Accommodating Employees with Mental Health Conditions

Presented by
Brian P. Goodman
Thursday, October 31, 2019

BoardmanClark

1 South Pinckney Street
Suite 410
Post Office Box 927
Madison, Wisconsin 53701-0927
(608) 257-9521
bgoodman@boardmanclark.com

I. Introduction.

A. Employers are reporting an increased number of requests for accommodation and FMLA leave from employees with mental health conditions. Employers must be prepared to address these issues just as they would for employees with a physical health condition. However, employees may be hesitant to discuss their mental health conditions due to the employees' perception of a stigma surrounding mental health conditions.

B. Employers should avoid stereotyping employees with mental health conditions because just like physical health conditions, mental health conditions range from mild to severe, can be treated by doctors, and in many cases, accommodated in the workplace. Recognizing that each employee with mental health condition is unique will go a long way toward ensuring employers comply with their legal obligations.

C. Employers should keep good documentation and keep all employee medical information confidential.

D. All disability inquiries and medical examinations of current employees must be job-related and consistent with business necessity. Employers should not ask for more information from an employee or the employee's doctor than is necessary to determine if the employee can perform his/her job with or without reasonable accommodation or qualifies for medical leave.

II. Mental Health Conditions as Disabilities.

A. Mental health conditions can qualify as disabilities under both state and federal disability laws. However, not all employees with mental health conditions need accommodations.

1. Employers may not discriminate against qualified employees with disabilities.

2. Employers must provide reasonable accommodations to employees with disabilities.

B. The Americans with Disabilities Act (ADA).

1. Disability under the ADA means:

a. A physical or mental impairment that substantially limits one or more of the major life activities of an individual;

b. A record of having such an impairment; or

c. Being regarded as having such an impairment (regardless of whether the employer perceives the impairment as substantially limiting a major life activity), so long as the perceived impairment is not transitory (lasting six months or less) and minor.

2. The effects of mitigating measures (such as medication) are not relevant when determining if an employees has a disability.

3. A "major life activity" means more than just work, and can include daily life activities and core bodily functions.

4. Whether someone is disabled under the ADA should not require extensive analysis.

5. Employers need to be cautious to avoid "regarded as" claims with respect to mental health conditions. For example, a supervisor stating on a performance review that an employee is "anxious" about receiving assignments that require quick turnaround times could give rise to a claim that the employer perceived that employee as disabled with an anxiety disorder.

C. The Wisconsin Fair Employment Act (WFEA).

An individual with a disability under the WFEA means an individual who:

1. Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;

2. Has a record of such an impairment; or

3. Is perceived as having such an impairment.

a. Wisconsin courts have held that an "impairment which makes achievement unusually difficult" refers to a substantial limitation on a major life activity or life's normal functions.

b. Wisconsin courts have interpreted the phrase "limits the capacity to work" to refer to the specific job at issue.

D. Because mental illnesses are not easy for an employer to "see," the potential need to accommodate an employee is not always obvious to the employer. Therefore, an employer can ask the employee for limited medical information to verify the existence of a mental health condition that constitutes a disability.

E. The Interactive Process and Reasonable Accommodations.

1. An employee with a disability does not need to use "magic words" to request an accommodation. However, employers should not proactively ask whether an employee has a disability or needs a reasonable accommodation. This is particularly important with mental health conditions as employers are unlikely to be able to identify a mental health condition as easily as an employer could identify that an employee is in a wheelchair. Such an approach by an employer to an employee with a suspected mental health condition is likely to be based on stereotyping or a misunderstanding of a mental health condition, and could result in a "perceived as" claim of disability discrimination.

2. An employee might make a request for accommodation to the employee's direct supervisor rather than HR. Supervisors must be trained to identify direct and indirect requests for accommodation and bring all accommodation requests to the attention of HR so the requests can be handled properly.

3. An employee's request for accommodation triggers the interactive process during which the employee and the employer exchange information regarding the need for accommodation and identify appropriate reasonable accommodations for the employee that would enable him/her to perform his/her job duties.

4. The employer can request information from the employee and the employee's health care provider about the nature of the disability, the limitations caused by the disability, and what reasonable accommodations might exist to enable the employee to perform his/her job. The employer should not take the lead in this process or attempt to "play doctor." The medical information regarding the employee should drive the process.

5. An accommodation that worked for one employee with a similar disability, particularly a mental health condition, will not necessary be effective for another employee due to the individualized nature of mental health conditions.

6. While under the ADA a reasonable accommodation must enable the employee to perform the "essential functions" of the job, the WFEA does not use an "essential functions" analysis. Due to the WFEA, employers in Wisconsin must consider accommodation requests to remove essential functions, even though that is not required under the ADA.

7. Specific categories of accommodations that might be required:

    a. Making existing facilities accessible.

    b. Job restructuring/reallocation of certain job functions.

c. Temporary and possibly permanent part-time or modified work schedules.

d. Acquiring or modifying equipment.

e. Changing tests, training materials, or policies.

f. Providing qualified readers or interpreters.

g. Reassignment to a vacant position.

h. Extended, unpaid leave of absence (even beyond FMLA entitlements).

i. Temporary "forbearance" of attendance and performance issues.

j. Work at home requests.

8. Accommodations that will generally not be required:

a. Longer-term lowering of job standards (performance/attendance).

b. Bumping another employee out of a job.

c. Repeatedly excusing prohibited behavior on the job.

d. Indefinite leaves of absence.

e. Hiring additional employees to assist or perform part of the job.

f. Transferring a light duty job reserved for worker's comp injuries into a regular job.

g. Creating a new position.

9. Undue Hardship.

An employer does not have to make an accommodation that constitutes an undue hardship on the employer. This is a case by case analysis that looks at the specific circumstances of the employer, including its size and financial resources, the impact the accommodation would have on the employer's operations, and the specific accommodation requested by the employee. Reduced workforce morale is unlikely to constitute an undue hardship.

10. Direct Threat.

a. An employee that poses a direct threat can be subject to adverse employment actions. A direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. However, this requires an individualized assessment of the employee that includes whether or not a reasonable accommodation is available

b. When assessing a direct threat, employers must consider:

i. The duration of the risk;

ii. The nature and severity of the potential harm;

iii. The likelihood that the potential harm will occur; and

iv. The imminence of the potential harm.

c. In particular with mental health conditions, employers must be careful not to stereotype employees with respect to potential direct threats. Not all mental health conditions lead to violence, and many mental health conditions can be treated such that the risk of a direct threat is low. Employers must make these decisions based on an individual assessment stemming from information provided by the employee and doctors. Mere discomfort with an employee's mental health condition does not constitute a direct threat.

11. The interactive process takes time, and employers need to take sufficient time to explore accommodations options in order to avoid "failure to accommodate" claims. "He who breaks down the accommodation process loses."

III. Mental Health Conditions and the FMLA.

A. Many mental health conditions could qualify as a serious health condition under state and federal FMLA. An employee with such a condition must still meet all the other qualifications for FMLA (such as working for a covered employer, having sufficient service time, and working at a location with 50 employees within 75 miles).

B. Under federal FMLA, a serious health conditions means (in relevant part):

An illness, injury, impairment, or physical or mental condition that involves:

a. Inpatient treatment; or

b. Continuing treatment by a health care provider during which the employee due to the serious health condition is incapacitated from working, attending school, or performing other daily activities for more than 3 consecutive full calendar days, and

i. The person has treatment 2 or more times by a health care provider within 30 days of the first day of incapacity (absent extenuating circumstances) by a health care provider, or

ii. The person is treated by a health care provider at least once with a continuing regimen of treatment of the health care provider. This might include a visit to a psychiatrist followed by a prescribed drug regimen.

c. Any period of incapacity or treatment for incapacity due to a chronic serious health condition. A chronic condition is one which:

i. Requires periodic visits (at least 2 visits per year) for treatment by a health care provider, and

ii. Continues over an extended period of time (including recurring episodes of a single underlying condition), and

iii. May cause episodic rather than continual periods of incapacity.

d. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

e. Any period of absence to receive multiple treatments by a health care provider for a condition that would likely cause incapacity for 3 or more full calendar days if not treated.

C. Serious mental health conditions can meet any of the above criteria for leave but most prevalently qualify as chronic serious health conditions.

D. Under state FMLA, a serious health conditions means:

A disabling physical or mental illness, impairment, or condition that involves any of the following:

1. Inpatient care in a hospital, nursing home, or hospice; or

2. Outpatient care that requires continuing treatment or supervision by a health care provider.

Unlike under federal law, there is no express "three day" incapacity requirement under state FMLA.

E. A health care provider can include a doctor, a psychiatrist, or a social worker.

F. Under federal FMLA, leave may be taken intermittently (for less than a full day or for non-continuous days). Intermittent leave is somewhat common for employees with mental health conditions. An employee taking leave for planned medical treatments (such as psychiatry appointments) must make reasonable efforts to schedule the leave so as not to unduly disrupt the employer's operations. Employees whose doctors place job restrictions limiting the number of hours they can work might qualify for intermittent leave during the time they are under those job restrictions.

G. Under state FMLA, an employee can take intermittent FMLA leave in the same increments that the employer allows employees to take any other form of leave (such as PTO).

H. Employers must get the appropriate FMLA health care provider certification forms from the employee (usually the one provided by the U.S. Department of Labor).

1. Employers should make the request that the employee submit a certification form at the time the employee gives notice of the need for leave (or within five business days after the start of the leave) or should make this request within five business days after the employee commences unforeseen potentially FMLA-qualifying leave.

2. The employee has 15 calendar days to submit the certification form, but this can be extended if it was not practical for the employee to meet this deadline under the circumstances.

3. The employer should ensure the form is complete and that the employer understands it. If the employer needs additional information, the employer should explain to the employee what additional information is necessary and provide the employee with 7 days to provide the additional information or cure any deficiency with the form. The employee's failure to provide the additional information in this time period can be a basis for the employer to deny the employee leave.

4. An employee might authorize his/her health care provider to follow up directly with the employer regarding the certification form, rather than have the employee serve as an intermediary.

a. An employer can authenticate and clarify the certification form with the health care provider.

b. Authentication means confirming that the information was completed or authorized by the health care provider that signed the agreement.

c. Clarify means understanding the handwriting or the meaning of a response (such as clarifying inconsistencies between two of the health care provider's responses on the form).

d. The employer should not seek information beyond that which would be covered by the form.

5. If the employer doubts the validity of the form, the employer can require the employee to get a second opinion from the doctor of the employer's choice (at the employer's expense), so long as the employer does not employ this doctor on a regular basis. If the two opinions differ, the employer may require a final, binding third opinion (at the employer's expense) from a mutually-approved health care provider. The employee is tentatively entitled to leave while the second and third opinions are being pursued.

6. In connection with an absence by the employee, the employer may request recertification every 30 days or after the expiration of the minimum duration stated on the certification form, whichever is longer. Regardless of the minimum duration on the form, an employer can request recertification once every six months.

7. However, an employer may request recertification in less than 30 days if:

   a. The employee requests an extension of the initial medical leave.

   b. Circumstances stated in previous certifications have changed significantly (e.g., the duration and frequency of the absence, nature or severity of the illness).

   c. The employer receives information casting doubt on the continuing validity of an employee certification.

8. If an employee is absent more often than stated on the form, this likely constitutes changed circumstances justifying the employer asking for a recertification. During the recertification process, the employer may want to ask the employee's doctor if the employee's attendance pattern is consistent with what is required due to the employee's condition.

I. Anti-retaliation. Employers cannot take adverse employment actions based on employees taking state or federal FMLA leave.

J. Managing FMLA fraud.

1. Because mental health conditions are harder for employers to "see," it is not uncommon for an employer to question the validity of the employee's condition or the necessity for the leave. Employers need to not question the validity or necessity of the leave without a factual or medical basis.

2. Employers should not assume FMLA fraud.

   a. An employee with depression might post pictures on Facebook of the employee taking a long walk in the woods while out on FMLA leave. The employee's doctor might have told the employee to get outdoor exercise as part of the employee's treatment.

   b. An employee might frequently need to take intermittent leave on Friday afternoons. The stresses of the workweek could result in a legitimate flare up of the employee's mental health condition over the course of the week. Employers should not assume that the employee is always trying to take an early weekend.

3. An employer cannot have an FMLA policy that prohibits an employee from working another job while on FMLA leave. The policy can only prohibit the employee from participating in activities that are inconsistent with the needs of the employee's job. While an employee might not be able to perform the duties of the job for which he/she is taking FMLA leave, the employee might be able to perform the duties of a different job while on FMLA leave.

4. An employer might be able to encourage an employee to make choices in life that will make work possible, but this is a slippery slope to an FMLA interference claim.

IV. The Interaction Between the ADA/WFEA and State and Federal FMLA.

A. Unpaid leaves of absence due to disability can be a reasonable accommodation under the ADA/WFEA. Therefore, even an employee who is not eligible for leave under state or federal FMLA or who has used all of his/her FMLA leave, might still be entitled to unpaid leave under the ADA/WFEA.

B. An indefinite period of absence is not a reasonable accommodation, and employers are able to communicate with employees to ensure that employees on leave have a return to work date.

C. When a leave of absence due to disability can be properly categorized as FMLA, the employer should provide the FMLA notices and certification forms to the employee so that the leave can be properly attributed to the employee's FMLA allotment.

D. A strict "cap" on the number of days employees can be on unpaid leave is generally considered a per se violation of the ADA because whether a certain amount of unpaid leave is a reasonable accommodation and not a hardship should be analyzed individualized basis.

V. Disability-Related Inquiries or Medical Examinations

A. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

B. Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.

Disability-related inquiries may include the following (these apply equally to current employees):

1. asking an applicant whether the applicant has (or ever had) a disability or how the applicant became disabled or inquiring about the nature or severity of an applicant's disability;

2. asking an applicant to provide medical documentation regarding the applicant's disability;

3. asking an applicant's co-worker, family member, doctor, or another person about an applicant's disability;

4. asking about an applicant's genetic information;

5. asking about an applicant's prior workers' compensation history;

6. asking an applicant whether the applicant currently is taking any prescription drugs or medications, whether the applicant has taken any such drugs or medications in the past, or monitoring an applicant's taking of such drugs or medications; and,

7. asking an applicant a broad question about the applicant's impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).

C. At the second stage - after an applicant is given a conditional job offer, but before the applicant starts work - an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

1. Medical examinations include, but are not limited to, the following:

a. vision tests conducted and analyzed by an ophthalmologist or optometrist;

b. blood, urine, and breath analyses to check for alcohol use;

c. blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);

d. blood pressure screening and cholesterol testing;

e. nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);

f. range-of-motion tests that measure muscle strength and motor function;

g. pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);

h. psychological tests that are designed to identify a mental disorder or impairment; and,

i. diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

j. Procedures and tests employers that generally are not considered medical examinations, include:

i. tests to determine the current illegal use of drugs;

ii. physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);

iii. tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;

iv. psychological tests that measure personality traits such as honesty, preferences, and habits; and,

v. polygraph examinations.

D. At the third stage - after employment begins - an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

1. Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer has a reasonable belief, based on objective evidence, that:

    a. an employee's ability to perform essential job functions will be impaired by a medical condition;

    b. an employee will pose a direct threat due to a medical condition;

    c. Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity; or

    d. Periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.

2. When a disability or the need for the accommodation is not known or obvious, it is job-related and consistent with business necessity for an employer to ask an employee for reasonable documentation about the employee's disability and its functional limitations that require reasonable accommodation.

    a. An employer may require an employee to provide documentation that is sufficient to substantiate that the employee has an ADA disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation. This means that, in most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

    b. Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.

    c. The ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides insufficient documentation from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation.

d. The employee has a duty to cooperate, even when the medical condition is not known and whether its existence is even in question. "Where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job related and consistent with business necessity." A department is not required to wait to order an exam until perceived threat becomes real or questionable behavior results in injury. *Watson v. City of Miami Beach*, 177 F.3d 932 (11th Cir. 1999). *But see McGreal v. Ostrov*, 368 F.3d 657 (7th Cir. 2004).

e. Failure of the employee to cooperate may constitute insubordination warranting serious disciplinary consequence. *Thomas v. Corwin*, 483 F.3d 516 (8th Cir. 2007).

3. An employer may make disability-related inquiries or require a medical examination when an employee who has been on leave for a medical condition seeks to return to work

a. If an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that the employee will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination.

b. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work.

VI. Keys to Addressing Performance and Conduct Concerns for Employees with Mental Health Issues.

A. General legal standards.

1. Employers generally have an obligation to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose undue hardship. This is true even when the disability is causing conduct or performance problems on the job.

2. However, it is not discriminatory under the WFEA to discipline or terminate an employee if the employee's disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of the employment.

3. When examining whether an employee can adequately undertake job-related responsibilities, the present and future safety of the individual, of the individual's co-workers and of the general public may be considered on a case-specific basis. If the job involves a special duty of care for the safety of the general public, such special duty may be considered on a case-by-case basis. Considering the present and future safety facts is similar to the ADA's "direct threat analysis."

4. If an employer can show that an employee's disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities, then the question becomes whether the employer can establish that it did not refuse to reasonably accommodate the Complainant's disability, or that any accommodation which might have been made would have posed a hardship on the employer's organization. The question of whether a reasonable accommodation was refused, or whether it would have posed a hardship, comes into play only if it appears that a challenged employment decision was made because of a disability, and that the disability which was the reason for the challenged employment action was reasonably related to the Complainant's ability to do the job.

5. If the employer can show that an employee's disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities, and that the employer did not refuse to reasonably accommodate the Complainant's disability, or that any accommodation would have posed undue hardship, the employer is generally not required to retain the employee.

B. Conduct issues case study. Your employee has recently become very irritable at work and has yelled at co-workers in meetings. She has also used inappropriate language in emails complaining of customers and recently "provided" her co-worker a stack of papers by angrily throwing them to the ground in front of the co-worker. You are not aware that the employee has any type of medical issue. What are recommended steps to address this?

1. Meet with the employee to address her conduct.

   a. Have a witness.

   b. Focus on reported or observed facts.

   c. Avoid speculation about mental health issues, stress in the employee's personal life, or similar issues.

   d. Clearly state that the conduct is unacceptable.

2. Say that the employee discloses that she suffers from depression and anxiety, she is having marital problems and these issues are causing her difficult behavior on the job.

   a. At this juncture, you generally should treat this as a possible request for accommodation.

   b. Engage in the interactive process. This involves getting information from the employee and/or her physician (or other professionals) to understand the nature of the condition, how it functionally affects the employee, and any accommodations they believe may alleviate the condition or the symptoms of the condition.

   c. Since each person's mental health condition is different, and you are not a health care professional, it is best not to present accommodations to the employee that you believe would be useful. Instead, listen to the employee and her physician, etc. Note that this is different than accommodations for certain physical disabilities, where it might be make sense (and even be required) for you to suggest accommodations to the physical facility or how an employee performs a job.

   d. As part of the interactive process, you assess and determine which accommodations to implement (will any cause undue hardship?), and how to implement them.

   e. Possible accommodations might be (these are just examples, you are going to rely on the employee and her health care providers or therapists):

      i. Additional breaks or authorization to step away from specified situations.

      ii. Time off from work (including possibly FMLA).

      iii. Moving to a quiet/calming work station.

      iv. Allowing music to be played or removing extraneous noise and distraction.

      v. Tolerating *some* level of behavior.

   f. If the accommodations are not working to alleviate the behavior, you may try other accommodations, or, if the unacceptable behavior persists, you may be in a position to end employment. Again, most of these situations will come down to whether the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities and whether accommodations that have been attempted have not adequately helped or would cause undue hardship.

g. Illustrative case: *Sampson v. S & S Distributing*, LIRC (Nov. 19, 1999).

i. The employee engaged in violent behavior toward coworkers and managers, including screaming, swearing and hurling objects, and threatened suicide and harm to others.

ii. The employee argued that the employer failed to conduct a case-by-case analysis regarding whether he posed an actual risk to safety at the time it terminated him.

iii. The Labor and Industry Review Commission ruled that the employer proved that employee was unable to adequately undertake his job duties because he could not conform his behavior to the employer's general expectations. Due to his behavior he could not maintain acceptable workplace relationships. Because the employer showed that the employee was unable to adequately undertake job-related duties, it did not have to show that he posed a safety risk to himself or others.

iv. The employee also argued that the employer failed to provide reasonable accommodation that would have allowed him to remain at work. The employer could have obtained a second opinion about whether his depression posed a safety risk and could have engaged in ensuring he stayed in treatment and on his medication. The Commission rejected these arguments, ruling that the employee never asked for accommodation in regard to treatment and declining to impose a duty on employers to assume responsibility for an employee's psychiatric treatment.

C. Performance issues case study. You have an employee whose primary role is to generate financial analysis reports for others in your organization. The role requires that the employee can process complex information, use independent judgment to assess what information should be included in the report and set priorities. The employee has historically been a decent performer, but not in the top tier. He has started to miss deadlines and internal customers have complained that his reports contain errors.

1. Meet with the employee to address his performance.

a. Have a witness.

b. Focus on specific concerns that are examples of performance.

c. Avoid speculation about mental health issues, stress in the employee's personal life, or similar issues.

d. Clearly state that the performance issues are not acceptable and must improve.

2. Three days later, the employee leaves a doctor's note on your desk which states that the employee has Adult Attention Deficit Disorder ("ADD") and asks you to "bear with" the employee while they work through a new treatment regimen. This should be recognized as a request for accommodation.

   a. Engage in the interactive process. This involves getting information from the employee and/or her physician (or other professionals) to understand the nature of the condition, how it functionally affects the employee, and any accommodations they believe may alleviate the condition or the symptoms of the condition.

   b. Again, since each person's mental health condition is different, and you are not a health care professional, it is best not to present accommodations to the employee that you believe would be useful. Instead, listen to the employee and his physician, etc.

   c. As part of the interactive process, you assess and determine which accommodations to implement (will any cause undue hardship?), and how to implement them.

   d. Possible accommodations might be (these are just examples, you are going to rely on the employee and her health care providers or therapists):

      i. A modified job schedule or part time work.

      ii. Use of additional/assistive technology to assist in organization, etc.

      iii. Additional training or retraining.

      iv. Time off from work (including possibly FMLA).

      v. Moving to a quiet/calming work station.

      vi. Removing extraneous noise and distraction.

      vii. Additional time to complete work.

      viii. Temporary or permanent removal of certain job duties.

e. When analyzing these types of accommodation requests, you must carefully think through how much of a job can be changed before the employee is not adequately performing the job and how long you can tolerate significant changes to the job.

f. You should monitor the employee's performance and the effectiveness of the accommodations. It is a good idea to have regular "check-ins" with the employee to ensure that the employee is comfortable with the accommodations. During these check-ins, if you are not seeing that the performance has improved (or has improved to an acceptable level), it is important that you are honest with the employee about this. If the accommodations you implement are not working to improve the performance you may try other accommodations, or, if the performance issues persist, you may be in a position to end employment. Again, most of these situations will come down to whether the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities and whether accommodations that have been attempted have not adequately helped or would cause undue hardship.

D. Absences Case Study. A teacher takes repeated absences after being assigned to a new classroom. She quickly uses up all her available sick leave. Now the teacher begins to come in late to work almost every day. You sit the teacher down to talk about her absences, she explains that she is suffering from seasonable affective disorder that is exacerbated by being in a classroom with no windows.

1. Illustrative case: Providing a teacher with a classroom with a window to the outside can be a form of reasonable accommodation. *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972 (7th Cir. 2009).

2. In the fall of 2005, after the school year began, Ekstrand began to experience symptoms of seasonal affective disorder, a form of depression. Both her psychologist, Dr. Erickson, and her primary care physician recommended that she take a leave of absence due to illness.

3. Her initial leave was only three months. Dr. Erickson wrote a letter on November 28, 2005 which was delivered to the school district's office. The letter detailed Dr. Erickson's opinion that natural light was crucial to Ekstrand's recovery and that her classroom without windows had been a major cause of her condition. This letter backed up Ekstrand's prior conversations with both the superintendent and the school principal in which she had communicated the importance of natural light to her recovery.

4. School officials refused each request for a classroom change.

5. A federal court awarded Ekstrand damages arising from her allegation that the school district failed to accommodate her disability.

E. Impact of *Wisconsin Bell, Inc. v. LIRC* (June 26, 2018)

1. The Wisconsin Supreme Court issued an important decision regarding the burden of proof in certain disability discrimination cases.

2. The Labor and Industry Review Commission ("LIRC") had historically taken the position that employers could be held liable for taking adverse action against an employee whose disability was causing conduct or performance issues, even if the employer had no knowledge of a causal connection between the employee's disability and the conduct or performance problems.

3. The Supreme Court ruled that employees can no longer prove discrimination without evidence of discriminatory intent or that the employer knew that the employee's conduct or performance issues were caused by a disability.

4. In *Wisconsin Bell*, a call center employee who suffered from bipolar disorder had previously hung up on several callers. On a later date, after becoming upset at work about failing an internal test at the company, he set his phone on a health code setting meant for bathroom breaks and was conversing with co-workers about the failed test.

5. Wisconsin Bell terminated him for violating work rules.

6. He sued Wisconsin Bell for disability discrimination, claiming through expert testimony that his misconduct was caused by his bipolar disorder, which cause extreme mood swings.

7. While the employee had previously submitted doctor notes to Wisconsin Bell explaining the general symptoms of his bipolar condition, the court held that the doctor notes did not put Wisconsin Bell on notice of any causal connection between his disability and the misconduct that led to his termination. In other words, a doctor note that the bipolar condition could cause extreme mood swings with relatively minor triggers was not evidence that the disability would cause the employee to hang up on customers or essentially avoid taking calls while he vented to co-workers.

8. The Court wrote, "[G]iven the nature of his mental health condition, causality is not a matter of common knowledge evident to laypersons, and [the employee] needed to provide Wisconsin Bell with proof of a causal connection as substantiated by an expert before the Company decided to terminate his employment."

9. The case will likely result in employers prevailing in more disability discrimination cases involving terminations for misconduct or performance issues.

F. Recent Developments.

1. Supervisor induced anxiety is not a disability under the ADA. S*ummers v. Target Corp.*, 382 F. Supp. 3d 842 (E.D. Wis. 2019).

   a. An employee was diagnosed with an anxiety and panic disorder after working under a specific supervisor for approximately a year.

   b. The employee requested and received medical leave for three months. During this time, the employee requested a transfer to another Target store. Target refused to transfer the employee.

   c. The employee resigned and sued Target for failing to accommodate his anxiety and panic disorder.

   d. The court awarded summary judgment to Target. An employee who cannot work under a specific supervisor is not substantially limited in his capacity to work. The employee could perform all the tasks of the position, just not under that supervisor, and for that reason he is capable of working and thus not disabled as that term is defined by the ADA.

   e. Further, the court held that even if the employee had a disability Target's refusal to transfer him was not a failure to accommodate. The ADA does not require an employer to transfer an employee to a different supervisor. Such a transfer would allow an employee to establish the conditions of his employment, in particular the person who will supervise the employee. Nothing in the ADA requires such an accommodation.

2. Obesity, by itself, is not a disability under the ADA. *Richardson v. Chicago Transit Auth.*, 926 F.3d 881 (7th Cir. 2019).

   a. A 566 pound Chicago Transit Authority ("CTA") bus driver failed a special assessment designed to ensure drivers weighing over 400 pounds could safely perform their jobs.

   b. The driver alleged that the CTA violated the ADA by regarding him as being too obese to work as a bus driver.

   c. The court held that in the absence of an underlying physiological disorder or condition that caused the obesity, obesity was not a covered disability.

   d. The decision is similar to Wisconsin state agency decisions interpreting the WFEA.

e. The Madison Equal Opportunities Ordinance protects employees based on their physical appearance, including weight. In one decision, the Madison Equal Opportunities Commission held that weight could constitute a disability under the Ordinance.

f. Employers should also be aware that some recent scientific research indicates a bidirectional relationship between depression and obesity. This means that obesity increases the risk of depression and depression increases the risk of obesity. This type of depression could constitute a disability under the ADA and WFEA. *See* Luppino FS, de Wit LM, Bouvy PF, Stijnen T, Cuijpers P, Penninx BW, Zitman FG. *Overweight, obesity, and depression: A systematic review and meta-analysis of longitudinal studies*. Arch Gen Psychiatry 67(3):220–9. 2010; CDC, *Depression and Obesity in the U.S. Adult Household Population, 2005-2010*, NCHS Data Brief No. 167 (Oct. 2014), https://www.cdc.gov/nchs/products/databriefs/db167.htm.

G. General Best Practices

1. Address conduct and performance issues head on and early.

2. Ensure that performance evaluations, performance improvement documents and written discipline and warnings are vetted to avoid raising legal issues.

3. Ensure that all communication about the employee's situation is discrete, professional and fact based.

4. Make sure job descriptions capture key conduct and performance elements of the job, just as the ability to handle stressful situations professionally and the ability to process complicated information and set priorities.

5. Maintain confidentiality of all medical information.