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

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## Listening to the Webinar, *continued*



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## 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”



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## “A Review of the Greatest Hits of ADA Employment Law and Case Updates”

Diego Demaya, J.D.  
Southwest ADA Center

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### Two Key EEOC Publications on Psychiatric and Emotional Disorders



- 1) EEOC Enforcement Guidance – The ADA and Psychiatric Disabilities:  
<https://www.eeoc.gov/policy/docs/psych.html>
- 2) Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights:  
[https://www.eeoc.gov/eeoc/publications/mental\\_health.cfm](https://www.eeoc.gov/eeoc/publications/mental_health.cfm)

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### ADA and Psychiatric Disabilities-1



- 1997 Enforcement Guidance – A detailed overview consistent with ADAAA;
- Reviews definition of disability, disclosure, and Reasonable Accommodation;
- Addresses Conduct, Job Performance, Discipline, and Direct Threat;
- Relevant situational examples;
- Reminds that Reasonable Accommodation is “prospective” whereas past misconduct based on disability may not be excused.

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## ADA and Psychiatric Disabilities-2

Question:

May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?



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## ADA and Psychiatric Disabilities-3

Illustration:

An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and minimal contact with other employees. Over several weeks he comes to work appearing disheveled, wearing ill-fitting and torn clothing. He has become increasingly anti-social. Coworkers complained that when they try casual conversation, he walks away or gives a rude reply. He is abrupt and rude when talking to co-workers. His work, however, has not suffered.



The company handbook states that employees should have a neat appearance at all times and that employees should be courteous to each other. When he is disciplined for his appearance and treatment of coworkers, he explains that his appearance and demeanor deteriorated because of his disability which was exacerbated during this time period.

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## ADA and Psychiatric Disabilities-4

- EEOC Analysis: the dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules in this situation would violate the ADA.
- CAVEAT: New 2018 NLRB rules on workplace policies may embolden employers to strictly enforce civility rules because they will likely claim that civility in the workplace outweighs protection of unacceptable disability-related conduct.

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Depression, PTSD & Other Mental Health Conditions  
in the Workplace: Your Legal Rights- 1

- In December 2016 EEOC issued user-friendly guidance to inform applicants and employees with mental health conditions about workplace rights under the ADA in response to rising mental health discrimination claims.
- The Q & A also addresses circumstances regarding confidentiality of medical information, and the process for requesting and documenting need for a reasonable accommodation.
- Web Link:  
[https://www.eeoc.gov/eeoc/publications/mental\\_health.cm](https://www.eeoc.gov/eeoc/publications/mental_health.cm)

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Depression, PTSD & Other Mental Health Conditions  
in the Workplace: Your Legal Rights- 2

- The Q&A appears to be a follow-up to the 1997 Psychiatric Disabilities enforcement guidance;
- Reminds employers and employees that decisions relating to psychiatric or other mental health disorders must be based on objective evidence, but not rely on stigma or stereotypes about a disclosed mental health condition;
- Emphasizes using “leave” as reasonable accommodation to address mental health issues; e.g., dealing with medication problems.

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Depression, PTSD & Other Mental Health Conditions  
in the Workplace:  
Your Legal Rights- 3

Cautions that a job applicant or Employee has no obligation to disclose a psychiatric or emotional disorder. But there are four situations where employer can make medical inquiry:

- 1) when an individual asks for a reasonable accommodation;
- 2) after a job offer, but before employment commences -- as long as everyone in the same job category is asked the same question;
- 3) when the employer engages in affirmative action to hire individuals with disabilities – though at applicant or employee has discretion whether to disclose;
- 4) during employment if there is objective evidence the individual is unable to perform job duties or poses a safety risk based on the mental health issue.

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Depression, PTSD & Other Mental Health Conditions  
in the Workplace: Your Legal Rights- 4

- Provides that employee may ask for accommodation, ideally before problems occur, because a change is needed due to a functional limitation caused by a disability;
- Provides that a reasonable accommodation is appropriate for a mental health condition that substantially limits the ability to concentrate, interact with others, communicate, eat, sleep, self-care, regulate thoughts or emotions, or conduct other major life activities;
- A condition is substantially limiting even if symptoms are episodic or intermittent;
- Employer must provide reasonable accommodation unless doing so causes undue hardship or the employee poses a “direct threat” to himself or others;
- E.g., if employee cannot perform essential job functions and leave will help the person become able to perform, unpaid leave may be reasonable accommodation if the employee has no paid leave.

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Depression, PTSD & Other Mental Health Conditions  
in the Workplace: Your Legal Rights- 5



Illustration:

In 2013, after the shootings at Sandy Hook Elementary School, a mentally ill school employee began to exhibit behaviors consistent with his diagnosis of bipolar disorder. Comments were made which led the employer to terminate the employee. The employee’s mental health condition allegedly played a role in the decision.

➤ EEOC analysis

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Depression, PTSD & Other Mental Health Conditions  
in the Workplace:  
Your Legal Rights VI

- A. The employee arguably was a qualified individual with a disability.
- B. The individual could perform essential job functions of a position with or without reasonable accommodation.
- C. The individual alleged that he/she was terminated not because of being unqualified, but because the employer “perceived” the individual to be a direct threat.
- D. Employer must establish that the employee poses a significant risk of substantial harm to the health or safety of himself or others that cannot be eliminated or reduced by a reasonable accommodation.
- E. Such a conclusion must be founded on medical evidence supporting the decision to terminate – not on unfounded fear or stigma.

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## Questions?



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### Analyzing National Labor Relations Act (NLRA) and Disability-Based Conduct Issues- 1

As of 2018 the National Labor Relations Board (NLRB) will evaluate two specific criteria to determine whether a particular workplace policy or rule will potentially interfere with the exercise of employee rights:

- 1) The nature and extent of the potential impact the workplace policy or rule would have on employee protected rights; and,
- 2) Whether there are *legitimate* justifications associated with the rule that would override or supersede concerns about the potential impact on employee exercise of protected rights.

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### Analyzing NLRA and Disability-Based Conduct Issues- 2

The two-pronged review criteria will be applied to Three categories of cases under which the NLRB will classify challenged workplace rules:

- 1) rules that are legal in all cases because they cannot be reasonably interpreted to interfere with workers' rights or because any interference is outweighed by business interests;
- 2) rules that are legal in some cases depending on their application; and
- 3) rules that are always illegal because they interfere with workers' rights in a way not outweighed by business interests.

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## Analyzing NLRA and Disability-Based Conduct Issues- 3

Two possible workplace misconduct scenarios:

- 1) Disability-related behavior deemed as unacceptable by employer occurred BEFORE employee disclosed a psychiatric or emotional disorder disability – will likely mean no ADA protection;
- 2) Disability-related behavior deemed as unacceptable by employer occurred AFTER employee disclosed psychiatric or emotional disorder disability – will likely merit ADA protection depending on circumstances and absence of a business necessity or direct threat.

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## Why Worry About NLRA Rights in an ADA Situation?

- Administrators may confuse well-meaning workplace civility policies as strictly protected regardless of disability-related conduct that may require review during an “interactive process” and/or pursuant to business necessity and/or direct threat.
- NLRB rule changes brought on by Presidential political appointments to the board will not likely push management to revise workplace handbooks to reflect labor rules shaped by progressive or conservative leaning labor theories.
- The NLRA is less likely to be invoked in an ADA situation and vice versa even as it applies to union and non-union work environments.

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## Seventh Circuit Court Disrupts ADA Leave



- On September 20, 2017 the U.S. Court of Appeals for the Seventh Circuit issued a significant ruling denying ADA leave as reasonable accommodation. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).
- Severson worked a physically demanding job and took 12 weeks of FMLA to deal with back pain, and on his last day of leave, he had back surgery requiring two to three more months of leave. Severson asked his employer to continue his medical leave, but the company denied his request and terminated his job and invited him to reapply when he was medically cleared.
- Several months later, Severson was cleared but never contacted the company. Instead, he sued the company for disability discrimination.

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## Seventh Circuit Holding



- The court held that Heartland Woodcraft did not violate the ADA by terminating Severson and rejected the EEOC's position that the additional 3 months of leave beyond FMLA might have been reasonable after doing an undue hardship analysis.
- Rather than considering whether the defined three-month period beyond FMLA was reasonable, the court found that "a long-term leave of absence beyond FMLA cannot be a reasonable accommodation" because an employee unable to work for a long period is unable to perform essential job functions.
- The court emphasized that the ADA defines a "qualified" individual as "any person who, with or without [a] reasonable accommodation, can perform essential job functions." 42 U.S.C. § 12111(8).
- While reasoning that the "ADA is an antidiscrimination statute and not a medical-leave entitlement," it held that the term "reasonable accommodation" was "expressly" limited to those measures that enable the employee to work. Thus, an employee needing long-term medical leave cannot work and would not be deemed as a qualified individual with a disability under ADA.

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## Take Away on ADA Leave in 2018 and Beyond

- Employers justifiably consider "regular and predictable attendance" to be an essential job function, and thus, there is a natural tension between this general rule and the provision of leave as an accommodation, especially if the leave goes beyond FMLA and/or employer-provided leave.
- Federal courts continue to generally reject attempts by plaintiffs to claim that an indefinite leave of absence is a required reasonable accommodation under the ADA.
- These cases illustrate the importance of updated medical information from employees nearing the end of FMLA or other medical leave.
- If employee's physician is unable to specify a date of return to work close to expiration of ranted leave, employers have greater legal flexibility in determining whether or not to accommodate an ADA request for more leave.

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## Are You Affected by an EEOC Lawsuit or Settlement?

- The EEOC has a number of on-going lawsuits and settlements. They are looking for people who may have been affected by the unlawful discrimination alleged in these suits:
- EEOC v. Lowe's Home Centers, Inc., or Lowe's HIW – settlement Termination for exceeding the maximum amount of leave available.
- Federal Express Ground Package System, Inc. – litigation Discrimination against current and former deaf and hard-of-hearing Package Handlers and applicants for the Package Handler position.(ASL video available.)
- USPS - settlement, federal sector employees only Disability discrimination against employees in permanent rehabilitation positions.

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## Available EEOC Assistance for Small Businesses

- The EEOC provides services For small employers who do not have a human resources department or a specialized EEO staff.
- Small Employers with questions about the laws enforced by EEOC or about compliance in specific workplace situations may contact a Small Business Liaison for assistance.
- An SBL may be located here:  
<https://www.eeoc.gov/employers/contacts.cfm>

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## I Want to File a Complaint - 1

- Individuals may submit an Online Inquiry with EEOC, and after responding to five general questions, the EEOC will evaluate the information and advice on what it can do to help -- including assisting with filing a charge of discrimination to determine whether there is reasonable cause to believe that discrimination has occurred.
- The system enables individuals to digitally sign and file a charge prepared by the EEOC, upload documents, and update contact information.



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## I Want to File a Complaint - 2



- An online inquiry IS NOT an online complaint.
- A charge of discrimination is a signed statement asserting that an organization engaged in employment discrimination.
- A filed charge asks EEOC to take remedial action.
- The laws enforced by EEOC require you to file a charge before you can file a discrimination lawsuit in court.
- To submit an inquiry go to:  
<https://publicportal.eeoc.gov/portal/ShowForm.aspx?templateId=129#mainContent>

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Questions?



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### Contact Your Regional ADA Center

- TOLL FREE – (800) 949-4232
  - WEB: [www.adata.org](http://www.adata.org)
- To contact today's presenter, Diego Demaya
- WEB: [www.SouthwestADA.org](http://www.SouthwestADA.org)
  - Local Phone: (713) 520-0232
  - Direct: (713) 797-7114
  - E-Mail: [diego.demaya@memorialhermann.org](mailto:diego.demaya@memorialhermann.org)

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You will receive an email following the session with a link to the on-line evaluation. Your feedback is important to us!

Join us for our next session:

*“Disability Related Questions and Medical Exams”*

**September 12, 2018**



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