Mental Illness Under the ADA and FMLA: Avoiding and Defending Claims
Determining Reasonable Accommodation and FMLA Leave; Leveraging Expert Witnesses, Motion and Trial Strategies

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Today’s faculty features:

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MENTAL ILLNESS UNDER THE ADA AND FMLA: AVOIDING AND DEFENDING CLAIMS

July 9, 2014
1:00 – 2:30 p.m. EDT
Presented by Strafford Publications, Inc.

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The Expanded Coverage of the ADAAA and EEOC Regulations

Background

A “disability” under the Americans with Disabilities Act is:

1. A physical or mental impairment that substantially limits one or more major life activities;
2. A record (or previous history) of such an impairment; or
3. Being “regarded as” having a disability
Changes to the ADA

• Under the ADAAA, the three-pronged definition of a disability remains the same, BUT:
  • - the ADAAA changes how the first and third prongs are evaluated

• Mandates liberal interpretation of “substantially limits”
  - To “maximum extent” permitted by ADA
  - Need not limit more than one major life activity

• Expanded prior definition of “major life activities” (“MLAs”) to include a range of activities such as:
  • Eating, sleeping, standing, lifting or bending, learning, reading, thinking, concentrating, and communicating
EEOC’s Rules of Construction: Impairments that Are Episodic or in Remission

An impairment that is episodic or in remission meets the definition of disability “if it would substantially limit a major life activity when active”

- Episodic or in remission: e.g.,
- Bipolar disorder
- Major depressive disorder
- Schizophrenia
- PTSD
Defining Intellectual Disabilities Under the ADA

EEOC Regulations

29 C.F.R. § 1630.2 (h) “Physical or mental impairment means

• (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems...; or

• (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

• Full text of regulations available at http://ecfr.gpoaccess.gov/cgi/t/text/textidx?c=ecfr&tpl=/ecfrbrowse/Title29/29cfr1630_main_02.tpl
Categories of Mental Impairments

• Mood Disorders
  – Depression, Bipolar, Seasonal Affective Disorder, Dysthymia
• Anxiety Disorders
  – Phobias, Panic disorder, Generalized anxiety disorder, OCD, PTSD
• ADHD
• Schizophrenia Spectrum Disorders
• Physicians’ source for classifying mental illnesses: Diagnostic and Statistical Manual of Mental Disorders (5th Ed. 2013)
What Intellectual Disabilities are Substantially Limiting?

• According to the EEOC, the following impairments, given their inherent nature, will virtually always be found to impose a substantial limitation on brain function, a major life activity:
  • Intellectual disability
  • Schizophrenia
  • Bipolar disorder
  • Autism
  • Major depressive disorder
  • Post-traumatic stress disorder (PTSD)
  • Obsessive-compulsive disorder (OCD)
  • 29 C.F.R. § 1630.2 (j) (3) (ii)-(iii)
What is not Considered an Intellectual Disability?

- Normal sadness or grief that is brought on by a traumatic event but that is expected to pass with time (e.g. death, divorce)
- Temporary anxiety due to change in circumstances at work or at home (new boss, ill family member)
- Personality conflicts with particular individuals at work
- Appropriate stress caused by work (e.g., deadlines)
- ADA’s Specific Exclusions: kleptomania, pedophilia, pyromania, compulsive gambling, etc...
Is Medical Evidence Required?

• What can the Employer do if an Employee asks for an accommodation?
  – Request medical documentation of
    • Nature
    • Severity
    • Duration, and
    • Extent of intellectual disability
  • If employee does not provide documentation, employer does not have to provide an accommodation
  • But, employer must give employee a reasonable time to produce documentation
    – HIPAA Release, EEOC’s GINA safe harbor language
• Caveat: Doctor/Therapist is making the diagnosis based entirely on what employee is telling him/her about work environment and is likely to be an advocate for what the patient wants
Options for the Employer

• Challenge the Diagnosis
  – Get a 2nd (or 3rd) medical opinion
  – Cannot be a medical professional with whom the employer has a relationship

• An employee’s actions may make a Fitness for Duty evaluation appropriate
  – Determine whether employee is capable of performing the essential functions of the job and/or whether employee poses a direct threat
  – Not a challenge to an employee’s claim of disability
  – May need to avoid negligent retention claims in some situations
Fitness for Duty Examinations

• **Coffman v. Indianapolis Fire Dept., 578 F. 3d 559 (7th Cir. 2009)**
  – Court found employer’s multiple fitness for duty evaluations of firefighter were job-related and consistent with business necessity
  – Court cited evidence of employee’s emotional withdrawal, indecisiveness, diminished performance, and defensiveness as well as categorical rise in firefighter suicides

  – Plaintiff was terminated after he refused a fitness for duty examination and claimed the requested examination violated the ADA
  – The Third Circuit held that the examination was proper in light of plaintiff’s increased angry outbursts at the workplace, rapid decline in conduct and in job performance following diagnoses of anxiety disorder, schizophrenia, and panic disorder
Medical Examination – Anxiety and Stress Disorders

Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013).
Employer required Plaintiff to undergo a fitness-for-duty examination in order to maintain his job after banging his fists on a table and threatening his manager
• 11th Circuit joined the 2nd, 6th, 8th, and 10th Circuits in holding a Plaintiff does not have to be disabled to bring a claim under the ADA’s ban on most employer medical inquiries
• However, the court upheld the examination order because it was job related and consistent with business necessity
  – An employee’s ability to handle the reasonable and necessary stresses of his job and to work well with others are job-related requirements and essential to any job
Determining Whether an Applicant or Employee with an Intellectual Disability is Qualified

• Test: Can the applicant or employee perform the essential functions of the job, either with or without a reasonable accommodation?

  – Remember: Employers cannot use qualification standards or other selection criteria that screen out individuals with a disability on the basis of that disability, unless the standard, is job-related for the subject position and consistent with business necessity.
Creating ADA Compliant Job Descriptions

• Review job descriptions to ensure they accurately reflect the extent to which communication and related skills are an essential function of a job. Be prepared with examples of the significance of effective communication skills to the position in question
  – Remember: Inability to perform essential job functions with or without accommodation is a defense

• Irregular attendance
  – Mental illnesses often manifest themselves more sporadically than physical disabilities, an employer might be asked to accommodate an employee’s irregular attendance
    • Advice: Where appropriate, job descriptions should include “regular and consistent attendance” as an essential function of the position

• E.g. Vandenbroek v. PSEG Power CT, (2d Cir. 2009)
  – Court: Regular attendance is an essential function of a boiler utility position, because absenteeism may result in power outages or explosions
Consideration of Particular Intellectual Impairments

- Bipolar disorder
  - Characterized by widely fluctuating behavior as individual cycles from manic state to depressed state
  - *Calandriello v. Tennessee Processing Ctr.*, (M.D. Tenn. 2009)
    - Employee in security sensitive facility revealed he was bipolar after being disciplined for defacing company property with a picture of Charles Manson
    - Further investigation revealed that employee had viewed online images of violence, assault weapons, and serial killers on his company computer in violation of company policy
    - Court upheld employer’s decision to terminate employee as being conduct-based, not discriminatory
PTSD – Mason v. Avaya Communications, Inc., 357 F.3d 114 (10th Cir. 2004)

• Plaintiff developed PTSD and changed employers after witnessing the murder of several co-workers. She then began working as a service coordinator.
• After learning that a colleague pulled out a knife during an argument at work, Plaintiff asked to work from home because her PTSD made her physically and emotionally incapable of working in the same building as her-knife wielding colleague.
• Plaintiff’s requested accommodation was to work from home. Employer refused on the basis that physical presence at the facility was an essential element of the job.
• Court:
  – Though plaintiff was disabled within meaning of the statute, the requested accommodation was not reasonable
  – Physical attendance at the facility was an essential function of the job because it required supervision as well as teamwork
Autism - Jakubowski v. Christ Hospital, 627 F.3d 195 (6th Cir. 2010)

• Medical resident requested an accommodation for his Asperger’s Disorder. Plaintiff’s supervisors noted his weak communication skills with patients as well as his lack of self-awareness, social competence, and inability to manage relationships with colleagues or patients.

• Plaintiff had difficulty relaying instructions between medical professionals and communicating with patients on the phone leading supervising physicians to become concerned harm to patients could occur unless plaintiff was closely monitored at all times.
Autism - Jakubowski (cont’d)

• Hospital proposed transferring Plaintiff to Pathology, a specialty with little patient interaction. Plaintiff proposed that hospital make physicians and nurses aware of his condition, its symptoms and “triggers” and order them to deal with him with “understanding and awareness” and have another doctor accompany him in patient interactions.

• Sixth Circuit affirmed the district court’s grant of summary judgment for the hospital, finding
  – (1) plaintiff did not demonstrate that he was “otherwise qualified” for his medical residency, and
  – (2) the requested accommodation did not resolve his inability to perform the essential functions of the job.
**Developmental Disability – Qualified – Bad Behavior Caused by a Disability**

**McElwee v. Cnty. of Orange, 700 F.3d 635 (2nd Cir. 2012) (Title II Case)**

- Plaintiff, a developmentally disabled nursing home volunteer, required constant care & assistance to complete non-routine tasks
- Plaintiff volunteered as a janitor, housekeeper, and helped transport nursing home residents to religious services
- Plaintiff dismissed when it was discovered that he had sexually harassed several female employees and visitors.
- Plaintiff’s mother requested the administration excuse Plaintiff’s behavior or speak with his therapist who could explain his actions
- Court:
  - Plaintiff was not “otherwise qualified” to work as a volunteer because while he was able to perform assigned tasks, he was not emotionally able to conduct himself appropriately
  - Inappropriate behavior is a legitimate non-discriminatory reason for dismissal, even if that behavior was the result of disabilities.
  - Plaintiff’s proposed accommodations were just excuses for past conduct

Medical Examination – Mandatory Counseling

Kroll v. White Lake Ambulance Authority, No. 09-626, 2013 WL 2253757 (W.D. Mich. 05/22/2013) (on remand)

• Plaintiff’s troubled romantic relationship with a co-worker affected her job performance. Employer informed Plaintiff that she must attend counseling to avoid termination of her employment. District Court granted SJ for the Employer.

• 6th Circuit vacated District Court’s SJ and remanded to lower court:
  – Sixth Circuit held that regardless of the employer’s intentions, mandated counseling could be seen by a jury as a medical examination that is likely to probe whether the employee has “mental health defects.”
  – Test is both administered and interpreted by a health care professional.
    • 691 F.3d 809 (6th Cir. 2012)

• On remand, the District Court held that the order to obtain counseling was “job related” and “consistent with business necessity.”
  – The court found that there was a significant basis to question whether the employee could perform the essential functions of an EMT because her emotional issues compromised her ability to perform her job duties competently and safely.
  – Co-worker said Plaintiff often cried at work, was on phone and texting while driving an ambulance, ignored request to administer oxygen to patient, etc.
QUESTIONS?

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Requesting Accommodations

What Is an Accommodation Request?


In cases involving mental disabilities, employee may not need to ask for accommodation if employer has reason to believe that job performance affected by obvious or known disability and employee is sufficiently impaired from asking. See also Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008) (upholding jury verdict that employer failed to reasonably accommodate employee with cerebral palsy even though employee had not asked for accommodation where disability obvious).
But see Wallin v. Minnesota Dep’t of Corrections, 158 F.3d 681 (8th Cir. 1998) (where mental disability not apparent, employee must identify disability, resulting limitations, and suggest accommodations); Rask v. Fresenios Med. Care N. Am., 509 F.3d 466 (8th Cir. 2007) (employee with depression failed to specify limitations of depression no duty to accommodate arose).
Requests from Others


But see Miller v. Nat’l Casualty Co., 61 F.3d 627 (8th Cir. 1995) (request for accommodation not sufficient where employee’s sister informed employer that employee falling apart mentally and family try to get employee into a hospital).
Documentation of Disability

EEOC – Employer’s request may ask only for “reasonable” documentation.

Not reasonable – submission of all medical records from employee’s healthcare provider.

Medical Exam by Employer’s Doctor

EEOC – allowed only if the employee “initially provides insufficient information to substantiate” disability and need for accommodation. SOURCE: EEOC Enforcement Guidance at 23.
Employee’s Failure to Provide Information

Impact – No employer liability for failure to accommodate. SOURCE: EEOC Enforcement Guidance at 23.

Cases:

*Thomas v. Corwin*, 483 F.3d 516 (8th Cir. 2007)
- Police department’s request for records of employee’s treatment for depression as part of fitness for duty exam was reasonable.
- Police department did not violate ADA by terminating employee for refusal to release records.

*Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001)
- Employee refused to release medical records to help employer devise alternative accommodation.
- Employer not liable “for failure to design a perfect accommodation.”
Employee’s Failure to Engage in Interactive Process

Where employer fails to engage in interactive process, employer liable for failure to accommodate by causing breakdown in accommodation process:

See Battle v. UPS, 438 F.3d 856 (8th Cir. 2006) (After employee who had suffered nervous breakdown and submitted physicians report that employee needed accommodation to perform marginal function of “memorizing intricate information,” employer liable for failure to provide appropriate reasonable accommodations.)
Calero-Cerezo v. Dep’t of Justice, 355 F.3d 6 (1st Cir. 2004) (despite employee’s reasonable accommodation requests and provision of medical evidence that employee suffering from depression, employer continued to claim that employee not disabled).
Types of Reasonable Accommodation

- Job Restructuring
- Modified Work Schedules and Part-Time Work
- Reassignment to a Vacant Position
- Acquisition or Modification of Equipment or Devices
- Adjustment or Modification of Employer Policies
- Qualified Readers or Interpreters
- Making Existing Facilities Readily Accessible To and Usable by Persons with Disabilities

42 U.S.C. § 12111(9); 19 C.F.R. § 1630.2(0)(2)

Also, temporary “job coach” to assist in job training. 29 C.F.R. App. § 1630.9
Types of Reasonable Accommodation

- Job Restructuring

  *Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001) (customer telephone consultant with acute anxiety disorder and panic attacks could not perform the essential functions of her position, which included handling safety-sensitive calls. Although plaintiff suggested routing safety-sensitive calls to other employees, employer not obligated to change essential functions of job).
• Modified Work Schedules & Part-Time Work

  *Orta-Castro v. Merck, Sharp & Dohne Quimica P.R., Inc.*, 447 F.3d 105 (1st Cir. 2006)

  Holding: Employer accommodated employee with major depression by (1) providing several medical leaves of absence and (2) allowing employee to work 4 hours per day upon return from leave and to take leave once every two weeks to see doctor.

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

  Holding: Employer not required to allow patient care technician with depression to take sudden unscheduled absences due to problems with medication.
Physical Changes to the Workplace/Adaptive Equipment

- Persons with psychiatric disabilities may have problems concentrating
- Sound proofing through room dividers or partitions may aid person’s concentration
- Relocating work station away from workplace noise may be effective

SOURCE: EEOC Enforcement Guidance at 25. See *Mobley v. Allstate Ins. Co.*, 531 F.3d 539 (7th Cir. 2008) (employer reasonably accommodated 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; *Ekstrand v. Sch. Dist. of Somerset*, 683 F.3d 826 (7th Cir. 2012) (upholding jury verdict that employer violated ADA by refusing to transfer teacher with depression (SAD) to a classroom with exterior windows).
Telework

*Humphrey v. Memorial Hosp. Ass’n*, 239 F.3d 1128 (9th Cir. 2002) (work from home may be reasonable accommodation for medical transcriptionist suffering from OCD).

*EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 7502 (6th Cir. April 22, 2014) (telework may be reasonable accommodation even if employee works as part of a team and job involves frequent interaction with co-workers).

But see *Mason v. Avaya Comm., Inc.*, 357 F.3d 1114 (10th Cir. 2004) (service coordinator with PTSD not qualified for her position because on-site attendance was an essential function of the job and working at home could not be a reasonable accommodation. Management could not adequately supervise her and she would not be available to cover other coordinators at busy times).
Changing Supervisory Methods

EEOC says employer may need to change methods of supervision by:

- Communicating by email (rather than orally) about work assignments, evaluations and training
- Providing additional training or modified training materials
- Providing detailed day-to-day feedback and guidance

**But**, following not required:

- Providing stress-free environment
- Immunizing employee from criticism

**SOURCE:**

Also, not required

- Providing New Supervisor

**SOURCE:** *Weiler v. HFC*, 101 F.3d 519, 526 (7th Cir. 1996); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3d Cir. 1998).

*But see Kennedy v. Dresser Rand Co.* (2d Cir. 1999) (employee may rebut presumption that new supervisor not reasonable accommodation); *Calero-Cerezo v. U.S. DOJ*, 355 F.3d 6, 24-25 (1st Cir. 2004) (fact finder could find that transfer to another worksite with new supervisor was reasonable accommodation for attorney with depression).
Other Reasonable Accommodations

- Transfer to different work environment – *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001) (transfer to another worksite of employee with paranoia and delusional disorder who was afraid of co-workers was “entirely reasonable” accommodation).

But see *Burchett v. Target Corp.*, 340 F.3d 510 (8th Cir. 2003) (transportation analyst with depression not entitled to a transfer to different position because she was qualified for her current position with the reasonable accommodation the employer provided).
Performance and Conduct Standards – EEOC says employer may (1) discipline employee for violating workplace conduct standard even though misconduct caused by disability and (2) set standards to maintain safe workplace. SOURCE: EEOC Enforcement Guidance at 29.

But, conduct standards must be “job related and consistent with business necessity.”
Cases:


- *Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007) (upholding termination of employee who was a veteran and suffered from PTSD where employee had been involved in numerous physical altercations at work).
Mr. Mook is a nationally recognized practitioner in employment law and has written two treatises on the Americans with Disabilities Act, *Americans with Disabilities Act: Employee Rights and Employer Obligations* and *Americans with Disabilities Act: Public Accommodations and Commercial Facilities*, both published by LexisNexis. He represents employers and businesses on matters relating to employment law, business torts and business disputes. Mr. Mook frequently counsels employers on issues involving compliance with the ADA and accommodating disabled employees, as well as other employment related matters. He is a co-editor of the *Virginia Employment Law Letter* and is a regular contributor to several legal publications, including *Bender’s Labor & Employment Bulletin*. He is included in *Best Lawyers in America* (2014 ed.) for employment law, and ALM Legal Leaders has listed him as a Top Rated Labor & Employment Lawyer (2013). Mr. Mook is a member of the Virginia and District of Columbia Bars, and is a member of the Labor & Employment Law Section of the District of Columbia Bar. Mr. Mook earned his Juris Doctor from Yale Law School.
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Navigating the Maze: Employees with Mental Health Conditions

- **Family and Medical Leave Act (FMLA)**
  - Unpaid, job-protected leave and benefits
  - Eligibility requirements and rules
  - No pushback on legitimate need for time off allowed

- **Americans with Disabilities Act and Amendments (ADAAA)**
  - Nondiscrimination obligation
  - Reasonable accommodation obligation
  - Takes effect Day #1
  - Benefits obligations are different
  - Accommodation for employee’s disability only
Navigating the Maze: Employees with Mental Health Conditions

- **Workers’ Compensation**
  - Medical expenses and wage replacement
- **State Laws**
  - Partially paid leaves and/or disability benefits
  - State FMLA laws
- **Short-term Disability, Long-term Disability**
  - Income protection
- **Employer Policies, Agreements Or Practices**
  - Extended and/or personal leaves?
Common Issues Re:
Employee’s Own Medical Condition

• Is the employee eligible for time off of work?
• How much leave does the employee get, and in what form?
• Is the leave paid or unpaid?
• What happens to the employee’s benefits?
• Do we have to hold his/her job? For how long?
• Do we have to offer light duty?
• What if he/she comes back with restrictions?
• What happens when he/she runs out of FMLA leave (or never qualified for it in the first place)?
Common Issues Re: Employee’s Own Medical Condition

- Can we force the employee to use FMLA for a leave we have reason to believe ADA covered or other medical leave is FMLA qualifying?
  - **Maybe not:** *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014)
  - *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007) (noting that any FMLA interference claim based upon forced FMLA designation ripens only upon employee’s need for FMLA leave, which is unavailable due to prior wrongful forced designation)
  - See also *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 769 n.3 (7th Cir. 2008) (if employee refuses FMLA leave but continues to be absent, employee’s absence must be justified under employer’s policies or termination is warranted)
  - **But see:** *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 175 (2d Cir. 2006) (“[F]orced leave, by itself, does not violate any right provided by the FMLA.”); *Foster v. New Jersey Dep’t of Transp.*, 255 F. App’x 670, 671 n.1 (3d Cir. 2007) (same).
  - What about employee who refuses FMLA, but needs an ADA-qualifying leave? Can they ever be forced to use/exhaust FMLA?
There is no Safe Zone Outside the FMLA

The EEOC has long maintained—and is now aggressively enforcing—that you may have leave obligations to your employees regardless of whether you or any of your employees is covered by/eligible for FMLA, and regardless of what your policies say.
FMLA May Apply to Seemingly Ineligible Employee

- Watch out for the employee who uses all available FMLA, and then takes an ADA-covered leave as an accommodation.
  - The FMLA year may begin again while employee is on leave and employee will be entitled to 12 more weeks of FMLA leave.

- Watch out for the employee who has not yet worked for the Company for a full year and takes an ADA-covered leave.
  - While on leave, the employee may have his or her one-year anniversary, and so long as hours requirement is met, employee may become FMLA eligible, and be entitled to 12 weeks of FMLA leave from that date forward.
Note the ADA/FMLA Crossover

- No “undue hardship” argument under FMLA.
- FMLA permits temporary transfer only for employee who needs intermittent or reduced schedule leave that is foreseeable based on planned medical treatment.
- Many mental health absences are unpredictable in nature.
What Do You Do?

Helen Conge
Life’s a beach, at least for me. I’ll be at Lake Calhoun sunning myself this afternoon.
Anyone want to join me?

Like · Comment · Share · 29 minutes ago

2 people like this

Jack Hammer ...stuck at work ... how long you there?
1 minute ago · Like
The Battle Over Indefinite Leave

• How much leave have you already provided to the employee?
• What do your policies say and how have they been applied?
• How will your business be impacted by additional leave?
• Will the leave enable the employee to return to work and perform the essential functions of the position?
Request For Leave Extension. . . and Another . . . and Another

- Employee brings a doctor’s note, stating that she needs four weeks of leave
- Four weeks later she brings in another note stating that she needs four more weeks
- The pattern of extending her leave continues several times
- Supervisor wants to terminate employment because supervisor anticipates another note in four weeks
Holding the Position

- Duty to hold the position open?
- Ability to replace the employee?
- What job is the employee entitled to upon her return?
  - The same position?
  - A comparable position?
  - A completely different job?
  - No position at all?
The Basic “Undue Hardship” Factors

• Can a request for a four week leave of absence ever be considered an undue hardship?

Factors to consider:
• The nature and cost of the accommodations
• The overall financial resources of the business
• The overall number of individuals employed by the employer
• The effect the accommodation would have on the resources of the business
• The impact the accommodation would have on the business
  – 29 C.F.R. § 1630.2(p)(2); see also 42 U.S.C. § 1211(10)(B)
Six Facts That Can Kill Your “Undue Hardship” Argument

1. A policy that provides for leaves of that length. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999)
3. Successful coverage during this leave by co-workers or subordinates. *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998)
Six Facts That Can Kill Your “Undue Hardship” Argument

4. Successful coverage, or ability to cover, this leave by temporary employees. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000); *Nunes*, supra


6. Failure to quickly replace the employee after termination. *Haushmann*, supra (took 6 months to replace); *Garcia-Ayala*, supra (never replaced)
ADAAA Standard of Proof

• The proof standard is changing
  – The overwhelming majority of courts addressing the issue have concluded that **but-for causation** applies.

• What does this mean?
  – Higher burden than motivating factor standard applicable to Title VII claims
  – More difficult standard for plaintiffs
  – Likely to impact summary judgment
Taking An ADAAA Mental Health Disability Case to Trial

• Expert testimony
  – Consider whether it is necessary to prove or refute disability
  – With alleged mental health condition, is a separate expert pertaining to the issue of emotional distress necessary

• Jury pool
  – The stigma surrounding mental health issues is all but gone
  – The jury pool is likely to contain one or more individual who has had a diagnosed mental health condition

• How to address delicate topic of mental health
Questions

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