



Welcome to the ADA Legal Webinar Series

A collaborative program between the Southwest ADA Center, Great Lakes ADA Center and members of the ADA National Network

The Session is Scheduled to begin at 2:00pm Eastern Time
We will be testing sound quality periodically

Audio and Visual are provided through the on-line webinar system. This session is closed captioned. Individuals may also listen via telephone by dialing 1-712-432-3066 Access code 148937 (This is not a Toll Free number)

The content and materials of this training are property of the presenters and sponsors and cannot be used without permission. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at webinars@ada-audio.org or toll free (877)232-1990 (V/TTY)



Listening to the Webinar

- The audio for today's webinar is being broadcast through your computer. Please make sure your speakers are turned on or your headphones are plugged in.
- You can control the audio broadcast via the Audio & Video panel. You can adjust the sound by "sliding" the sound bar left or right.
- If you are having sound quality problems check your audio controls by going through the Audio Wizard which is accessed by selecting the microphone icon on the Audio & Video panel



2

Listening to the Webinar, *continued*

If you do not have sound capabilities on your computer or prefer to listen by phone, dial:

712-432-3066
Pass Code:
148937
This is **not** a Toll Free number

3

Listening to the Webinar, *continued*



MOBILE Users (iPhone, iPad, or Android device (including Kindle Fire HD))

Individuals may listen** to the session using the Blackboard Collaborate Mobile App (Available Free from the Apple Store, Google Play or Amazon)



**Closed Captioning is not visible via the Mobile App and limited accessibility for screen reader/Voiceover users

4

Captioning



- Real-time captioning is provided during this webinar.
- The caption screen can be accessed by choosing the icon in the Audio & Video panel.
 
- Once selected you will have the option to resize the captioning window, change the font size and save the transcript.

5

Submitting Questions



- You may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area
- If you are connected via a mobile device you may submit questions in the chat area within the App
- If you are listening by phone and not logged in to the webinar, you may ask questions by emailing them to webinars@ada-audio.org

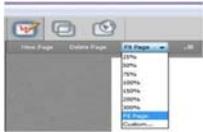


Please note: This webinar is being recorded and can be accessed on the www.ada-audio.org within 24 hours after the conclusion of the session.

6

Customize Your View

- Resize the Whiteboard where the Presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard. The default is “fit page”



7

Customize Your View *continued*

- Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or  “stretch/shrink”. Each panel may be detached using the icon in the upper right corner of each panel.

8

Technical Assistance

- If you experience any technical difficulties during the webinar:
 1. Send a private chat message to the host by double clicking “Great Lakes ADA” in the participant list. A tab titled “Great Lakes ADA” will appear in the chat panel. Type your comment in the text box and “enter” (Keyboard - F6, Arrow up or down to locate “Great Lakes ADA” and select to send a message); or
 2. Email webinars@ada-audio.org; or
 3. Call 877-232-1990 (V/TTY)

9

Workplace Accommodations for Employees with Psychiatric Disabilities

Diego Demaya, J.D.
Southwest ADA Center

10

Overview

- The principles prohibiting discrimination in the workplace under Title I of the ADA were formulated for both physical and psychiatric disabilities – yet The ADA as applied to physical disabilities tends to receive more attention.
- Approximately 44 million adults (over age 18) in the U.S. report having had a mental health condition during the past year, representing about 18.5% of the U.S. population. (National Alliance on Mental Illness, 2014)
- The workforce includes individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood – while the prevalence of employees with psychiatric disabilities continues to rise.

11

Agenda

- How the broadened definition of disability under the ADA Amendments Act (ADAAA) affects individuals with psychiatric disabilities;
- When a person with a psychiatric disability is "qualified" for a job;
- Common workplace issues involving employees with psychiatric disabilities;
- Recent cases;
- Safety issues and how "direct threat" may apply;
- Best Practices and Resources.

12

Remember the Basics

The employee must be a qualified individual with a disability to be covered by the ADA. This means that:

- The person meets the definition of disability;
- Has the requisite skill, experience, and education; and can perform the essential functions of the job with or without reasonable accommodation.
- May or may have not disclosed a disability.

13

Definition of Disability

The term "disability" means:

- (a) A physical or *mental* impairment that substantially limits one or more major life activities;
- (b) having a record of such an impairment; or
- (c) being regarded as having such an impairment.
- Notice that all three prongs of this definition can be involved in a psychiatric disability issue.

14

The ADA Covers Emotional or Mental Illness Including:

- Major depression; Bipolar disorder;
- Anxiety disorders; e.g., panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder;
- Schizophrenia, and personality disorders.
- The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) serves to identify such disorders as recognized by courts as a reference and as widely used by American mental health professionals.

15

Mental Impairments can Restrict Major Life Activities such as:

- Learning, thinking, concentrating, interacting with others;
- Caring for oneself, speaking, performing manual tasks, or working;
- Sleeping is also a major life activity that may be limited by mental impairments.

16

Disability Can be Permanent, Indefinite, or Temporary and of Short Duration

- * The ADA removed the “six month” duration rule.
- * A disability can be of short duration – e.g., leave to recuperate from a severe panic attack that compromises the ability to interact with others.
- * Surprise? An accommodation may therefore be needed for a limited time.

17

Reasonable Accommodations

- Reasonable accommodations aim to allow equal participation in the hiring process or to allow a qualified employee to perform essential job functions.
- Reasonable accommodation means any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the application process, to perform the essential functions of a job, and to enjoy benefits and privileges of employment equal to those enjoyed by all employees.

18

ADAAA Required Interactive Process

- Employers are required to engage in an *Interactive Process* with employees who disclose a disability and request reasonable accommodations.
- The *Interactive Process* is a collaborative effort to identify appropriate accommodations that employer facilitates so employee may perform essential job functions.
- Courts are required to first determine whether employer engaged in “good faith” interactive process – even before medical documentation was provided. [Nine Rules of Construction at 29 C.F.R. 1630.2(j)(1)(iii)]

19

Consistently Applied Performance Standards

- Generally the ADA does not infringe on the right of employers to define jobs and to evaluate employees according to consistently applied performance and conduct standards.
- Employees with disabilities must meet qualification standards that are job-related and consistent with business necessity.
- Sometimes a psychiatric disability may contribute to performance or conduct problems. If so, a reasonable accommodation may eliminate the problem – if the employee asks for help.

20

Job-Related Requirements or “Qualification Standards” May Include:

- Possessing specific training.
- Possessing specific licenses or certificates.
- Possessing certain physical or mental abilities; e.g., meeting vision, hearing, or lifting requirements; showing ability to run or climb; exercising good judgment.
- Meeting health or safety requirements.
- Demonstrating certain attributes; e.g., the ability to work with other people or to work under pressure.

21

Issues with Psychiatric Disabilities?

- Despite flashy headlines, there is no credible evidence that individuals with psychiatric disabilities pose a danger to others in the workplace.
- People with psychiatric disability are far more likely to be victims than perpetrators of violence.

22

Question

- Is it legal for an employer to apply the same requirements for performance of essential job functions, in terms of quantity and quality, to an employee with a disability that it applies to other employees?

23

Answer: Yes!

- Same production and behavioral standards for all employees in same job can be expected.
- A lower production standard is not required just because an employee is unable to perform or behave as expected due to a disability.
- A Reasonable Accommodation may, however, help employee meet production and behavioral standards.

24

Defense – Business Necessity

- A standard or policy that cannot be met by an employee due to a disability must be job-related and consistent with business necessity.
- This requirement ensures that the qualification standard is a legitimate measure of an individual's ability to perform an essential function of the specific position. 42 U.S.C. § 12113; 29 C.F.R. § 1630.10.
- Employer need only justify the rule on an aggregate and overall basis; i.e., showing the probability of a problem out of a pool of workers or job applicants.

25

Defense - Direct Threat

- Direct threat is a significant risk of substantial harm ... that cannot be eliminated or reduced by reasonable accommodation.
- Direct threat' must be based on an individualized assessment of the individual's present ability to safely perform essential job functions that relies on current medical knowledge and/or on the best available objective evidence.
- Four factors:
 - (1) duration of the risk;
 - (2) nature and severity of the potential harm;
 - (3) likelihood that the potential harm will occur; and
 - (4) imminence of the potential harm.
- Reasonable accommodations that would eliminate the risk of harm or reduce it to an acceptable level must also be considered.

26

Examples and Observations

- Should the corrective effects of medications be considered when deciding if an impairment is so severe that it substantially limits a major life activity?
- The ADAAA unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications. Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.

27

Example A:

- An employee was diagnosed with Major Depression for almost a month. He has been intensely sad and socially withdrawn (except for going to work). He developed serious insomnia, and has had severe problems concentrating and interacting with others. Yet, when asked by a supervisor why his work has been of poor quality along with his poor communication with coworkers, he snapped that nothing was wrong and asked to be left alone.
- What should the supervisor do?

28

Example B:

- An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, she experienced increasingly severe and frequent cycles of depression and mania; at times, she became extremely withdrawn socially or had difficulty caring for herself. Her symptoms have abated with medication, but her doctor says that the duration and course of her bipolar disorder is indefinite, although it is potentially long-term.
- The employee requests leave for 4 weeks but she is not qualified for FMLA. Should she get ADA Leave?

29

Example C:

- An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was distressed for about two months during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. He asks to work only 40 hours per week even though his employer asks that everyone in his division work at least 50 hours weekly.

30

Recommended Process:

- 1) Analyze the job and determine essential and marginal job functions. Marginal functions are tangential and should be removed as necessary.
- 2) Consult with employee to ascertain precise job-related functional limitations imposed by the disability and how to overcome them with reasonable accommodations or auxiliary aids.
- 3) Identify potential accommodations and assess the effectiveness each accommodation may have in enabling the employee to perform essential job functions without causing "undue hardship" on business operations.

31

Practical Reminders Part 1:

- 1) Realize that individuals with psychiatric disabilities may require occasional leave to address emotional, stress, or medication-related issues.
- 2) Realize that many individuals with diagnosed mental impairments will be highly hesitant to disclose a psychiatric disability due to negative stereotypes, stigma, and flashy news headlines.
- 3) Keep medical disclosures confidential.

32

Practical Reminders Part 2:

1. Get Past the Definition of Disability – any substantially limiting condition will likely be covered.
2. Make Decisions That Are Job-Related and Consistent with Business Necessity with good documentation.
3. Train Front line Managers, Supervisors, and Employees to be sensitive and aware.
4. Stop being afraid to work with people who have a psychiatric disability – the disability population is the only minority group that anyone can join at any time.

33

Questions?



34

Contact Your Regional ADA Center

- TOLL FREE – (800) 949-4232
- To contact Diego-
- WEB: www.SouthwestADA.org
- Local Phone: (713) 520-0232
- Diego Demaya – (713) 797-7114
- E-Mail: diego.demaya@memorialhermann.org

35

Session Evaluation

Your feedback is important to us

You will receive an email following the session with a link to the on-line evaluation



36



Next ADA Legal Webinar Session

May 18, 2015

Higher Education and the ADA:
Barry Taylor and Rachel Weisberg



37
