



# Disability Accommodations and Mental Health/Neurodivergence in the Workplace

Wednesday, November 20, 2024

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# Agenda

- Legal Overview - Definition of Disability in Context of Mental Health
- Legal Overview - Reasonable Accommodations and Leaves of Absence
- Legal Overview – Interactive Process, Direct Threat, “Counterfeit Deviance”
- Neurodivergence in Context of Disability Law
- Breakout Sessions/Discussion

# Legal Overview

## DEFINITION OF DISABILITY UNDER THE LAW

- Employee has an actual impairment that
  - › substantially limits one or more major life activities (broadly defined, to include working);
  - › significantly impairs physical or mental health; or
  - › requires special education, vocational rehabilitation, or related services
- Employee has a history or record of such an impairment
- Employee is (even inaccurately) ***regarded as or perceived by*** others as having any physical or mental impairment

# Legal Overview

## *Food for thought*

“Disability is not caused by a condition. It is caused when society fails to accommodate the needs of that condition” – Daniel Wendler, Psy.D.

# Legal Overview

## *Conditions Presumed to Be Disabilities*

### MHRA:

- absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; intellectual disability; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury

### EEOC adds:

- post-traumatic stress disorder, autism, cerebral palsy, deafness or hearing loss, blindness or low vision, mobility disabilities such as those requiring the use of a wheelchair, walker, or cane, intellectual disabilities, major depressive disorder, and traumatic brain injury

### Others:

- allergies (including latex), bunions, phobias, Alzheimer's...

# Legal Overview

## *Conditions Presumed to Be Disabilities*

- Mental Health Conditions as “Disabilities”
  - › Movement to characterize neurodivergence as “identity” and not “disability.”
  - › Currently, qualifies as disability.
    - Autism Spectrum, ADHD, Dyslexia, etc.
    - Bi-Polar Disorder, Borderline Personality Disorder, Schizophrenia, Dissociative Identity Disorder
    - Major Depressive Disorder, GAD, OCD
- What is difference between neurodivergence and mental illness?

# Legal Overview

- Law does not prohibit an employer from declining to hire or terminating an applicant or employee because of their disability if the individual is not “qualified”
- Qualified =
  - › Meets legitimate skills, experience, education and other requirements of the position
  - › Can perform the **essential functions** of the job sought or held, **with or without reasonable accommodation**
  - › **What are considered essential functions?**
    - In-office work?
    - Strict working hours, including set break times?

# Legal Overview

## Essential v. Marginal Job Functions

- Essential functions are the fundamental duties – if individual is unable to perform one of them, even with reasonable accommodation, individual is not qualified
- But whether a job function is essential is often disputed
  - › Job description matters, but does not control
- Consider:
  - › Whether the job exists to perform the function
  - › Amount of time spent performing the function
  - › The consequences of the function going undone
  - › The terms of a collective bargaining agreement
  - › Others' work experience



# Legal Overview

## Function and Manner Are Not the Same Thing

- Certain job functions are typically accomplished the same way.
  - › To retrieve something on a high shelf, most use a ladder
  - › To send emails, most type with fingers
  - › To travel to different work locations during the day, most drive
- Policies, available equipment, work environment generally set up assuming functions accomplished in most **typical** manner – **typical** is often set by the individual workplace.
- Be careful not to conflate the job function with the way it's **typically** performed.
  - › Essential function is communicating with others in writing, not typing
  - › Essential function is meeting certain deadlines, not how or when the work is performed to meet those deadlines
  - › Essential function is partial in-office work, not in-office work in an open concept office space with fluorescent lighting, no soundproofing and no noise-canceling headphones allowed.
  - › Essential function is working well as a team, not “making eye contact.”

## Leave of Absence as Reasonable Accommodation

- If employee is unable to work due to a “disability” and FMLA is not available (*e.g.* employee does not yet qualify or has exhausted), employer must consider whether leave – continuous or intermittent – is a reasonable accommodation
- Leave will generally be reasonable if it is likely to be effective, enabling employee to return to work
- There is no bright line rule about how much leave is reasonable and, in fact, maximum leave policies (*e.g.* policy that employees are terminated if unable to return 30 days after expiration of FMLA) are *per se* unlawful
- Like any accommodation, leave and leave extensions may be denied if employer can provide undue hardship
- Indefinite Leave is NOT reasonable
  - › How to tell when it is indefinite? 3 months, 6 months, 1 year?

# Leave of Absence as Reasonable Accommodation

- Indefinite Leave Continued – common issues
  - › Extremely rare that a doctor’s note will say “indefinite leave required.”
    - “Estimated” return to work
    - Follow-up appointment scheduled for . . .
  - › Addressing the non-responsive healthcare provider.
  - › What to do?
- Interactive process with leave – not a one-way street.

# Reasonable Accommodations Informal Interactive Process

Notice of  
impairment and  
request for  
accommodation

Dialogue to  
understand  
limitations and  
identify potential  
accommodations

If / when effective  
accommodation  
identified,  
employer  
implements

# Retaliation and Performance Management Common But Tricky Issues to Navigate

- The post-PIP request for accommodation, complaint of retaliation.
- Last-ditch effort to avoid PIP or termination with complaint of retaliation of request for accommodation.
  - › Do we halt everything? Investigate? Press on?
- Blaming protected status, disability for the performance issues cited.

# Neurodivergence in Context of Disability Law

- “The scales have tipped: the future is likely going to belong to organizations that manage to accommodate cognitive diversity proactively rather than those that fail to confront the issue, hiding behind claims of lack of expertise.”
- Dr. Maureen Dunne, “The Neurodiversity Edge, The Essential Guide to Embracing Autism, ADHD, Dyslexia, and Other Neurological Differences” © 2024

# Neurodivergence in Context of Disability Law

- Corporate leadership needs to be educated on neurodivergence in context of accommodations.
- 1/3 of Millennials and 1/2 of Gen Z identify as Neurodivergent.
- If you've met one person with \_\_\_\_\_, you've met one person with \_\_\_\_\_.
- Movement to characterize neurodivergence as identity instead of disability – not there yet.

# Neurodivergence in Context of Disability Law

- 2020 study in UK found that 50% of employers would **not hire** a neurodivergent individual, if given the choice.
  - › Well-known individuals who are confirmed to be neurodivergent:
    - Richard Branson (Dyslexia, ADHD)
    - Anthony Hopkins (Autism)
    - Darryl Hannah (Autism)
    - Mark Zuckerberg (Autism)
    - Simone Biles (ADHD)
    - Elon Musk (Autism)
    - Eminem (Autism)
    - Dan Akroyd (Autism)
    - Albert Einstein (Suspected Autism, ADHD, Dyslexia)
    - Emma Watson (ADHD)
    - Barbara Corcoran (Dyslexia)
    - Ryan Gosling (ADHD)
    - Billie Eilish (Tourette's Syndrome)
- Estimated 50 to 60 million Americans identify as neurodivergent.
- Companies with neurodiverse management report 19% **higher** revenues than those without.



# Neurodivergence in Context of Disability Law

Why focus on this topic today?

- The topic is quickly picking up speed.
- It is important to your future leaders.
- It is good for your business.
- It is good for your employees.
- If not, your business will be behind your competitors.

# Creating a Neuro-Inclusive Workplace Through Accommodations and Understanding

- Neuro-affirming language
- Accommodations
  - › What is and is not reasonable
  - › Environment that makes requesting accommodation easy and comfortable
- Training and understanding
- Support from the top
  - › Mid-level managers will follow the lead of executive leadership

# Creating a Neuro-Inclusive Workplace Through Accommodations and Understanding

- Neuro-affirming language/terminology
  - › Autistic person, not “person with autism”
    - Identity first versus person first
  - › “high or low support needs” not “high functioning” or “low functioning”
  - › No casual use of mental health diagnoses to describe day-to-day occurrences or describe people.
    - “That’s just my OCD...”
    - “Ugh, I have PTSD from last week’s meeting...”
    - “Everyone is a little autistic...”
    - “I’m having an ADHD moment...”
    - “I’m sorry, I’m acting so bi-polar today...”
    - “He’s always so awkward; I bet he’s on the spectrum.”
    - “I’m so dyslexic today, I can’t string two words together!”

# Creating a Neuro-Inclusive Workplace Through Accommodations and Understanding

- Under law, burden is still on employees to request accommodations.
- Neuroinclusive questions in context of accommodations:
  - › What are your access/support needs?
  - › What is best form of communication for you?
  - › How do you learn best?
  - › How do you prefer to receive feedback?
  - › What is best working environment for you?

# Scenarios - Interactive

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## Scenario 1

An autistic associate attorney who also has ADHD, Reed, has worked with his supervising partner and HR to implement an accommodation that any supervising partners provide him, when practicable, at least thirty-minutes of advanced notice of any meetings related to a specific project because, due to the employee's autism, he struggles with unexpected meetings and can get flustered, upset or dysregulated. Further, the advanced notice helps accommodate his ADHD because, if Reed enters a state of hyperfocus, it is very challenging for him to break from what he is doing.

The supervising partner communicates the accommodation to other partners. One of those partners doesn't feel she has time to accommodate this and insists on an unannounced meeting with Reed, even though it is not time-sensitive, while he is deeply focused on a stressful part of his work. Reed snaps at the partner and asks if this is time sensitive, to which the partner says "it's time-sensitive because I say it is." Reed responds, "You're supposed to let me know before you want a meeting! I'm f\*\*\*ing busy with something important right now," and shuts his door in her face. The manager would like to write up Reed for insubordination.

- Is the partner allowed to write up Reed? If so, is the employer exposed to liability? What should the write-up say?
- What is the issue was time-sensitive? What if advanced notice of meetings was not an agreed-upon accommodation? Does that change your analysis?
- What if the manager did not know of the accommodation agreed upon by Reed and the other supervisor?

## Scenario 2

Andi is an employee who has been diagnosed with Generalized Anxiety Disorder and ADHD. To cope with this, she takes Adderall for her ADHD, as well as medical marijuana, both of which have been prescribed by her PCP. She tells her employer that, as an accommodation, she needs to take one pill of Adderall and one cannabis gummy per day shortly before lunchtime. The employer refuses due to its policy against usage of controlled substances during the workday. The employee contests this, arguing that the cannabis and Adderall have been prescribed by a doctor. Employer persists in its refusal. Andi keeps working, trying her best, but is later written up for several errors due to lack of attention to detail. She claims the employer's failure to accommodate is at fault for her errors.

- What is employer's potential liability?
- Should employer have allowed her accommodations? Did both parties engage in the interactive process?
- Should employer proceed with the write-up? Why or why not? If so, what should it say?

## Scenario 3

A new patient services rep. at a hospital is trying to schedule a difficult and demanding patient who has unreasonable expectations about how quickly she should be seen. In the patient's frustration, he pounds his fist on the desk in front of the rep. The rep. then raises her voice at the patient and curses, in front of a waiting room full of other patients. You immediately pull the employee out of the waiting room area and head to a conference room with her. En route, she apologizes and explains that she has post traumatic stress disorder from her time in the military and felt triggered by the patient's rudeness.

- What kinds of accommodation(s) might this employee request or require, and are they reasonable?
- Assume the conduct is highly problematic, but not terminable and supports a final written warning. Can you issue the warning?
- Assume she was in her probationary period (so no progressive discipline required), can you terminate?
- Is the employee a "direct threat"? Why or why not?



## Scenario 4

In this employee's department, every team member is required to work every other Friday – Sunday. Employee requests an accommodation to work non-consecutive days, which interferes with their bi-weekly weekend duty. They produce medical documentation to support their disability and the need for this accommodation. You're concerned that co-workers will resent this employee being excused from working their three-day weekends, every other week.

- Is working every other weekend an essential function?
- If not, is there any undue hardship given resentment of coworkers?
- The employee can't work three-day weekends every other weekend, but the restriction doesn't prevent them from working a weekend day *every* weekend. Any reason employer can't require employee to work every Saturday while two other employees work every Friday and Sunday, respectively?

## Scenario 5

Bart takes leave under the FMLA to recover from surgery. A week before he is scheduled to return, he provides a doctor's note to employer stating that he needs another month of leave due to his major depressive disorder. The employer agrees, but a week before Bart is scheduled to return, he says he has not recovered and provides another note stating only "please allow Bart to remain on leave for another month due to a medical issue." It has now been three months since he was scheduled to return from his initial leave and Bart continues to claim he cannot return due to his mental health condition. He has repeatedly promised to provide additional documentation but claims his doctor's office is having trouble with their fax machine or is slow in responding.

- What is employer's obligation?
- Should employer terminate Bart's employment? Why or why not?
- How should employer have addressed the initial doctor's note? Second note?
- Is this an indefinite leave? What would make it indefinite?



# Presenters

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