

September 29, 2016

**DISCRIMINATION ON THE BASIS OF MENTAL HEALTH CONDITIONS UNDER  
THE ADA AND  
REHABILITATION ACT<sup>1</sup>**

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**Introduction**

The Rehabilitation Act of 1973<sup>1</sup> protects federal employees and job applicants from workplace discrimination on the basis of medical conditions, including mental health conditions which satisfy the ADA definition of disability. However, employees in the federal workplace with mental health conditions continue to experience discrimination, or are otherwise hindered from fully experiencing the equal opportunity guaranteed to them by statute. Despite the variety of approaches that the federal government has taken toward accommodation, greater flexibility is needed to provide for the unique needs and obstacles that employees with mental health conditions face in the modern workplace.

**A Brief History**

The Rehabilitation Act was created to promote the inclusion of individuals with disabilities in the federal workforce and to prevent discrimination against individuals with disabilities in federal employment.<sup>2</sup> Enacted in 1990, the Americans with Disabilities Act (ADA) similarly prohibited private sector employers from discriminating on the basis of disability.<sup>3</sup> The Rehabilitation Act was amended in 1992 to clarify that all legal standards applied under the ADA are applicable to complaints of disability discrimination brought by federal employees and applicants for federal employment.<sup>4</sup>

The ADA defines the term "disability" to mean (A) a physical or mental impairment that substantially limits one or more of an individual's major life activities; (B) a record of such

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<sup>1</sup> **Disclaimer**

The legal information in this article is intended as a general overview of this issue and is subject to change; it is not meant to serve as legal advice in any particular situation. The law is in a constant state of change as Congress amends statutes; Federal Agencies issue and amend regulations, and the courts issue decisions interpreting the laws and regulations. We recommend you consult a licensed lawyer who is knowledgeable about the area of law in question before you take action to address a legal matter.

impairment, or (C) being regarded as having such an impairment.<sup>5</sup> Subsequently, the Supreme Court issued several decisions that narrowly interpreted the term "disability." In *Sutton v. United Air Lines, Inc.*,<sup>6</sup> the Court concluded that impairments that do not substantially limit a major life activity when mitigated by medication, medical devices, or other measures do not fall within the statutory definition of "disability" and thus were not protected by the ADA.<sup>7</sup> In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>8</sup> the Court held that a claimant must be substantially limited in an activity that was "of central importance to most people's daily lives" in order to meet the definition.

Congress responded to these decisions by enacting the ADA Amendments Act of 2008 (ADAAA), which broadened the protection afforded by the ADA and the Rehabilitation Act.<sup>9</sup> The ADAAA specifically noted that the Sutton and Toyota decisions narrowed the scope of protection contrary to Congress' intention.<sup>10</sup> In response to the Sutton trilogy, the ADAAA stated that the effects of mitigating measures such as medication and other corrective devices should be ignored when considering whether a condition meets the definition of "disability."<sup>11</sup> In response to the decision in Toyota, the ADAAA provided that an impairment need not substantially limit more than one major life activity to meet the definition, and that in order to be substantially limiting, an impairment need not prevent, or severely or significantly restrict, a major life activity.<sup>12</sup> The ADAAA further provided that "[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted."<sup>13</sup>

The Commission issued regulations in 2011 to implement the ADAAA's broader definition of disability.<sup>14</sup> The Commission noted that in amending the ADA and, by extension, the standards applicable under the Rehabilitation Act, Congress reaffirmed that the primary objective of the ADA should be "whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."<sup>15</sup> The ADAAA also provided a non-exclusive list of examples of major life activities, which included lifting, walking, hearing, communicating, and concentrating, among other activities.<sup>16</sup>

### **The ADAAA Today and its Application to Employers**

The ADAAA defines a disability using a three-pronged approach. Specifically, the ADAAA provides that a "disability" includes (A) a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the

regulations as an "actual disability"); (B) a record of a physical or mental impairment that substantially limited a major life activity ("record of"); or (C) when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as").<sup>17</sup> Examples of major life activities that may be particularly relevant to individuals with mental health conditions include, but are not limited to, caring for ones' self, concentrating, thinking, sleeping, interacting with others, and the operation of major bodily functions including brain and neurological functions.<sup>18</sup>

An employee's mental health condition is often not apparent to the employer even if it satisfies the definition of "disability." A mental impairment is defined by statute as "[a]ny mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities."<sup>19</sup> Employers are generally not liable for employment discrimination if they are unaware of an employee's disability. Thus, the invisibility of mental health conditions can often make it more difficult for employees in the workplace who can feel pressure to self-disclose at an early stage. For example, in *Shealey v. Equal Employment Opportunity Commission*,<sup>20</sup> Complainant sent multiple requests to her District Director asking to be voluntarily reassigned. It was not until one month after these requests were denied that Complainant informed the Director that she was experiencing cumulative stress and was unable to maintain concentration, pace, and persistence sufficient for her challenging 40-plus-hour position thereby raising Rehabilitation Act concerns.<sup>21</sup>

### **Reasonable Accommodation**

The ADA requires an employer to provide reasonable accommodation to qualified employees with disabilities, mental or physical, unless doing so would cause an undue hardship.<sup>22</sup> A reasonable accommodation is a change in the way things are typically done at work that enables an individual with a disability to apply for a job, perform the essential functions of a job, or have equal access to the benefits and privileges of employment.<sup>23</sup> Reasonable accommodations can include modifications or adjustments to the work environment or to the manner or circumstances under which the individual's position is performed which enable the individual with a disability to perform the essential functions of the position the individual holds or desires.<sup>24</sup> Reasonable accommodation can also include modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as access to training opportunities and employer-sponsored social events.<sup>25</sup> A modification or

adjustment must also be effective in meeting the needs of the individual.<sup>26</sup> Some examples of reasonable accommodations include modifications to an employee's workstation or equipment; altered break or work schedules; telework, and reassignment to a vacant position.<sup>27</sup>

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. "Undue hardship" means a significant difficulty or expense to the employer.<sup>28</sup> Factors to be considered when determining whether an accommodation would impose an undue hardship on the employer include: (i) the nature and cost of the accommodation; (ii) the financial and personnel resources of the facility or facilities involved and the effect on expenses and resources; (iii) the employer's financial resources; (iv) the type of operation or operations of the employer; and (v) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.<sup>29</sup> Federal agencies will be unlikely to demonstrate undue hardship based on cost, and in fact most accommodations needed by individuals with mental health conditions will involve little or no cost to the agency. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship.<sup>30</sup>

### **Modified Work Environment**

Although modifying an employee's work environment seems to apply primarily to individuals with physical disabilities, reasonable mental health accommodations can also include making changes to physical surroundings. For example, a reasonable accommodation for an employee who has difficulty adjusting to alterations in his daily routine due to a mental health condition may include a permanent assignment to one location, or allowing for a transition period to adjust to a change in location.<sup>31</sup> The use of room dividers, partitions, and soundproofing or visual barriers can also accommodate individuals with limitations in their concentration, as can moving the individual away from machinery or reducing workplace noise.<sup>32</sup> In addition, an employee with a severe learning disability who has difficulty reading written memoranda may be provided with accommodations such as computer software to read the material or taped oral versions of the memoranda.<sup>33</sup>

Modifications to the way employees interact with each other should also be considered as a possible accommodation. The EEOC has noted, for example, that modification of supervisory methods may be an effective accommodation for individuals with mental health conditions.<sup>34</sup> For example, supervisors may be able to adjust the manner in which they communicate assignments, instructions, or training in a way that is most effective for the individual with a disability.<sup>35</sup> This could include communicating electronically rather than face-to-face, or in person rather than by e-mail.<sup>36</sup> Supervisors can also provide more day-to-day guidance, feedback, or structure, or break larger tasks down into smaller ones with discrete deadlines for each step.<sup>37</sup>

In *Michelle G. v. Department of the Treasury*,<sup>38</sup> the Commission found that the Agency failed to reasonably accommodate Complainant's disability (attention deficit disorder) when the Agency waited two years before meeting Complainant's request to move to a quiet work area. Complainant submitted documentation supporting her need for a quiet work area, to have work focused on the task at hand, to avoid multi-tasking when possible, and to take time to formulate ideas and readjust when moving between tasks. Nevertheless, the Agency moved Complainant to a cubicle in a high-traffic area. The Agency also failed to show that it would experience undue hardship if it modified the manner in which Complainant was expected to handle phone calls, including eliminating the requirement that Complainant summarize phone discussions within an arbitrary time frame, allowed Complainant to complete cases before receiving new ones, or gave Complainant specific directions regarding performance expectations.

### **Use of Leave and Schedule Changes**

The EEOC has stated that providing additional leave for treatment and recovery is a reasonable accommodation, absent an undue hardship on business operations.<sup>39</sup> A change in scheduled working hours can also be a reasonable accommodation.<sup>40</sup> For example, an individual with a mental health conditions may need to have a later schedule in order to perform essential job functions.<sup>41</sup> The EEOC specifically noted that this may be true because some medications taken for mental health conditions cause extreme grogginess and lack of concentration in the morning.<sup>42</sup>

In *Donovan O. v. U.S. Postal Service*,<sup>43</sup> the Commission found that the Agency failed to provide Complainant, who had Post Traumatic Stress Disorder, with reasonable accommodation. It was undisputed that Complainant could perform the duties of his

clerk position, and the only medical limitation was the hours he could work. Complainant provided a 12 and one-half hour window during which he could work eight hours. The Commission rejected the Agency's assertion that since Complainant's medical restrictions did not prohibit him from performing his job, his request to adjust the time he worked was not a request for accommodation. The Agency merely closed Complainant's request for accommodation, and the Commission found no evidence that the Agency considered the merits of the accommodation request or offered alternatives. Instead, the Agency provided Complainant with four hours of work each shift and little evidence about the position or why it was limited to four hours. The Agency failed to show that accommodating Complainant's request to work within a specified window of time would have resulted in an undue hardship.

In *Kathleen P. v. Social Security Administration*,<sup>44</sup> the Commission found that the Agency failed to provide Complainant with reasonable accommodation when it refused to allow Complainant to use one day of unscheduled sick leave every other month without providing additional medical documentation. Complainant's psychiatrist previously submitted documentation to the Agency which described Complainant's diagnosis, prognosis, the medication she was prescribed and her limitations. In addition, Complainant told the Agency that, at times, she was so incapacitated from her disabilities that she was unable to get out of bed in the morning. While the Commission noted that it would have been an undue hardship for the Agency to allow Complainant to take unscheduled leave in an unfettered manner, it found that allowing Complainant six days of unscheduled leave per year would not have been an undue hardship. The Commission further found that requiring Complainant to provide medical documentation every time she used sick leave was not an effective accommodation because it exacerbated her symptoms.

### **Reassignment**

The ADA specifically lists reassignment to a vacant position as a form of reasonable accommodation.<sup>45</sup> Reassignment must be provided to an employee who, because of a disability, can no longer perform the essential functions of his or her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.<sup>46</sup> An employee must be qualified for the new position, that is, he or she must have the requisite skill, experience, education and job-related requirements.<sup>47</sup> Reassignment is considered the reasonable accommodation of last

resort.<sup>48</sup> Reassignment is required only after it has been determined that there are no effective accommodations that will enable an employee to perform the essential functions of her current position or all other reasonable accommodations would impose an undue hardship.<sup>49</sup>

In *Bart M. v. Social Security Administration*,<sup>50</sup> Complainant was diagnosed with anxiety and attention deficit disorder (ADD) which substantially limited his ability to concentrate and think. Complainant informed the Agency that co-workers and supervisors had been harassing him and that the harassment affected his ability to learn and perform his job, and requested a transfer to another location. The Commission stated that Complainant's request for a transfer to another office location would have removed him from the harassing environment and helped him to manage stress. The Agency did not provide a reasonable accommodation to Complainant that was effective, or that enabled him to perform the essential functions of his position, and did not show that Complainant's requested accommodations would have constituted an undue hardship.

### **Conclusion**

Individuals with mental health conditions are entitled to reasonable accommodation under the Rehabilitation Act and the ADA. Such accommodations can include modifying an employee's work environment, granting leave or schedule changes, or reassignment. Agencies should exercise greater flexibility to provide for the unique needs and obstacles that employees with mental health conditions face in the workplace.

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### **Footnotes**

<sup>1</sup> Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.*

<sup>2</sup> Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-791).

<sup>3</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213).

<sup>4</sup> Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569 § 503(b) (codified as amended at 29 U.S.C. § 791(g) (1994)).

<sup>5</sup> 42 U.S.C. § 12102(1)(A).

<sup>6</sup> 527 U.S. 471 (1999).

<sup>7</sup> See also *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (addressing medication as a mitigating measure); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (addressing an individual's ability to compensate for an impairment).

<sup>8</sup> 534 U.S. 184 (2002).

<sup>9</sup> Pub. L. No. 110-325, 122 Stat. 3553 (codified at 29 U.S.C. § 705, 42 U.S.C. § 12101 *et seq.*)

<sup>10</sup> *Id.* at § 2, 122 Stat. at 3553-54.

<sup>11</sup> *Id.*, 122 Stat. at 3556 (codified at 42 U.S.C. § 12102(4)(E)), other than ordinary eyeglasses or contact lenses.

<sup>12</sup> *Id.* at § 4, 122 Stat. at 3556 (codified at 42 U.S.C. § 12102(4)(C)).

<sup>13</sup> *Id.* at § 4, 122 Stat. at 3555 (codified at 42 U.S.C. § 12102(4)(A)).

<sup>14</sup> 29 C.F.R. Part 1630 .

<sup>15</sup> 29 C.F.R. § 1630.2(j)(1)(iii).

<sup>16</sup> 42 U.S.C. at § 12102(2)(A).

<sup>17</sup> 29 C.F.R. § 1630.2(g).

<sup>18</sup> 29 C.F.R. § 1630.2(i).

<sup>19</sup> 29 C.F.R. § 1630.2(h)(2).

<sup>20</sup> EEOC Appeal No. 0120070356 (2011).

<sup>21</sup> *Id.* .

<sup>22</sup> 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

<sup>23</sup> EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (October 17, 2002) (hereafter referred to as "Enforcement Guidance").

<sup>24</sup> 29 C.F.R. § 1630.2(o)(1)(ii).

<sup>25</sup> 29 C.F.R. § 1630.2(o)(1)(iii).



<sup>26</sup> Enforcement Guidance.

<sup>27</sup> The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work, [https://www.eeoc.gov/eeoc/publications/ada\\_mental\\_health\\_provider.cfm](https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm); Questions & Answers about Persons with Intellectual Disabilities in the Workplace & the Americans with Disabilities Act, [https://www.eeoc.gov/laws/types/intellectual\\_disabilities.cfm](https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm).

<sup>28</sup> 29 C.F.R. § 1630.2(p).

<sup>29</sup> *Id.*

<sup>30</sup> Enforcement Guidance, at Question 32.

<sup>31</sup> Enforcement Guidance.

<sup>32</sup> EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 (March 25, 1997).

<sup>33</sup> Enforcement Guidance.

<sup>34</sup> EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 (March 25, 1997).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> EEOC Appeal No. 0120132463 (May 13, 2016).

<sup>39</sup> EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 (March 25, 1997).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> EEOC Appeal No. 0120132617 (August 11, 2015).

<sup>44</sup> EEOC Appeal No. 0720120001 (January 18, 2013).

<sup>45</sup> 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630(o)(2)(ii).

<sup>46</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o).

<sup>47</sup> 29 C.F.R. § 1630.2(m).

<sup>48</sup> Enforcement Guidance; *see also* Melodee M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120142484, (April 8, 2016) (citing *Zachary K. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120130795 (November 19, 2015)).

<sup>49</sup> Enforcement Guidance.

<sup>50</sup> EEOC Appeal No. 0720110030 (November 4, 2013).