ENCOMPASS MISSION

To provide employers with expert training and consulting for early identification and remediation of mental health issues in the workplace.

MENTAL HEALTH AND THE EEOC

COSTLY MISTAKES EMPLOYERS CAN AVOID
UPON COMPLETION
YOU WILL:
- Understand what constitutes a mental impairment
- Understand the changes in the Amendments Act to the Americans with Disabilities Act
- See examples of many employers who made costly mistakes
- Learn how the creation of a mental health receptive workplace can reduce your liability

FIRST, LET’S LEARN SOME OF THE TERMINOLOGY

WHAT IS THE ‘AMERICANS WITH DISABILITIES ACT’
Congress enacted the ADA in 1990 to:
"provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"
THE ADA AMENDMENTS ACT

Amendments to the Americans With Disabilities Act and Enforcement of the ADAAA By the EEOC

WHAT IS A DISABILITY

The ADA defines disability as any mental or physical impairment that substantially limits a major life activity.
WHAT IS A MENTAL IMPAIRMENT?
- an intellectual disability (formerly termed 'mental retardation')
- organic brain syndrome
- emotional or mental illness or disorder
- specific learning disabilities

WHAT IS A MAJOR LIFE ACTIVITY
The ADA, as originally enacted, did not elaborate on the term “Major Life Activity”

MAJOR LIFE ACTIVITY AND MENTAL HEALTH
ADAAA expanded the definition to include:
- Thinking
- Concentrating
- Communicating with others
- Reading
- Sleeping
AMENDMENTS TO THE ADA
The amendment also mandates liberal interpretation of “Substantially Limits a major life activity” to the maximum extent permitted by the ADA.

WHEN IS SOMEONE CONSIDERED DISABLED?
A person may be disabled if he or she:

1. has a physical or mental impairment that substantially limits one or more major life activities of an individual
2. has a record of such an impairment
3. or is being regarded as having such an impairment

Our Presentation Will Focus on Mental Impairments as they Relate to Mental Health.
MENTAL HEALTH DISORDERS INCLUDED BY ADA

- Mood Disorders
  - Major Depression
  - Bipolar Disorder
- Anxiety Disorders
  - Panic Disorder
  - Obsessive Compulsive Disorder
  - Post-traumatic Stress Disorder
- Schizophrenia
- Personality Disorders

IMPACT OF ENFORCING THE ADAAA

A 36% increase in disability charges since 2010

MORE IMPACT

- Disability discrimination claims have the highest median award when compared to other federal discrimination claims
- The median disability is $292,500 – which is over 18% higher than next closest type of discrimination suit
ONE EMPLOYER’S MISTAKE

- Dillard’s to Pay $2 Million to settle class action disability discrimination lawsuit by EEOC
- Department store chain policy required the disclosure of confidential medical information affecting thousands of workers

MENTAL IMPAIRMENTS ACCORDING TO THE EEOC

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

RECAP OF ADAAA’S IMPACT

- Easier for an impairment to constitute a disability
- Easier for employees to make claims for a perceived disability
- Lower threshold for finding a substantial limitation to a Major Life Activity
RECAP OF ADAAA’S IMPACT

- Impairment need not last a particular length of time to be substantially limiting
- Episodic impairments or those in remission may qualify
- An employee can be considered disabled without addressing the effects of medication or other mitigating factors

MITIGATING MEASURES

- Medication
- Use of assistive technology
- Learned behavioral or adaptive neurological modifications
- Psychotherapy, behavioral therapy, and physical therapy

SUBSTANTIALLY LIMITING MENTAL IMPAIRMENTS

- Bipolar disorder
- Major Depressive Disorder
- Post-traumatic Stress Disorder
- Anxiety Disorders
WHAT IS NOT CONSIDERED A MENTAL IMPAIRMENT?

- Normal sadness or grief
- Temporary anxiety

WHAT IS NOT CONSIDERED A MENTAL IMPAIRMENT?

- Personality conflicts at work
- Appropriate stress

MENTAL IMPAIRMENT DISCRIMINATION
ACT OF DISCRIMINATION

1. An employer may be charged if the employer or staff member in a position of authority commits an act of discrimination against an employee due to their mental impairment.

ONE EMPLOYER’S MISTAKE

- Dayton Superior Corporation to pay $50,000 to settle EEOC disability discrimination lawsuit
- Federal agency charged company fired employee because of her bipolar disorder

ONE EMPLOYER’S MISTAKE

- Gannett Companies settle EEOC disability discrimination lawsuit for almost $50,000
- Media giant fired employee who returned from leave for bipolar disorder
FAILURE TO REASONABLY ACCOMMODATE

2. An employer can be charged when the employer refuses to make reasonable accommodations to compensate for an employee’s disability.

ONE EMPLOYER’S MISTAKE

- MISO to Pay $90,500 to Settle EEOC Disability Discrimination Lawsuit
- Power Grid Operator Denied Employee Reasonable Accommodation for Postpartum Depression, Federal Agency Charged

REASONABLE ACCOMMODATION?

Determining Whether an Applicant or Employee with a Mental Impairment is Qualified for a Reasonable Accommodation
THE INTERACTIVE PROCESS

Must a Person with an Mental Impairment Request a Reasonable Accommodation?

THERE ARE EXCEPTIONS

- When the disability is “obvious”
- When the employee does not understand that he/she is disabled, or cannot articulate the need for an accommodation
- When the employer has enough information to determine that there is a disability

IS MEDICAL EVIDENCE REQUIRED?

Employer may request medical documentation of the:
- Nature
- Severity
- Duration, and
- Extent of psychological impairment
OPTIONS FOR THE EMPLOYER

- Employer may challenge the diagnosis
- Employer may request a ‘Fitness for Duty’ evaluation

ONE EMPLOYER’S MISTAKE

- Alorica Pays $135,000 to Settle EEOC disability discrimination suit
- Company’s predecessor unlawfully fired employee with bipolar disorder and depression while on short-term disability leave

SPECIAL CONSIDERATIONS

Employees with a mental health condition:
- May be reluctant to seek assistance
- May have symptoms that only manifest in behaviors and are more difficult to identify
- May have symptoms that are more episodic
- May have medication side effects
**WORK ENVIRONMENT**

3. An employer can be charged when an unsafe, unhealthy or unreasonable work environment contributes to an employee’s disability.

**AT RISK EMPLOYEES**

4. An employer can be charged when the disability of an employee puts other employees, clients/customers or associates at risk.

**THE DIRECT THREAT DEFENSE**

"A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

- Must be an individualized assessment
- Diagnosis in and of itself does not pose a direct threat
ONE EMPLOYER’S MISTAKE

- The case was resolved through a consent decree which provides for payment of $360,000 to charging party compensatory and punitive damages, $50,000 for medical expenses and $124,000 in attorney’s fees.

THE DIRECT THREAT DEFENSE & SAFETY CONCERNS

- The employer must identify the specific behavior that would pose a direct threat.
- If the essential job duties implicate the safety of others, employee always bears the burden of showing they can perform the job without posing a direct threat to others.

CAN DIRECT THREATS BE REMEDIED BY A REASONABLE ACCOMMODATION?

Factors to consider when determining if an employee poses a direct threat:
- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and,
- The imminence of the potential harm.
HOW TO AVOID DISCRIMINATION CHARGES

SOLUTIONS TO MINIMIZE RISK
1. Clearly define position descriptions
2. Create a barrier free workplace
3. Train management/supervisor/HR staff to recognize employees with a mental health condition
4. Know when and how to negotiate "reasonable accommodation"

SOLUTION: CREATE ADA COMPLIANT JOB DESCRIPTIONS
SOLUTION: CREATE A BARRIER FREE WORKPLACE

Identify and remedy workplace conditions that might cause and/or contribute to disability claims for mental impairments.

SOLUTION: TRAIN MANAGERS & SUPERVISORS

Train management supervisors and HR staff to recognize employees with a mental health condition.

BARRIER FREE WORKPLACE

- Conduct workplace assessments
- Have clear leave policies and procedures
- Create a mental health receptive workplace
FEW SUPERVISORS ARE TRAINED

Only 15% of supervisors are trained to recognize problem behaviors in the workplace.

ONE EMPLOYER’S MISTAKE

$21.7M For Panic Attack Overreaction
Valley Vista Services

A Los Angeles jury awarded a former customer service representative $5.2 million for her losses and an additional $16.5 million in punitive damages after the Rancho Cucamonga woman was fired because she suffers panic attacks.

SOLUTION: KNOW WHEN & HOW TO ACCOMMODATE
REASONABLE ACCOMMODATIONS

It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of business. Undue hardship means that the accommodation would require significant difficulty or expense.

LET’S REVIEW REASONABLE ACCOMMODATIONS

Modification of the:

- Work schedule
- Job
- Work environment

SCHEDULE MODIFICATION

Allowing a worker:

- To shift schedules earlier or later
- To use paid or unpaid leave for appointments related to their mental health problems
- To work part-time temporarily
OTHER REASONABLE ACCOMMODATIONS

- Additional training
- Modified work schedule or shift change
- A Job Coach
- Time off
- Relocation of workstation

ONE EMPLOYER’S MISTAKE

EEOC v. Starbucks Corp. (settlement agreement entered 2007)

MODIFICATIONS TO THE PHYSICAL ENVIRONMENT

- Providing an enclosed office
- Providing partitions or room dividers
- Soundproofing and visual barriers between workspaces
ONE EMPLOYER’S MISTAKE
PRESS RELEASE  12-4-13

- Direct Optical sued by EEOC for disability discrimination and retaliation
- Optical store denied employee’s request to bring her service dog to work, then fired her in retaliation

JOB MODIFICATION

- Arranging for job sharing
- Reassigning some tasks among workers
- Reassigning an employee to a new or vacant position

ONE EMPLOYER’S MISTAKE
EEOC v. United Parcel Service
(consent decree entered 2006)

The EEOC alleged that defendant failed to provide a reasonable accommodation to an employee with epilepsy, bipolar disorder, and attention deficit hyperactivity disorder, and then discharged him because he was disabled.
ONE EMPLOYER’S MISTAKE

- EEOC Sues King Soopers for discriminating against employee with bipolar disorder
- Supermarket chain failed to accommodate and fired long-term employee after she tried to use medical leave to manage her bipolar condition

NEGOTIATING REASONABLE ACCOMMODATIONS

Properly manage the interactive process of accommodating the employee

PRESENTING PROPOSED REASONABLE ACCOMMODATIONS

- Establish clear policies
- Know what is and is not a reasonable accommodation
ADDRESSING PROPOSED ACCOMMODATIONS

- Don’t automatically reject an accommodation request
- Ask the employee for details
- If unreasonable, explore alternatives
- Get “buy-in” from the employee

ONE EMPLOYER’S MISTAKE

- GGNSC Charlotte Renaissance, LLC will pay $50,000 to settle EEOC disability discrimination lawsuit
- Nursing facility refused to provide reasonable accommodation to employee with depression

ONE EMPLOYER’S MISTAKE

- EEOC Sues Bobby E. Wright Behavioral Health Center for disability discrimination
- Center fired employee after she sought medical treatment to manage depression and panic attacks.
UNREASONABLE ACCOMMODATIONS

- Ones that are incompatible with a normal work environment
- Ones that eliminate essential functions from the job
- An indefinite leave of absence
- Irregular, erratic, or unreliable attendance
- Accommodations that would threaten the viability of the employer

QUIZ:
Which of the following is not a reasonable accommodation?

- Changing an employee’s supervision
- Creating a new position for the employee
- Assignment to permanent light duty
- Providing any accommodation "carte blanche"
- Excusing prerequisites of the job, i.e., degree

THE ANSWER IS...

All of the above are not reasonable accommodations under the ADAAA according to the EEOC!
PROTECTING THE EMPLOYER

- Employers must use caution
- Have an Employee Assistance Program (EAP)
- Have sound policies and procedures
- Train supervisors

RECAP

- Don’t make the mistakes of the employers in this presentation
- Create a mental health receptive work environment through education on mental health conditions in the workplace

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- Learn how the creation of a mental health receptive workplace can reduce your liability
For more information on our Encompass Programs please visit our website:
www.encompasselearning.com

or Contact Lisa Kiner at reTRAINING MINDS
614.985.6463 lisa@retrainingminds.com

Encompass Program Authors:
Deborah Dutton Lambert, MBA, PC, CRC
Daina R. Dennis, MBA, PhD