

## **Mental Health Issues in the Workplace: ADA and FMLA Compliance, Leave as Accommodation, Disability vs. Fear**

WEDNESDAY, JULY 28, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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# Mental Health Conditions as Disabilities

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- DSM-5 = Diagnostic and Statistical Manual of Mental Disorders Volume 5 (the psychological text that defines and classifies mental disorders in order to improve diagnoses, treatment and research)
- Defines **intellectual disabilities** as neurodevelopmental disorders that begin in childhood and are characterized by intellectual difficulties as well as difficulties in conceptual, social, and practical areas of living



# Mental health is a global issue...

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## ...Particularly in the legal profession

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### Studies have shown that:

- Lawyers are 3.6 times more likely to suffer from depression than the average person
- Male lawyers are 2 times more likely to die by suicide than men in the general population (this figure does not include attempted deaths by suicide)



# ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation's 2016 Study

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## Practicing lawyers (13,000)

- 21% - 36% qualify as problem drinkers
  - Versus 15.4% of surgeons
- 28% - depression
- 23% - stress
- 19% - anxiety
- Other issues – suicide, social alienation, sleep deprivation, job dissatisfaction, complaints of work-life conflict
- Young lawyers (first 10 years in private practice) experience highest rates of problem drinking and depression

## Law Students (3,300)

- 17% - depression
- 14% - severe anxiety
- 23% - moderate anxiety

# What do these studies reveal?

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- While the majority of lawyers and students do not have a mental health or substance abuse disorder, as an industry, we are not thriving.
- We are not performing at our best and we are often unhappy or unfulfilled.
- One report suggests lawyers exhibit a “profound ambivalence” about their work.



## Why the legal profession?

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- Culture of the industry
  - Long hours/lack of flexibility
  - Alcohol and networking (internal and external)
  - Stigma and related fears about professional repercussions
  - Loneliness/isolation



## Why the legal profession?

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- Our work is adversarial
  - Absence of professional courtesy
  - Discourages asking for help/showing weakness
  - Specifically as it relates to in-house counsel:
    - Can be viewed as roadblocks to the business
    - May experience “clients” (business stakeholders) who are unhappy with work product, timelines, and/or priorities



## Why the legal profession?

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- Lawyer's personality
  - Type A, competitive, perfectionist
- What makes us good lawyers, also lends itself to mental health disorders
- Walking a fine line



# Why should we care

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## Job performance

Productivity  
Work Product  
Absenteeism

## Violence

Self Harm  
Harm to Others

## Turnover

Recruitment and  
training costs  
Morale

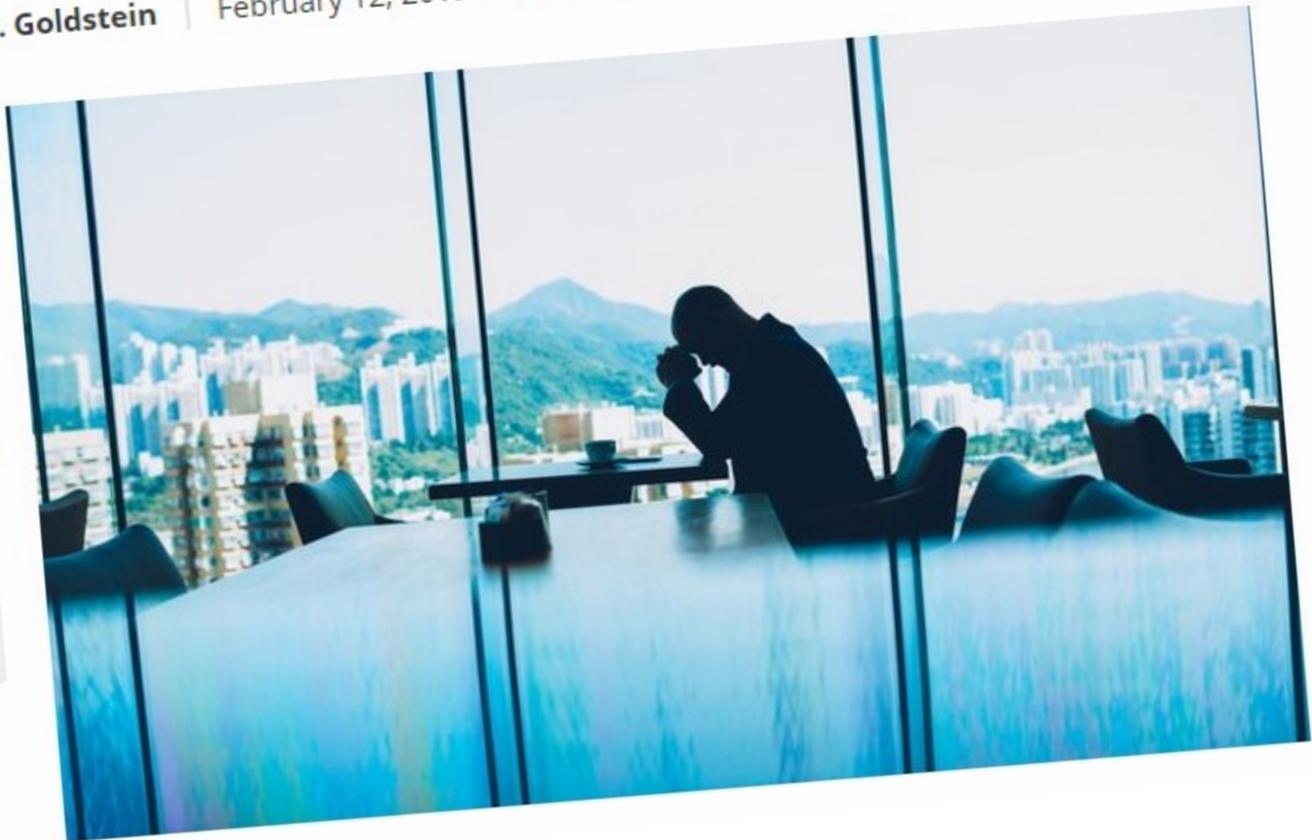
## Liability

ADA, FMLA and  
state/local laws

# 'Scared. Ashamed. Crippled.': How One Lawyer Overcame Living With Depression in Big Law

Reed Smith counsel Mark Goldstein wasn't sure he could both be a lawyer and have mental health disabilities. But he learned how to survive and thrive in Big Law.

By **Mark S. Goldstein** | February 12, 2019 at 02:15 PM



# My story



- Onset
- Denial
- Acknowledgment/acceptance
- Speaking up
- Making a change/reclaiming my personal and professional lives
- The aftermath/response (the Firm, clients, colleagues, etc)

# Expanded Coverage of the ADAAA and EEOC Regulations

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## 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

42 U.S.C. § 12102(2)

# “Disability” Under the ADAAA

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- **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

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- 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
  - Anxiety

# Defining Intellectual Disabilities Under the ADA

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## 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](http://ecfr.gpoaccess.gov/cgi/t/text/textidx?c=ecfr&tpl=/ecfrbrowse/Title29/29cfr1630_main_02.tpl)

# Categories of Mental Impairments

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- 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)
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# What Intellectual Disabilities are Substantially Limiting?

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- 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)
  - Gender identity disorders (possibly)
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# What is not Considered an Intellectual Disability?

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- 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
  - Tinsley v. Caterpillar Fin. Svcs. Corp., 766 Fed. App'x 337 (6th Cir. 2019)
- Appropriate stress caused by work (e.g., deadlines)
  - Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013)
- ADA's Specific Exclusions: kleptomania, pedophilia, pyromania, compulsive gambling, etc.

## **Determining Whether an Applicant or Employee with an Intellectual Disability Is Qualified**

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- 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

# Requests for Accommodation

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- How does an Employee Request an Accommodation?
- **General Rule:** Employee must let employer know (1) that adjustment or change at work is needed and (2) related to medical (mental) condition. Source: EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, No. 915.002 (March 25, 1997) available at <http://www.eeoc.gov/policy/docs/psych.html>.
- *Murray v. Warren Pumps, LLC*, 821 F.3d 77 (1<sup>st</sup> Cir. 2016) – where disabled employee agreed to let employer know if he needed accommodations, employer could not be faulted when employee “opted to remain silent” and failed to inform employer of his need for an accommodation.
- *Tennial v. UPS*, 840 F. 3d 292, 307 (6<sup>th</sup> Cir. 2016) – employee’s “fleeting reference to ‘my ADA deal’ was insufficient to put [employer] on notice of an accommodation request” where employee “did not explain that the recorder [device the employee asserted he needed] would help accommodate his disability and the record evidence indicates that [employer] did not understand his request as such.”

## Requests for Accommodation (con't)

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- *Waggoner v. Carlex Glass America, LLC.*, 682 Fed. Appx. 412 (6<sup>th</sup> Cir. 2017) – Because the employee had never made clear that his request for a transfer to another department was connected to his bipolar disorder or stated that his coworkers triggered his disorder, no duty to accommodate.
- *Walz v. Ameriprise Financial, Inc.*, 779 F.3d 842, 846 (8<sup>th</sup> Cir. 2015) – holding that employee who engaged in disruptive behavior due to her bipolar disorder failed to put employer on sufficient notice that she was disabled and required accommodation.

# Requests for Accommodation - Exceptions

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**In cases involving mental disabilities, employee may not need to ask for accommodation if employer has reason to believe that job performance affected by known disability and employee is sufficiently impaired from asking. See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, No. 915.002 (March 15, 1997), available at <http://www.eeoc.gov/policy/docs/psych.html>**

- See *Kowitz v. Trinity Health*, 839 F.3d 742 (8<sup>th</sup> Cir. 2016) – employer’s knowledge that an employee had a disabling condition and was unable to obtain a work related certification until after she had undergone several months of medical treatment presented sufficient evidence to raise a jury issue as to whether the employee had made a request that the employer accommodate the employee's inability to obtain the certification the employer required.
- *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2<sup>nd</sup> 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.

# Requests for Accommodation - Exceptions

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## Employer Received Accommodation Request From Others

EEOC position: Family member, friend, healthcare professional may request accommodation for disabled employee. SOURCE: EEOC Enforcement Guidance, *supra*; *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) (employee's son); *Bultemeyer v. Ft. Wayne Comm. Sch.*, 100 F.3d 1281 (7<sup>th</sup> Cir. 1996) (employee's psychiatrist).

*But see Miller v. Nat'l Casualty Co.*, 61 F.3d 627 (8<sup>th</sup> 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.

# Requests for Accommodation

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What is the Interactive Process?

A discussion to determine if the employee requires a reasonable accommodation to perform the essential functions of their job, and if so, what the accommodation(s) may be.

This process is initiated either by:

The employee's written or verbal request for assistance, or

The employer's inquiry into workplace behaviors that potentially may be the result of a medical condition covered by the ADA.

# Requests for Accommodation

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- 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, Ward v. McDonald, No. 12-5374, 2014 U.S. App. LEXIS 15402 (D.C. Cir. Aug. 12, 2014)
    - 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

# Interactive Process

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**General Rule:** Where employee fails to provide documentation of disability, no employer liability for failure to accommodate. SOURCE: EEOC Enforcement Guidance, *supra*.

- *Ortiz-Martinez v. Fresenius Health PR, LLC*, 853 F.3d 599 (1<sup>st</sup> Cir. 2017) – upholding the dismissal of an employee’s ADA claim for failure to accommodate where in response to the employer’s request for more specific information concerning the employee’s medical restrictions, the employee failed to respond. The employer’s requests for more specific medical information were both reasonable and important in assessing whether the employee could perform the essential functions of the job and what type of accommodations might be required.
- *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476 (5<sup>th</sup> Cir. 2016) – employer did not violate the ADA by terminating employee who failed to provide doctor’s note or report justifying employee’s statement to employer that he had been undergoing medical tests during his week long absence.
- Note: Employer may seek only “reasonable” documentation.

# Interactive Process: Employee Fails to Engage

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**General Rule:** Where employee fails to engage in interactive process, employer is not liable for failure to accommodate.

- *Frazier-White v. Gee*, 818 F.3d 1249, 1257-58 (11<sup>th</sup> Cir. 2016) – where plaintiff failed to identify any reasonable accommodation that would have allowed her to return to work, “there is no basis for imposing liability on defendant for failing to engage in an ‘interactive process’ to identify accommodations.”
- *Ward v. McDonald*, 762 F.3d 24 (D.C. Cir. 2014), cert. denied, 2015 U.S. 5225 (2015) – employee who did not respond to questions from employer failed to engage in interactive process.
- *EEOC v. Kohl’s Dep’t Stores, Inc.*, 774 F.3d 127 (1<sup>st</sup> Cir. 2014) – employee’s premature resignation after employer requested additional information failed to engage in interactive process.

# Types of Reasonable Accommodations

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- 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

## **Accommodation provided need only be effective; not employee’s choice.**

- *Noll v. IBM*, 787 F.3d 89 (2d Cir. 2015) – Court (2-1) held that IBM had reasonably accommodated deaf employee by providing ASL interpreters for work-related Internet videos. Employee wanted on-screen captioning, but court found ASL interpreters sufficiently effective. Dissent argued that whether accommodation effective should be for jury.

# Undue Hardship

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Undue hardship defined as significant difficulty or expense or would fundamentally alter the nature of the job. 42 U.S.C. § § 12111(10), 12112(b)(5)(A).

- See *Reyazzuddin v. Montgomery County*, 789 F.3d 407 (4th Cir. 2015) – Jury issue as to whether providing accessible software to blind employee would be undue hardship where estimates of cost ranged from \$130,000 to \$650,000.
- *Stephenson v. Pfizer*, 641 Fed. Appx. 214 (4th Cir. 2016) – Jury issue as to whether providing driver for sales representative, whose vision impairments rendered her unable to drive, constituted reasonable accommodation or undue hardship.

If providing one type of accommodation would be an undue hardship, employer has obligation to consider other accommodations.

# Job Restructuring

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**No *if* job restructuring where restructuring would eliminate essential function.**

- *Stevens v. RiteAid Corp.*, 851 F.3d 224 (2d Cir. 2017), cert. denied, 2017 U.S. LEXIS 6347 (U.S. Oct. 15, 2017) – pharmacist with needle phobia and whose job required that he give immunization injections to customers suggested as a reasonable accommodation that the company could hire a nurse to give immunization injections for him or assign him to another pharmacy location with another pharmacist who could give immunizations. In rejecting the employee’s arguments, the Second Circuit explained that neither accommodation was required under the ADA because other employees would have been required to perform the pharmacist’s essential immunization duties.
  - *Stern v. St. Anthony’s Health Center*, 788 F.3d 276 (7<sup>th</sup> Cir. 2015) – eliminating administrative and supervisory responsibilities of hospital’s chief psychologist with short-term memory deficiencies not required because duties were essential.
  - *Emerson v. Northern States Power Co.*, 256 F.3d 506 (7<sup>th</sup> 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.
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# Unscheduled Absences

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- *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466 (8<sup>th</sup> Cir. 2007) - Employer not required to allow patient care technician with depression to take sudden unscheduled absences due to problems with medication.
- *Williams v. AT&T Mobility Services LLC*, 847 F.3d 384 (6<sup>th</sup> Cir. 2017) – no duty to accommodate flex schedule that would not address employee's unpredictable anxiety attacks when at work

# Teleworking – Is COVID a Game Changer?

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## Not required where onsite attendance essential

- *Mason v. Avaya Comm., Inc.*, 357 F.3d 1114 (10<sup>th</sup> 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.
- *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc) - employee with irritable bowel syndrome requested accommodation to work from home up to 4 days a week. Ford had a telecommuting policy, but denied employee's accommodation request because her job as a resale steel buyer required her to frequently interact face-to-face with coworkers. Court ruled in favor of Ford because attendance at the job site was an essential function and employee's disability-related absences meant she was not a "qualified" individual under the ADA.
- *Credeur v. State of Louisiana*, 860 F.3d 785 (5th Cir. 2017) – state attorney general not required to accommodate a litigation attorney, who developed serious health problems due to complications from a liver transplant, and wanted to work from home. Litigation attorneys engaged in an interactive and team-oriented approach, which could not be accomplished when an employee was working from home. Additionally, the attorney's working at home resulted in the employee's cases being reassigned to other attorneys.

# Teleworking – Is COVID a Game Changer?

## (cont)

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### Not required where onsite attendance essential

- *Winston v. Ross*, No. 17-8041 (10<sup>th</sup> Cir. Feb. 27, 2018) – telework not reasonable accommodation where job involved receptionist duties and other tasks requiring employee to be in the office.
- *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565 (7<sup>th</sup> Cir. 2019) - physical presence at work was required in order for the employee to perform the essential functions of her job which involved changing day-to-day responsibilities, some of which the employee could not perform working remotely. As a consequence, the court pointed out that the team with which the employee worked was “spread very thin at times.”
- *Yochim v. Carson*, 2019 U.S. App. LEXIS 24346 (7<sup>th</sup> Cir. Aug. 15, 2019) – medical needs of government attorney with carpal tunnel and osteoarthritis did not require that she work from home three or more days a week where government agency offered other alternatives such as reduced typing demands, paralegal help, and flexible work schedule.

# Teleworking – Is COVID a Game Changer?

## (cont)

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- *Usually an Issue of Fact:*
- *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128 (9<sup>th</sup> Cir. 2002) - work from home may be reasonable accommodation for medical transcriptionist suffering from OCD.
- *Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2007) – factual issue as to whether work at home reasonable for federal employee who was team leader where agency had policy allowing telework 5 days/wk and employee had previously telecommuted 2 days/wk and said that team was self-directed.
- *Goonan v. FRB of N.Y.*, 2014 U.S. Dist. LEXIS 99922 (S.D.N.Y. July 22, 2014) – request to work at home or be transferred to a different position could be reasonable accommodation based on comparator evidence even though employer had policy that teleworking was only available for strong performers, and employee was regarded as a poor performer.

# Reasonable Accommodations: New Supervisor

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## a. Employer not required to provide new supervisor

SOURCE: *Weiler v. HFC*, 101 F.3d 519, 526 (7<sup>th</sup> 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 (1<sup>st</sup> Cir. 2004) (fact finder could find that transfer to another worksite with new supervisor was reasonable accommodation for attorney with depression).

## b. But, 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

SOURCE: EEOC Enforcement Guidance, *supra*

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# Reasonable Accommodations: Stress Free Workplace

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- *Marino v. U.S. Postal Serv.*, 25 F.3d 1037 (1<sup>st</sup> Cir. 1994) - unreasonable to place employee in stress-free environment or to immunize him from criticism
- *Pesterfield v. TVA*, 941 F.2d 437, 442 (6<sup>th</sup> Cir. 1991);
- *Grillasca-Pietri v. Portorican American Broadcasting Co.*, 233 F. Supp.2d 258, 264 (D.P.R. 2002).
- *Cohen v. Ameritech Corp.*, 2003 U.S. Dist. LEXIS 23166 (N.D. Ill. Dec. 23, 2003) - even though employee's anxiety disorder exacerbated by manager's monitoring and disciplinary authority, unreasonable to exempt employee from monitoring and discipline.

# Reasonable Accommodations: Excuse Violations of Performance and Conduct Standards

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- 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, *supra*
- *Sista v. CDC Ixis N. Am. Inc.*, 445 F.3d 161 (2d Cir. 2006) (upheld termination of employee who made threats of violence to co-workers and supervisor).
- *Macy v. Hopkins Ctny. Sch. Bd. of Educ.*, 484 F.3d 357 (6<sup>th</sup> Cir. 2007) (upheld termination of teacher for threatening students even though verbal outbursts caused by disability, post-concussive syndrome).
- *Jarvis v. Potter*, 500 F.3d 1113 (10<sup>th</sup> 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).

# Reasonable Accommodations: Excuse Violations of Performance and Conduct Standards (con't)

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- *Walz v. Ameriprise Fin., Inc.* (8<sup>th</sup> Cir. 2015) – employee’s bipolar disorder caused her to interrupt meetings, disrupt coworkers, and be insubordinate; essential function of job required “people, teamwork, and communication skills.”
- *Mayo v. PCC Structural, Inc.* (9<sup>th</sup> Cir. 2015) – employee’s major depressive disorder caused him to inappropriately handle stress and threaten to kill his supervisors, employee not qualified to perform essential job functions.
- *DeWitt v. Southwestern Bell Tel. Co.*, 845 F.3d 1299 (10<sup>th</sup> Cir. 2017) - customer service rep could not excuse hanging up on customers and retroactive leniency not appropriate despite disability.
- *Calandriello v. Tenn. Processing Ctr.*, No. 3:08-1099 (MD Tenn. Dec. 15, 2009) – Bi-polar employee in security sensitive facility viewed online images of violence, assault weapons, and serial killers – termination upheld.

**Exception:** Conduct standards must be “job related and consistent with business necessity.”  
SOURCE: EEOC Enforcement Guidance, *supra*

# Reasonable Accommodations: Leave

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## 1. Indefinite leave not required

EEOC: “[I]ndefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation.” EEOC “Employer-Provided Leave and the Americans with Disabilities Act” (May 9, 2016)

- Punt v. Kelly Services 862 F.3d 1040 (10th Cir. 2017)
- Peyton v. Fred’s Stores of Arkansas, Inc., 561 F.3d 900 (8th Cir. 2009)
- Fiumara v. President and Fellows of Harvard College, 327 F. App’x. 212 (1st Cir. 2009)
- Larson v. United Nat. Foods W. Inc., 518 F’Appx. 589, 591 (9th Cir. 2013)
- Moss v. Harris County Constable Precinct One, 851 F.3d 413 (5th Cir. 2017)
- Minter v. District of Columbia, 809 F.3d 66 (D.C. Cir. 2015)

# Reasonable Accommodations: Leave

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## Time periods unreasonable based on facts:

- *Hwang v. Kansas Severson v. Heartland Woodcraft*, 872 F.3d 476 (7th Cir. 2017) – “multimonth” leave of absence after FMLA leave expired is not a reasonable accommodation under the ADA
- *State University*, 753 F.3d 1159 (10th Cir. 2014) - 6-month leave after 6 months of paid leave
- *Luke v. Bd. of Trustees Florida A&M Univ.*, 674 Fed. Appx. 847 (11th Cir. 2016) - 6 month leave, after 9 month leave
- *Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119 (1st Cir. 2017) - 12 month leave after 5-month leave held not reasonable
- *Hill v. Walker*, 918 F. Supp. 2d 819 (E.D. Ark. 2013), aff’d, 737 F.3d 1209 (8th Cir. 2013) – 2 weeks (where no evidence employee would have been able to perform the essential functions at the conclusion of leave)
- *Boileau v. Capital Bank Fin. Corp.*, 646 Fed. Appx. 436 (6th Cir. 2016) – 8 to 12 weeks at a time
- *Stallings v. Detroit Pub. Schs.*, 658 F’Appx. 221, 226-27 (6th Cir. 2016) – 4 months (teacher)
- *Larson v. United Nat. Foods W. Inc.*, 518 F’Appx. 589, 591 (9th Cir. 2013) – at least 6-month leave

# Direct Threat Defense in Mental Disability Cases

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**Employee who, because of his or her disability, poses a “direct threat” to the health and safety of others that cannot be eliminated by reasonable accommodation.**

**To determine whether an individual poses a direct threat involves factors including:**

- (1) The duration of the risk;**
- (2) The nature and severity of the potential harm;**
- (3) The likelihood that potential harm will occur; and**
- (4) The imminence of potential harm. 29 CFR 1630(r)**

**Direct threat defense always turns on the particular facts of a given case.**

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# Family and Medical Leave Act (FMLA)

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- A leave of absence under the FMLA can be an accommodation
- Qualified individuals entitled to up to 12 weeks of unpaid, job-protected leave
- A “disability” under the ADA is not necessarily the same as a “serious health condition” under the FMLA
- Separate analysis necessary for protection of each statute.

# Family and Medical Leave Act (FMLA)

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## Eligible employees:

- Work for covered employer (50+)
- Worked for at least 12 months
- Worked for at least 1,250 hours during 12-month period
- Work at location where employer has at least 50 employees within 75 miles

# Family and Medical Leave Act (FMLA)

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## Covered Reasons:

- Employee's serious health condition;
- Care for a child, spouse or parent with serious health condition;
- Birth of a child and to care for the child;
- Placement of a child with the employee for adoption or foster care;
- A "qualifying exigency";
- To care for an injured servicemember/veteran

# Family and Medical Leave Act (FMLA)

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A “**Serious Health Condition**” means an “illness, injury, impairment, or physical or mental condition” that involves:

- Inpatient care, or
- Continuing treatment by a health care provider

# Family and Medical Leave Act (FMLA)

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- Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity
- Incapacity means inability to work, attend school, or perform other regular daily activities due to the serious health condition

# Family and Medical Leave Act (FMLA)

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- **Continuing treatment includes:**
  - Incapacity of three or more consecutive days, or
  - Chronic conditions, or
  - Permanent or long-term conditions
  - Conditions requiring multiple treatments
- **Depression** may constitute a “serious health condition” when the employee is under continuing treatment by a health care provider

# “Continuing Treatment” Examples

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## ***Hurley v. Kent of Naples, Inc.*, (11th Cir. 2014) 746 F.3d 1161:**

- Plaintiff suffered from depression and anxiety that produced panic attacks
- Plaintiff notified of a “vacation schedule”- 11 weeks of vacation over two years
- Claimed medical/health professional said vacation time was “no longer optional”
- Plaintiff was terminated; sued for FMLA interference and retaliation

# “Continuing Treatment” Examples

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***Hurley v. Kent of Naples, Inc.*, (11th Cir. 2014) 746 F.3d 1161:**

- Court held plaintiff was not a qualified individual to assert interference/retaliation
- FMLA does not extend to any “chronic health condition” – it only protects leave for “[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition.”
- Plaintiff could not predict any periods of incapacity from his condition; did not meet his burden of proving his leave request qualified for FMLA protections

# Notice of Need for FMLA

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- Employees must notify employers of their need for leave
- Notice must be sufficient to let the employer know that the leave is for a qualifying reason
- No need to expressly mention FMLA
- Notice of unqualified leave does not necessarily trigger FMLA protections. Hurley, 746 F.3d at 1167 (“notice is only relevant to an FMLA claim if the noticed leave is protected by the FMLA.”)

## Hannah P. v. Coats (4<sup>th</sup> Cir. 2019) 916 F3d 327

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- Snowden Project employee disclosed to employer depression diagnosis
- Employee was “either lethargic or almost unconcerned” about absences
- Employer attempted to accommodate; at which point employee indicated her psychiatrist recommended she take leave
- After employee’s term ended, she sued for interference with FMLA-rights

## Hannah P. v. Coats (4<sup>th</sup> Cir. 2019) 916 F3d 327

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- 4th Circuit held notice re depression and psychiatrist's recommendation triggered the employer's "responsibility to inquire further about whether employee was seeking FMLA leave."
- Employer's failure to give information re FMLA prejudiced employee.

# Spangler v. Federal Home Loan Bank of Des Moines

## (8<sup>th</sup> Cir. 2002) 278 F3d 847

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- Bank employee suffered from depression; showed a persistent pattern of absenteeism and tardiness
- Employee was put on probation; after additional absences she stated she was “depressed again”
- Two days later employee was terminated; sued under ADA and FMLA
- Court held that employee’s statement she was “depressed again” was potentially valid request for FMLA leave

# Stevenson v. Hyre Elec. Co. (7<sup>th</sup> Cir. 2007) 505 F3d 720

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## **Abnormal behavior may constitute “constructive notice”**

- Employee did not have prior performance issues
- Started behaving erratically after stray dog entered the workplace
- Yelled and cursed at supervisor and called police after her belongings had been moved to a different desk
- Employee’s unusual conduct could be construed as constructive notice of her need for FMLA leave

# Medical Certification

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- Employer may require medical certification to certify the need for FMLA
  
- Medical certification to include:
  - Date on which the serious health condition commenced;
  - The probable duration of the condition
  - Medical facts to support the need for leave
  - Employee cannot perform the essential functions of the job
  
- Generally, employer may not request additional information
  - Inquiry limited to authentication or clarification
  - Following written notice

# FMLA; Unpredictable Absences

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## *Collins v. NTN-Bower Corp. (7th Cir. 2001) 272 F3d 1006*

(unscheduled and unpredictable absences may not be protected):

- Plaintiff was terminated from her employment due to repeated attendance issues
- Plaintiff was incapacitated by depression 10%-20% of the time; episodes occurred without warning
- Court: FMLA did not have “much to offer” to Plaintiff
- “Courts have been reluctant to read the FMLA as allowing unscheduled and unpredictable, but cumulatively substantial, absences, when the [ADA] protects only persons who over the long run are capable of working full time.”

# FMLA; Forced Leave

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*Sista v. CDC Ixis North America, Inc.*, (2<sup>nd</sup> Cir. 2006) 445 F.3d 161  
(forced leave did not violate FMLA):

- Plaintiff was demoted after he made a threatening remark to a subordinate
- After his demotion, Plaintiff became depressed; was agitated, “blew up” at his supervisors, and made other threatening remarks
- Defendant placed plaintiff on leave until a doctor would clear him back; Court held involuntary leave does not create a cause of action under the FMLA

Note: *Wysong v. Dow Chemical Co.*, (6<sup>th</sup> Cir. 2007) 503 F.3d 441:

Forcing an employee to take FMLA leave absent a “serious health condition” may create an interference claim

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# Having the hard conversations

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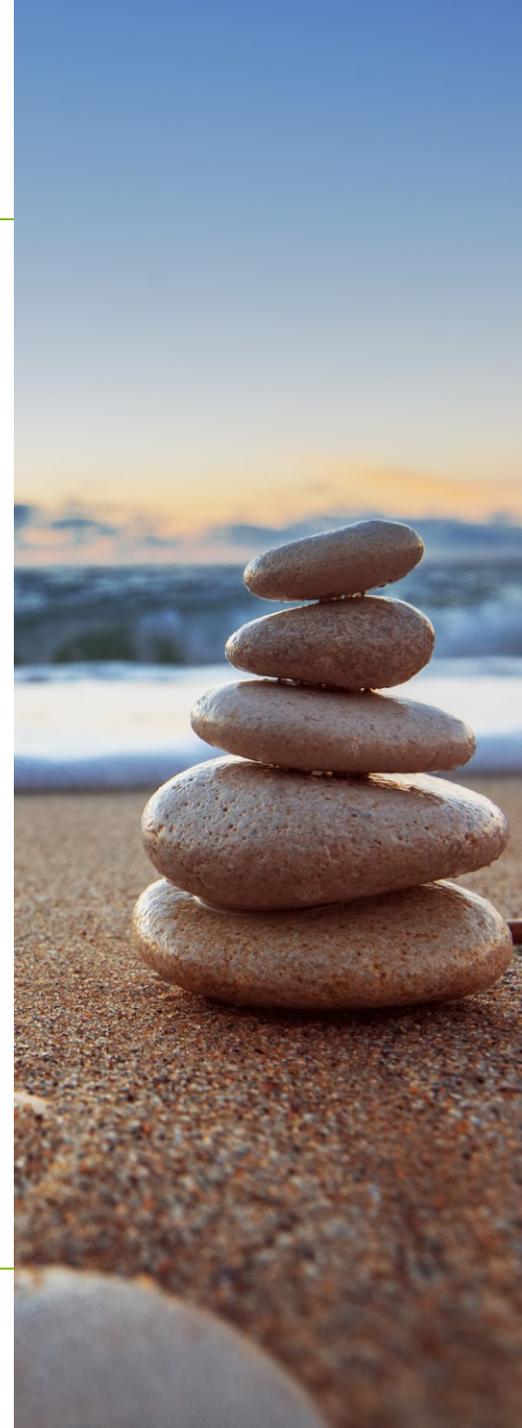
- Express empathy +
  - Examples: “I’m concerned about you,” “I’m here to listen and support you,” “I’m on your side”
- Direct conversations +
  - But note the potential risks
- Follow up
- Open a dialogue
- Address performance issues
- EAP
- Interactive dialogue and legal/policy compliance

## How to encourage self-care?

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- Establish confidential reporting procedures and procedures for help
- Reduce expectations of alcohol use at events
- Avoid rewarding extreme behavior
- Set realistic deadlines based on true needs
- Recognize personal needs and accommodate schedules and vacations when possible
- Evaluate 24/7 and face time expectations

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- Employee Assistance Program
  - Therapy: online, one-on-one, phone, group
  - Unplug – exercise, cooking, streaming, reading, find your outlet
  - Make time for reflection, meditation
  - Breathe
  - Confide in trusted friends





- Mental health is often stigmatized
- Mental health often correlated to mental illness
- We know it is important to take care of our bodies. It is as important (or more) to care for our minds.
- Going to the gym makes the body more fit; creating and going to a “gym for the mind” makes the mind fit.

# Thank You

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