitation Act); *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998) ("the ADA does not insulate emotional or violent outbursts blamed on an impairment" and "an employee who was fired because of outbursts at work directed at fellow employees has no ADA claims"); *Palmer v. Circuit Court of Cook County, Illinois*, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 522 U.S. 1096 (1998) ("if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not prevent an issue under [the ADA]").

But see *Riehl v. Foodmaker, Inc.*, 152 Wn. 2d 138, 152, 94 P.3d 930, 938 (2004) (*en banc*) ("Conduct resulting from the disability . . . is part of the disability and not a separate basis for termination.") (decided under Washington state law); *Gambini v. Total Renal Care, Inc.*, 480 F. 3d 950, 955-956, as amended, 486 F. 3d 1087 (9th Cir. 2007) (district court abused discretion by declining to give instruction that "conduct resulting from a disability is part of the disability and not a separate basis for termination"); hence, "the jury was entitled to infer reasonably that [plaintiff’s] 'violent outburst' . . . was a consequence of her bipolar disorder, which the law protects as part and parcel of her disability.") (decided under Washington state law).
remarks about the students and their families.\textsuperscript{32} Although the plaintiff argued that this explanation did not constitute a legitimate, non-discriminatory reason because her verbal outbursts were symptomatic behaviors of her disability, in this case, post consussive syndrome, the Sixth Circuit rejected the plaintiff’s argument noting that the court had “repeatedly stated that an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualifies the employee from his or her job.” \textit{Id.} at 366.

\footnotesize{\textsuperscript{32} 484 F. 3d 357, 366 (6\textsuperscript{th} Cir. 2007).}
In a case decided under the 1973 Rehabilitation Act, *Jarvis v. Potter*, the Tenth Circuit Court of Appeals upheld the termination of a Postal Service custodian who suffered from PTSD and had been involved in a number of physical altercations when he became startled at work. The plaintiff, Lanny Jarvis, was a decorated Viet Nam war veteran, who had been working for the Postal Service since 1988 after a medical examination determined that he was fit for duty despite several war injuries. Approximately ten years later, Jarvis was diagnosed with PTSD, which did not prevent him from continuing to work for the Postal Service. Subsequently, he changed from his job as a mailhandler to a custodial position. He told his new supervisor that he suffered from PTSD and did not like people coming up behind him and touching him. In working around Postal Service employees, however, Jarvis would become startled at times, and when he did he would clench his fists or, sometimes, strike a co-worker. Following one incident in which he struck a coworker with his open palm and reached to grab his hair, Jarvis was placed on administrative leave without pay because of the concern that retaining Jarvis on duty at work would be injurious to others. Jarvis appealed this decision through the Postal Service grievance process. At a Postal Service “due-process” meeting, Jarvis said that if he hit someone in the right place, he could kill him; that his PTSD was getting worse; that he could no longer stop the first blow; and that he could not safely return to the workplace. *Id.* at 1118. Based upon these incidents, the Postal Service determined that Jarvis could not safely return to the work place and terminated his employment. Jarvis challenged his termination as being violative of the Rehabilitation Act. The Tenth Circuit Court of Appeals, however, disagreed. The court found that the Postal Service had relied upon an “individualized assessment” of Jarvis’ condition and the threat that he posed, and the Postal Service made its determination that he should not return to work based upon such a factual assessment. *Id.* at 1124.

III. Enforcement of Title I of the ADA

A. Administrative Enforcement

Employees who believe they have been discriminated against on the basis of disability first must exhaust the available administrative remedies before proceeding to court. 42 U.S.C. § 12117(a).

In those jurisdictions where the EEOC has certified a state or local human rights commission or agency as having jurisdiction over charges of disability discrimination, a complainant is to file with the state agency and, within 300 days of the discriminatory action, file a charge with the EEOC. 42 U.S.C. § 2000e-5(c).

If no state agency has jurisdiction over complaints of disability discrimination, a complainant must file a charge with the EEOC within 180 days of the discriminatory action. *Id.*

B. Judicial Enforcement

*Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007).
After 180 days the charging party is entitled to a right to sue letter from the EEOC or the state agency, allowing the party to sue individually in court. Suit must be filed within 90 days after receiving the letter. The EEOC also can file suit on behalf of a charging party.

C. Remedies

The remedies for violations of Title I of the ADA parallel the remedies available under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a); 42 U.S.C. § 1981a(a)(1); 42 U.S.C. § 2000e-5(g)(1). As amended by the Civil Rights Act of 1991, Title VII remedies include:

- Injunctive relief prohibiting the employer's discriminatory practices;
- Reinstatement;
- Backpay, front pay, and restoration of fringe benefits;
- Attorney fees, litigation expenses and costs;
- Compensatory and punitive damages.

Where an employer has engaged in unlawful intentional discrimination, compensatory and punitive damages may be awarded. Compensatory damages include compensation not only for future pecuniary losses, but also for non-pecuniary losses, such as pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life. 42 U.S.C. § 1981a(a)(2), (b)(2).

In cases involving the failure of an employer to make a reasonable accommodation, damages may not be awarded if the employer demonstrates a good faith effort to identify and make a reasonable accommodation. 42 U.S.C. § 1981a(a)(3).

Compensatory and punitive damages are subject to the following statutory limits depending upon the size of the employer:

- 15 to 100 employees – $50,000
- 101 to 200 employees – $100,000
- 201 to 500 employees – $200,000
- More than 500 employees – $300,000


If a complaining party seeks compensatory or punitive damages, either party may demand a trial by jury.
The following is a general outline for defendants to use in obtaining discovery from a plaintiff in a disability discrimination case. The order and content of the information sought to be obtained will vary depending upon the facts and circumstances of each particular case. The goal of discovery is to obtain all information relevant to the facts of the case and the plaintiff’s legal theories.

I. Background Information

(A) Personal background

(1) Name

(2) Address

(3) Past addresses

(4) Date of birth

(5) Social Security number

(6) Marital status and dependents

(7) Prior involvement in litigation as a witness or a party

(B) Education
(1) Schools Attended: High School, College, Technical School (chronological order)

(2) Continuing education courses and seminars

(3) Areas of emphasis (majors or specialties)

(4) Degrees received and any licenses, certificates, academic honors, etc.

(C) Employment history prior to employment with defendant

(1) All jobs held (in chronological order)

(2) Names of all employers and/or businesses and their location

(3) Types of jobs and duties

(4) Rates of pay and benefits received

(5) Supervisors

(6) Reasons for leaving prior jobs

(7) Job performance evaluations

(8) Disciplinary actions or awards and commendations

(9) Disciplinary actions taken by plaintiff

(10) Claims of discrimination or litigation against former employers

(11) During any periods of non-employment, what did plaintiff do?

(D) Plaintiff's Disability

(1) What disability or disabilities does plaintiff claim to have?

(2) Does plaintiff claim a mental disability or a physical disability, or both?

(3) When did the disability first manifest itself?

(4) Has plaintiff received any medical care or treatment for the disability? If so:
(a) Who provided the care or treatment?
(b) What did the care or treatment consist of?

(5) As a result of the disability, has plaintiff received any accommodations in the past? If so:

(a) What were those accommodations?
(b) Who supplied those accommodations?
(c) At whose request were the accommodations supplied?

(6) To what extent has plaintiff been affected in her or her life activities by the disability?

(7) What type of life activities have been affected by plaintiff’s disability?

(8) Does plaintiff take any medication or use any aids or devices to lessen the impact of the disability? If so, does the medication or do the aids or devices allow plaintiff to carry on life activities?

(9) Over time, has plaintiff’s disability become worse or better?

(a) If plaintiff’s disability has become worse, in what manner has it worsened?
(b) If plaintiff’s disability has lessened, in what manner has it lessened?

II. Hiring and Interview Process with Defendant

(A) Plaintiff’s employment status at time of application

(B) How did plaintiff become aware of job opening?

(C) What caused plaintiff to apply to defendant?

(D) Application Procedure

(1) What forms, if any, did plaintiff complete?

(2) What was plaintiff told?

(E) Interview Procedure

(1) With whom did plaintiff interview?
(2) Who else was present?

(3) What references to written policies or procedures were made?

(4) What reference to general policies or procedures?

(F) What documents were received or shown to plaintiff?

(1) Did plaintiff receive a copy?

(2) Did plaintiff retain a copy?

(3) Did plaintiff read the document?

(4) What was plaintiff’s understanding?

(5) Any conversations regarding the documents?

(G) What tests, if any, did plaintiff take?

(1) Did plaintiff see the test results?

(2) What were the results of the test?

(H) When was plaintiff hired? If so,

(1) What was the job?

(2) What was the rate of pay and benefits?

(I) If plaintiff was not hired, what was the reason given, if any?

(1) Who gave plaintiff the reason for not being hired?

(2) Does plaintiff agree with the validity of the reason? If not, why not?

(J) Why did plaintiff consider himself or herself qualified for the job position with defendant?

(K) Did plaintiff disclose a disability during the course of the interview process?

(1) Did plaintiff disclose a disability on the employment application?

(2) Did plaintiff disclose a disability during the interview?
(3) Did plaintiff disclose a disability at the time any pre-employment tests were conducted?

(4) Did plaintiff request a reasonable accommodation? If so, what accommodation did plaintiff request?

(5) If plaintiff requested a reasonable accommodation, to whom did plaintiff make the request? What was the response?

III. Employment History with Defendant

(A) Types of jobs and duties.

(B) What types of accommodations, if any, were made to plaintiff?

(C) Rates of pay and benefits.

(D) Supervisors.

(E) Promotions, demotions and lateral transfers.

(F) Job performance evaluations.

(G) Were any oral or written evaluations received by the plaintiff discriminatory or evidence of discrimination by the defendant? If so, in what manner were the evaluations discriminatory?

(H) Identity of plaintiff’s co-employees or subordinates.

(I) Was any discipline imposed against plaintiff discriminatory? If yes, in what manner was it discriminatory?

(J) What disciplinary actions were taken against plaintiff?

(K) Did plaintiff receive any awards or commendations?

(L) Disciplinary actions taken by plaintiff.

(M) What were the actions by management that plaintiff believes were discriminatory?

(1) What specific actions or inactions were taken by management?
(2) What indicates that the actions were discriminatory?

(N) Were any of plaintiff’s requests for reasonable accommodation denied by defendant? If so, what were the reasons given by the defendant?

(O) Did the defendant offer any alternative accommodations to the plaintiff?

(1) If so, did plaintiff accept those accommodations?

(2) If plaintiff did not accept accommodations, why did plaintiff refuse?

IV. Training

(A) What training, if any, did plaintiff received in the course of employment with defendant?

(B) What were the dates of any training and courses or classes attended?

(C) Who else received training?

(D) Was there anything discriminatory about the training? If so, give details of claimed discrimination.

(E) Did plaintiff request any reasonable accommodation? If so,

(1) To whom did plaintiff make the request?

(2) What was the request?

(3) What was the response?

(F) If any request for a specific accommodation was denied by defendant

(1) What were the reasons given for the denial?

(2) Did defendant offer any alternative accommodation? If so, did plaintiff accept this accommodation?

(3) If plaintiff refused to accept an alternative accommodation, what was the reason for plaintiff’s refusal?

V. The Complaint

(A) Review of factual allegations in complaint.
(B) Describe each and every fact plaintiff claims supports charge.

(C) List all witnesses and other persons with knowledge of any alleged discrimination.

(D) Does plaintiff have any notes or other documents relating to particular allegations of discrimination?

(E) Related proceedings.

(1) Did plaintiff go through any internal grievance proceedings with defendant? If so, what were those proceedings and the outcome?

(2) When did plaintiff file a charge with the EEOC? What information did plaintiff supply to the EEOC, including documents? With whom did plaintiff speak at the EEOC concerning the charge of discrimination?

(3) What was the outcome of the EEOC’s investigation? When did plaintiff receive a right to sue notice? How received?

VI. Damages and Mitigation of Damages

(A) Plaintiff’s claimed losses.

(1) How is plaintiff’s claim for damages determined?

(2) If plaintiff was discharged or not hired, does plaintiff wish to be in defendant's employ?

(3) What wages and benefits does plaintiff claim were lost as a result of defendant's purported discrimination?

(4) If plaintiff is making a claim for compensatory damages (e.g., future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life), describe each and every element of claimed damage.

(5) If plaintiff is making a claim for punitive damages, what is the specific basis for this claim?

(6) Does plaintiff claim any lost promotional opportunities as a result of the alleged discrimination?
(B) Mitigation of Damages

(1) If plaintiff was terminated or not hired, what specific attempts has plaintiff made to obtain alternative employment?

(a) Employers and job placement agencies contacted.
(b) Job offers.

(2) What has been plaintiff’s post-termination employment?

(a) Types of jobs and duties.
(b) Wages and benefits.
(c) Prospective and future changes in wages and benefits.
(d) Supervisors.
(e) If job no longer held, reason for leaving.
(f) Job performance evaluations.
(g) Any reasonable accommodations offered or supplied by subsequent employer.
(h) Disciplinary action awards or commendations.

VII. Communications Regarding Lawsuit

(A) All communications, written or oral, plaintiff has had regarding the lawsuit.

(B) All communications, written or oral, plaintiff has had regarding any charge with the EEOC.

VIII. Witnesses and Documents

(A) All people who have knowledge of any facts that would support plaintiff’s claims.

(B) All documents that support or otherwise relate to plaintiff’s claims.

(C) Has plaintiff consulted with an expert? If so, does plaintiff have a report from that expert?
In disability discrimination cases, it is likely that the testimony of physicians and vocational rehabilitation experts will be very important, if not crucial. An expert may testify as to the impact of an individual's disability upon job performance as well as the nature of any accommodations that could allow the person to successfully perform the duties of the job. The following is a list of general questions that may be asked of a physician or vocation rehabilitation expert testifying on behalf of an employer that is a defendant in a disability discrimination case.

I. Review of Expert's Qualifications

(A) Education

(1) Undergraduate/Graduate schools.

(2) Medical school.

(3) Internship.

(4) Residency.

(B) Licenses

(1) What specialties?

(2) What states?

(C) Job experience

(D) What publications has the Expert authored? What was the nature of those publications?

(E) Experience in dealing with disability of plaintiff
(F) Consulting experience
   (1) Non-litigation.
   (2) Litigation.

(G) Contact with employer
   (1) What was assignment?
   (2) What was fee arrangement?

II. Information Provided to Expert
   (A) What materials were provided to Expert, such as job descriptions, personnel files, etc.?
   (B) What persons did Expert contact?
      (1) Consult with plaintiff’s supervisors?
      (2) Visit the employer's facility?
      (3) Interview fellow employees?
   (C) What medical records of the plaintiff did Expert review?
   (D) Does Expert intend to gather more information? If so, what information?

III. Opinions Held by Expert
   (A) What is Expert's opinion as to the disability of the plaintiff?
      (1) Does the Expert believe that the plaintiff has a mental or physical impairment that substantially affects a major life activity?
      (2) Does Expert believe that plaintiff’s disability affects the performance of the job in question?
         (a) If so, in what manner does the disability affect job performance?
         (b) Does the disability affect the performance of the essential functions of the job?
(3) Would the plaintiff’s performance of the job have a likelihood of affecting the health and safety of the plaintiff or of other employees?

(4) Can Plaintiff safely perform the functions of the job with a reasonable accommodation?

(a) If so, what is the nature of that accommodation or accommodations?

(b) If not, why is an accommodation not possible?

(B) Does the Expert's opinion depend upon certain assumed facts? if so, what are those facts?

(C) Upon what treatises or other learned texts does the Expert rely?