

## Labor and Employment 2019 Symposium

### Compassion and Compliance: Leave and Accommodation Issues When Employees Experience Mental Health Conditions

#### Speakers

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#### Materials

1. PowerPoint Presentation

# ahead of the curve

Workplace law trends for today and beyond.  
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## Compassion and Compliance

### Leave and Accommodation Issues When the Disability is a Mental Health Condition

#### Meet the Speakers:

Anna Hickman, Corporate Counsel, Red Wing Shoe Company

Aaron Goldstein, Dorsey & Whitney *[unable to travel due to weather]*

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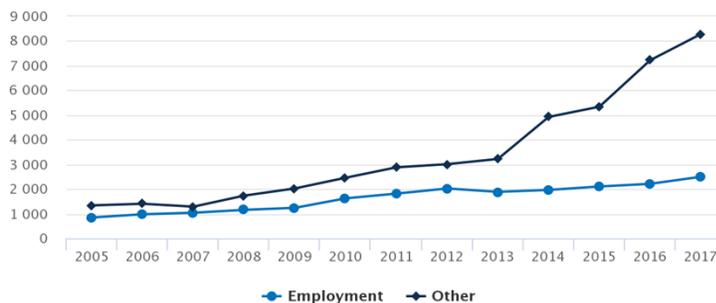


1

## Federal Employment Claims Under the ADA Increased 32.4% From 2013 to 2017

United States Federal Court: <https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act>

Figure 2. ADA Civil Rights Cases, by Type, 2005 – 2017



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017.

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Highcharts.com



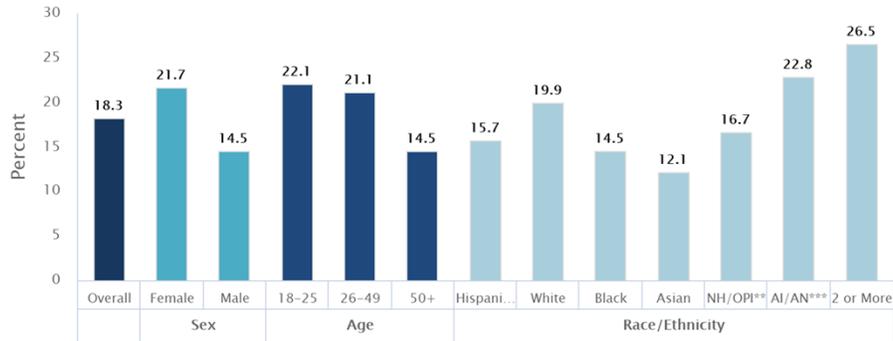
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## Each Year, Mental Illness Affects 1 in 5 Adults in U.S.

<https://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among-us-adults.shtml>

Past Year Prevalence of Any Mental Illness Among U.S. Adults (2016)

Data Courtesy of SAMHSA



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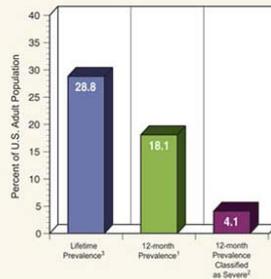
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## Over 1 in 4 U.S. Adults Experiences a Mental Illness in Their Lifetime

<https://www.nimh.nih.gov/health/statistics/prevalence/any-anxiety-disorder-among-adults.shtml>

### Prevalence

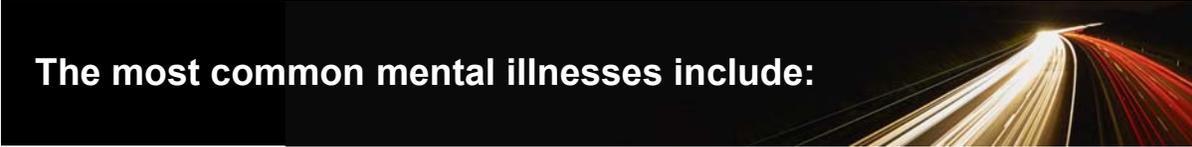
- **12-month Prevalence:** 18.1% of U.S. adult population<sup>1</sup>
- **Severe:** 22.8% of these cases (e.g., 4.1% of U.S. adult population) are classified as "severe"<sup>2</sup>



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4



## The most common mental illnesses include:

- Depression
- Bipolar disorder
- Panic disorder
- Obsessive-compulsive disorder
- Post-traumatic stress syndrome
- Generalized anxiety disorders
- Eating disorders
- Attention deficit hyperactivity disorder
- Autism
- Schizophrenia
- Alzheimer's disease

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5



## Current Issues in Failure to Accommodate Claims

- Of the 201 total lawsuits filed by the EEOC on behalf of claimants in 2017, 76 (38%) involved claims under the ADA.
- Mental health conditions are the second most common condition cited in EEOC Charges of Disability Discrimination.
- Unemployment rate for individuals with mental health conditions is 3-5 times higher than for those without a mental health condition.

Source: National Institute of Mental Health

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6

## ADAAA Definition of “Disability” as Applied to Mental Health Conditions

- Definition of “physical or mental impairment” expressly includes “any mental or psychological disorder” and any “emotional or mental illness.”
- “Major life activities” include (among others) caring for oneself, learning, concentrating, interacting with others, communicating, working.
- Disability status is assessed without regard to mitigating measures, including medication.
- **Bottom line** – definition of “disability” is very broad as applied to mental health conditions. Focus on reasonable accommodation.

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7

## Disability-Related Inquiries into Mental Health Conditions

### When can an employer ask a current employee about a mental health condition?

- **When the employee requests reasonable accommodation and the need for accommodation is not obvious.**
- **When the employer reasonably believes, based on objective evidence:**
  - that the employee is unable to perform the essential job functions due to a disability; or
  - that the employee will pose a direct threat to self or others.

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8

## Failure to Accommodate Claims

1. Individual was a qualified employee with a disability.
2. Employee/applicant informed or otherwise made employer aware of disability and need for accommodation.
3. Employer failed to engage in interactive process in good faith or reasonably accommodate the employee.

## Reasonable Accommodation Core Principles

- In general, onus is on the employee to *request* reasonable accommodation.
- Request for accommodation can be made in “plain English.”
- Employer need not necessarily provide the employee’s preferred accommodation if an alternative accommodation is effective and reasonable.
- The duty of reasonable accommodation is prospective, not retroactive.

## What Qualifies As a Request for Accommodation?

- **Generally the employee must make the employer aware of a need (i.e., request) for accommodation.**
  - Individuals may use “plain English” and need not mention the ADA or “reasonable accommodation.”
- **However, employers may be “on notice” of open and obvious needs for accommodation, even without an explicit request.**
  - Employers should not ask employees if they are disabled.
- **Employers must follow up with employees who self-identify as disabled/requiring accommodation on OFCCP forms.**

## Notice of the Disability Examples:

The following statements would put an employer on notice that there may be a disability issue:

- An employee asks for time off because he is “depressed and stressed.”
- An employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of medical treatments I’m undergoing.”
- An employee tells his supervisor, “I need six weeks off to get treatment for a back problem.”

## Request for Accommodation – It Doesn't Have to Be a “Request”

- **Telecommuting**

- *Fuller v. Interview, Inc.*, 2014 WL 2601376 (S.D.N.Y. May 14, 2014)

- While on paid medical leave, a salesperson asked her assistant to send files home so she could work from home.
  - Employer refused and temporarily reassigned her accounts.
  - When the employee returned, the employer terminated her in connection with alleged fraudulent expense reports.
  - The employee brought a failure to accommodate claim based on the employer's refusal to allow her to work from home.
  - The court denied the employer's motion for summary judgment, holding that a reasonable fact finder could conclude Plaintiff made an accommodation request when she asked her assistant to send work home.

## When is an Accommodation Reasonable?

In practical terms, an employer must justify its decision to reject an accommodation by pointing to the economic bottom line.

- How much is the accommodation actually going to cost the company?
- This can include the cost of disruption in the workplace—to co-workers or processes—but the disruption should be boiled down to its economic impact.
- If at the end of the day, it won't significantly damage the bottom line, it is probably not an undue hardship.

## Potential Examples of Reasonable Accommodation for Mental Health Conditions

- **Leave of absence**
  - Possibly in excess of what is allowed under the FMLA
- **Modification of workplace policies**
  - E.g., exception to “no-fault” attendance policy
- **Flexible work-schedule**
- **Working from home**
- **Adjustment of supervisory methods**
- **Provision of a job coach**
- **Reassignment**
- **Any other measure that enables the employee to perform his/her essential functions and does not cause undue hardship**

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15

## Flex Schedules *Solomon v. Vilsack*, 763 F.3d 1 (D.C.C. 2014)

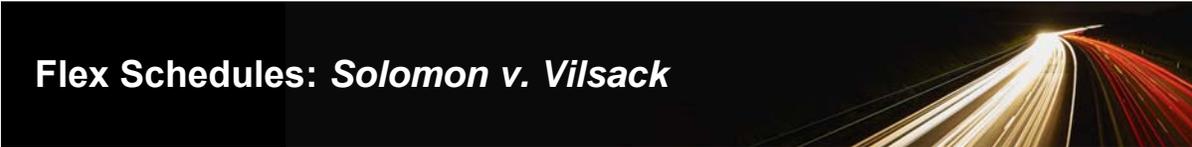
### Facts:

- **Plaintiff was a budget analyst in the Department of Agriculture. She had a long history of depression.**
- **Her condition often made it difficult to get out of bed, and at other times, difficult to work into the afternoon.**
- **Solomon informally worked early and late to make up for those times and never missed a deadline.**
- **Eventually, Solomon formally requested a “fluctuating work schedule,” with support from a doctor’s note.**

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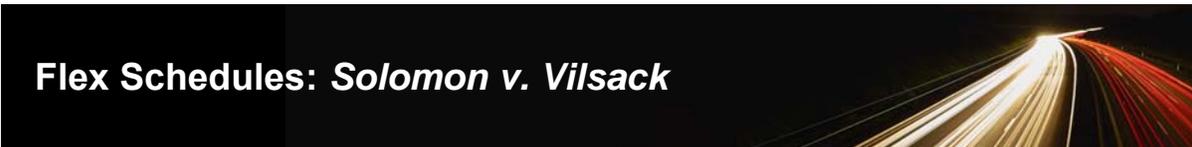


16



## Flex Schedules: *Solomon v. Vilsack*

- Around the same time, Solomon filed an EEOC grievance after the Department had charged her with being absent for 1.5 hours during her informal fluctuating schedule period.
- The Department eventually rejected Solomon's request for a fluctuating schedule.
- When Solomon attempted to work late, as she had been doing, her supervisors refused to allow her to work past 6 p.m., and then subsequently requested additional medical documentation.



## Flex Schedules: *Solomon v. Vilsack*

- **Holding:** Summary judgment denied to employer on both discrimination and retaliation claims.
- Reversed district court's decision that a "maxiflex" flexible schedule was unreasonable as a matter of law, holding that whether a given accommodation is reasonable is a factual inquiry appropriate for the jury.
- Evidence that Solomon had previously worked late raised issue of whether subsequent refusal to allow her to work past 6 p.m. was retaliatory.

## Working From Home and Informal Accommodations

*Moebius v. Tharperobbins Co.*, 2016 WL 6476941 (D. Mass. Nov. 1, 2016)

### Facts:

- Plaintiff told his former supervisor that he sometimes needed to work from home due to severe depression.
- Plaintiff's former supervisor allowed it for years.
- HR never notified, but handbook said employees can request accommodations from supervisor.
- New supervisor took over and fired Plaintiff in part for "not being in the office consistently."

### Held:

- Plaintiff could perform the essential functions of the job with the reasonable accommodation of working from home.
- Absenteeism does not justify a termination where the absence was a requested accommodation.

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19

## The Interactive Process – The Key Mechanism

- **“Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.”**
  - Reasonable accommodation must be effective, in enabling the employee to perform the duties of the position.
  - Interactive process requires “communication and good-faith exploration of possible accommodations” between employer and employee; neither side can delay or obstruct the process.
  - Failure to engage in the interactive process in good faith can result in liability if a reasonable accommodation would have been possible.

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20

## Navigating the Interactive Process



### Avoid Ultimatums

- **Never tell an employee out of the gate “here is all we are willing to do.”**
  - Even if the accommodations you mandate are reasonable, you’ve failed the “interactive” portion of the process.
- **Don’t offer up everything you are willing to do all at once.**
  - First offer the standing desk, if that doesn’t do it, offer the extra breaks, if that doesn’t do it, offer the fancy chair... etc.
- **Even if the employer offers a reasonable accommodation, the employee can recover lost wages and attorney fees if the employer doesn’t properly engage in the interactive process.**

## Navigating the Interactive Process



### What does the interactive process require?

- **Direct communications between the employer and the employee to explore possible accommodations in good faith. This requires a give and take between the employer and the employee.**
- **The employer must consider the employee’s requests.**
- **The employer must offer accommodations that are reasonable and effective if any such accommodations exist.**
- **The employer cannot give up on the first (or second) try.**

## The Interactive Process - Mental Health Issues

### *Miles v. Northcott Hosp. Int'l, LLC, 963 F. Supp. 2d 878 (D. Minn. 2013)*

**Q: Did you ever engage in any sort of interactive process with Ms. Miles to determine whether working at home could be an option or did you just blanketly say no?**

**A: Blanketly say no. I wanted her to work from the office, yes.**

...

**Q: Did you ever engage in an interactive process with Ms. Miles to determine whether she could, in fact, work from home and still complete all of her tasks?**

**A: Short answer, no.**

**Q: Did you ever consider restructuring Ms. Miles' [sic] job to accommodate her?**

**A: No.**

**Q: Did you ever consider maybe a part-time or a modified work schedule to accommodate her disability?**

**A: No.**

## The Interactive Process - Mental Health Issues

### *Miles v. Northcott Hosp. Int'l, LLC, 963 F. Supp. 2d 878 (D. Minn. 2013)*

- “Company culture” to work from the office.
- If Plaintiff’s request was granted, others would have to be allowed to work from home as well.
- No consideration given to restructuring the job or work schedule to accommodate disability.

#### Holding:

- A reasonable jury could find that working from home was a reasonable accommodation and not an undue hardship.
- A reasonable jury could find that the employer did not make a good-faith effort to assist the Plaintiff in seeking an accommodation.

## Mental Health Issues – Misconduct

- **The ADA does not obligate employers to ignore an employee's misconduct, even when it is attributable to a disability.**
  - *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435 (8th Cir. 2007)
- **Threatening other employees, for example, is not protected under the ADA, even if it stems from a mental health disorder.**
  - *Mayo v. PCC Structural, Inc.*, 795 F.3d 941 (9th Cir. 2015)
- **Appropriately managing stress and interacting with others is an essential function of almost all jobs.**

## Mental Health Issues – Interpersonal Issues and Differential Treatment

***Ward v. Dist. of Columbia*, --- F. Supp. 3d ---, 2016 WL 5674736 (D.D.C. Sept. 30, 2016)**

- **Plaintiff diagnosed with major depressive disorder, post-traumatic stress, anxiety, and panic disorders.**
- **Had mental breakdown after coming into contact with one of two alleged former harassers (coworkers), and took extended leave of absence.**
- **Plaintiff's therapist:**
  - **No more than 8 hours a day**
  - **No nights because working on normalizing sleep patterns**
  - **Proposed particular work hours and transfer to another position**

## Mental Health Issues – Interpersonal Issues and Differential Treatment



- In preparation for her return, plaintiff requested accommodations, including:
  1. to avoid work that placed her in contact with the alleged harassers;
  2. liberal leave for medical appointments; and
  3. exemption from the mandatory overtime policy.
- Employer denied exemption from overtime requirement (even though exemptions routinely granted to others)
- Instead proposed a midnight shift so no contact with harassers and no need for medical leave.

## Mental Health Issues – Interpersonal Issues and Differential Treatment



### HELD:

- Overtime not an essential function of the job when other employees exempt from mandatory overtime policy;
- Proposing midnight shift did not satisfy the requirements of the ADA because the employer failed to engage in the interactive process and could not show that the plaintiff's suggested shift schedule was an undue hardship;
- It was the employer's duty to determine whether there were any vacant positions for which the plaintiff was qualified.

## Practical Guidance

### 1. Carefully Identify Essential Job Functions

- a. While employers generally can identify what functions of the job are “essential,” (e.g., determine whether on-site attendance is “essential”), employers must do so genuinely and in good faith.
  - For example, past history of allowing employees to work from home indicates attendance may not be “essential”
- b. Make sure that designation of job function as “essential” is job-related, uniformly enforced, and consistent with business necessity.
- c. Employers are not required to eliminate or reallocate essential functions.

## Practical Guidance

### 2. Document accommodation requests and the interactive process.

- If an employee requests accommodations, document the dates of the requests and the dates of any accommodations provided.
- If an unreasonable request is made, the employer should provide a thoughtful statement as to why it is not honoring the request.
- Ensure that the people who need to know about the accommodations are informed.

## Practical Guidance

### 3. Consider all proposed accommodations carefully

- Resist urge to dismiss proposed accommodations out of hand.
- Meet with the employee before decisions are made regarding accommodations.
- Ask questions and look for alternatives.
  - Informal accommodations in the past?
  - Exceptions to work policies made for other employees?

## Practical Guidance

### 4. Do not inadvertently penalize the employee requesting accommodation.

- Do not place obligations on the employee that would not exist if the employee was not disabled and requesting accommodation.
- If you make an exception to a work policy for similarly situated employees, you will likely need to make the same exception when it is requested as an accommodation.

## The “Regarded As Disabled” Trap

The ADA prohibits discrimination against those who are disabled *and* those with a history of disability or who are perceived as disabled.

- A person may be “disabled” if he or she has a history of a disability, such as cancer that is in remission.
- A person may be disabled if he is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he does not have such an impairment).

## The “Regarded As Disabled” Trap

### Practical tips:

- Do not refuse to put employees in positions or refuse to give them long term projects because of a history of disability.
- Be aware if an employee’s coworkers make comments that suggest the employee is perceived as disabled.

## Retaliation: A Point That Bears Repeating

**We all know that employer cannot take a negative employment action because an employee has complained about disability related issues.**

**However, retaliation claims are very easy to fall into and it is a point that bears repeating.**

**Once an employee has raised a disability related issue any negative employment action could be considered retaliation. Accordingly, any negative employment action should be carefully scrutinized.**

## Retaliation: A Point That Bears Repeating

**Remember that “negative employment action” is a very broad term. It includes any negative decision regarding:**

- **Pay, hiring, firing, promotions, demotions, job assignments, training, leave, lay-off benefits.**
- **Even little decisions like whether to give overtime or to provide schedule flexibility can give rise to retaliation claims—especially where the employee quits shortly afterwards.**

## Retaliation: Practical Tips

### Practical tips:

- HR should be consulted before disciplining an employee who has recently raised a disability issue;
- Do not enforce the rules any more strictly after an employee complains about discrimination; and
- Carefully document all performance issues, but again, all negative employment actions, no matter how minor, should go through HR.

## Discipline and Disability Another Potential Pitfall

Employers must be careful when disciplining employees for conduct that could be related to a disability.

*Gambini v. Total Renal Care, Inc.* (9<sup>th</sup> Cir. 2007)

- When confronted by her supervisors regarding her performance issues, plaintiff cried, threw the performance improvement plan across the desk, directed a “flourish of several profanities” at her supervisors, and continued kicking and throwing things once she returned to her cubicle.

## Discipline and Disability Another Potential Pitfall

### *Gambini v. Total Renal Care, Inc.* (9<sup>th</sup> Cir. 2007)

- The Ninth Circuit held that the trial court should have issued a jury instruction that “[c]onduct resulting from a disability is part of the disability and not a separate basis for termination.”
- Employers should proceed with caution whenever contemplating discipline or discharge of an employee for misconduct associated with a known disability.
- Termination or other discipline is appropriate only when the employer has already provided a reasonable accommodation, or when a reasonable accommodation is unlikely to prevent future misconduct.

## Discipline and Disability Another Potential Pitfall

### Switch gears from the language of discipline to the language of essential functions.

- Trade “corrective action up to and including termination” for “we need to determine if there are any accommodations that would allow you to perform your job’s essential functions.”
- ...*unless* performance issues are clearly unrelated to request for accommodation.
  - *E.g.* a request for a larger monitor due to poor vision, followed by yelling at a customer.

## What To Do If Performance Could Be Related To Disability

- You can require a medical examination by an appropriate health care specialist with job description.
- Remember the purpose: to identify the person's abilities, limitations, and health risks, NOT to define the nature or extent of the disability

## What To Do If Performance Could Be Related To Disability

- **Healthcare practitioner's role:**
  - To define employee's abilities
  - To define limitations in relation to a particular job
  - To identify health and safety risks
- **Manager's role:**
  - To identify and make reasonable accommodations
  - To include an analysis of essential functions
  - Remember your resources
- **Communicate with the physician in writing**
- **Get medical information by letter after obtaining a release/consent from employee**

## Questions & Discussion

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