Celebrating 30 Years of Employee Rights Advocacy
National Employment Lawyers Association
2015 Annual Convention
Atlanta Georgia
June 24-27, 2015

Panel Presentation

ACCOMMODATING EMPLOYEES WITH MENTAL DISABILITIES

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Labour must be the cure, not sympathy!
Labour is the only radical cure for rooted sorrow!

– Charlotte Bronte[1]

[1] Quoted in Andrew Sullivan, *The Noonday Demon: An Atlas of Depression* (2011) at 133.

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I. The Prevalence of Mental Illness Within and Outside the Workforce

A. As of 2012, there were an estimated 43.7 million adults 18 or older in the United States with a mental illness, or 18.6% of the population, and an estimated 9.6 million adults with a serious mental illness (defined as a mental, behavioral or emotional disorder resulting in a serious functional impairment that substantially limits one of more major life activity).[2] It is predicted that by 2020, depression will be one of most prevalent disabilities globally, second only to heart disease.[3]

B. Among the working population, it is estimated that 10% of employees have at least one mental disability,[4] and that in any given year, 5% of employees may suffer from an episode of clinical depression.[5]

II. Unemployment and Underemployment of People with Mental Health Disabilities

A. Unemployment among people with mental disabilities is as high as 25%. Of those people in the workforce, a 2002 survey showed that 38% of workers with mental disabilities had jobs paying at or near the minimum wage compared with 20% of non-disabled employees. A survey from 1994-1995 revealed that people with mental health disabilities earned a median hourly wage almost a third-less than that earned by people without mental health disabilities.[6] Among people with serious mental illness, the unemployment rate is between 70-90%, and those that do hold jobs are generally paid low wages and have little potential for career advancement.[7]

B. Public income support programs are overrepresented by people with mental health disabilities, who make up more than 25% of Social Security Disability Insurance

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[2] National Institutes of Health, National Institute of Mental Health, Statistics: Any Disorder among Adults. Retrieved April 29, 2015, from http://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among adults.shtml; http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml.

[3] C.S. Dewa and D. McDaid, "Investing in the Mental Health of the Labor Force: Epidemiological and Economic Impact of Mental Health Disabilities in the Workforce," available online at http://www.springer.com/cda/content/document/cda_downloaddocument/9781441904270-c1.pdf. This paper (and others cited herein) is reprinted in I.Z. Schultz and E.S. Rogers (eds.), *Work Accommodation and Retention in Mental Health* (Springer 2011) (hereafter "*Work Accommodation and Retention*"), at 33.

[4] *Id.* at 37.

[5] J.I. Wang, "Mental Health Literacy and Stigma Associated with Depression in the Working Population," reprinted in *Work Accommodation and Retention*, *supra*, at 347.

[6] J.A. Cook, *Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission*, 57 Psychiatric Serv. 1391, 1392 (Oct. 2006), available online at http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.10.1391.

[7] T. Krupa, "Employment and Serious Mental Health Disabilities," reprinted in *Work Accommodation and Retention*, *supra*, at 91, 92.

recipients,[8] and are 38% more likely to receive welfare benefits than those without such disabilities.[9]

C. As reflected by its statutory findings, one goal of the ADA is to enable people with disabilities to free themselves of their reliance upon social welfare programs by removing barriers to work through equal employment opportunities:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.
> 42 U.S.C. § 12101(a)(8).

III. The Economic Cost of Mental Illness

A. In North America, the estimated annual economic cost of mental disability is $83.1 billion. This figure includes the cost of public welfare outlays as well as lost productivity throughout the workforce.[10] The cost of depression alone is estimated to be $8 billion as a result of premature death of potentially productive employees, and $23 billion through absences or loss of productivity.[11]

B. "By any metric, depression has an adverse impact on employment and work productivity."[12] The presence of a mental health disability has been found to reduce productivity in employment by 11%, which translates into an average of 1 day of work absence and 3 days of reduction in work per month for an individual.[13]

IV. Economic Costs and Benefits of Accommodation for People with Disabilities

A. The cost of job accommodations for employees with disabilities (mental and physical) is low. In a study of workplace accommodations at Sears, Roebuck and Co. from 1993 to 1997, the average direct cost of an accommodation was $45. This compared to the $1,800 to $2,400 average administrative cost of replacing an

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[8] C.S. Dewa and D. McDaid, cited *supra* note 3, at 41.
[9] Sullivan, cited *supra* note 1, at 338, *citing* R. Jayakody and H. Pollack, *Barriers to Self-Sufficiency among Low-Income, Single Mothers: Substance Use, Mental Health Problems, and Welfare Reform* (paper presented at Assn. for Public Policy Analysis and Management in Washington, DC, Nov. 1997).
[10] C.S. Dewa and D. McDaid, cited *supra* note 3, at 39.
[11] Sullivan, cited *supra* note 1, at 338, *citing* R. Hirschfeld et al, *The National Depressive and Manic-Depressive Assn. Consensus Statement on the Under Treatment of Depression*, JAMA, 277, no. 4 (1997): 335.
[12] D. Lerner et al, "Depression and Work Performance: The Work and Health Initiative Study," reprinted in *Work Accommodation and Retention*, at 104.
[13] I. Schultz et al, "Employer Attitudes Towards Accommodations in Mental Health Disability," reprinted in *Work Accommodation and Retention*, at 325.

employee.[14] A 1992 through 1999 survey conducted by the Job Accommodation Network (JAN) (an organization helping disabled employees become more employable and facilitating their integration into the workforce by working with employers), showed that the cost of accommodations incurred by employers using JAN's services was $250, while the median reported benefit of providing accommodations was $10,000.[15]

B. A study found that a majority of employers reported that disability accommodations helped them to retain a qualified employee (91%), increase the employee's productivity (71%), or eliminate the cost of training a new employee (56%). A substantial number of employers also reported improved employee attendance (46%), interactions with co-workers (40%), overall company morale (35%), and overall company productivity (30%).[16]

C. In another study, both employers and disabled employees reported that functional limitations in the workplace due to disability could be mitigated significantly by accommodations. Without workplace accommodation, employers indicated the mean functional limitation level for disabled employees on a scale of 1 (not limited) to 5 (substantially limited) was 3.66, while with accommodations the mean limitation level dropped to 2.18. Employees' perception of the benefits of accommodations was even greater. Employees with disabilities reported their mean limitation level as 3.88 without an accommodation, and 1.89 with accommodations.[17]

V. The Non-Economic Costs and Benefits of Unemployment and Underemployment for People with Mental Health Disabilities

A. Working can be vital for recovery: "Existing qualitative evidence suggests that people with psychiatric disabilities view work as central to their recovery … and experience or anticipate many benefits from working, including increased self-esteem, decreased social isolation, and improved quality of life…, as well as financial gains, personal growth, and improved mental health."[18]

1. From a review of social science literature it was concluded that "work is an important source or role identity, social interaction and structured time that

[14] *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I - Workplace Accommodations*, 46 DePaul L. Rev. 877–914 (1997).

[15] "Accommodation Benefit/Cost Data" (JAN 1999), cited in D.J. Hendricks et al, *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*, Disabilities Studies Quarterly, Vol. 24, No. 4 (2005). JAN has been updating its cost surveys, and the most recent one is available is online at http://askjan.org/media/lowcosthighimpact.html.

[16] T. Solovieva et al, *Employer Benefits From Making Workplace Accommodations*, Disability and Health Journal, 4(1), 39-45 (2011).

[17] D.J. Hendricks et al, cited *supra* in note 15.

[18] E.C. Dunn et al, *The Meaning and Importance of Employment to People in Recovery from Serious Mental Illness: Results of a Qualitative Study*, Psychiatric Rehabilitation, Vol. 32, No. 1 at 69 (2008).

is associated with improved quality of life and recovery for persons with serious mental disorders," while being denied access to the labor market or segregated into poorly paid second tier jobs can add to the sense of failure and stigma already associated with mental disorders.[19]

VI. The Stigma Attached to Mental Illness

A. The stigma against mental illness generally

1. Studies ranking health conditions by degrees of stigma show that mental health disorders generate some of the strongest negative attitudes, with little change over the last three decades, and to a degree comparable to persons with AIDS or ex-convicts.[20]

2. In a study of people's perceptions of mental illness, 33% of the participants thought that people with major depression were violent, a stereotype that actually became more prevalent between 1950 and 1996. Another survey measuring people's comfort level with people with mental illness showed that 47% of the participants were unwilling to work closely or spend an evening socializing with someone with a major depressive disorder; 29% reported being unwilling to engage in social interactions with a troubled person (defined as having mild worrying, sadness, nervousness, sleeplessness with no functional impairment).[21]

3. Inherent to the stigma against mental illness is a moral judgment. Mental disorders are viewed as more controllable than physical impairments, leading to responses that often punish, rather than help, those with such disorders. Other common perceived attributes of mental illness are dangerousness, incompetence, and instability.[22]

B. Prejudices held by employers towards people with mental disabilities

1. Stigma is a more significant barrier to the employment of people with mental illness, especially serious mental illness, than is the individual's actual disabling condition. Ninety percent of employers would hire a person with a physical disability while only 10% would hire a person with a mental disability. Employers commonly believe that people with mental health disabilities are of limited employability and do not consider accommodations to be effective options for retaining them on the job.[23]

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[19] M.L. Baldwin and S.C. Marcus, "Stigma, Discrimination, and Employment Outcomes Among Persons with Mental Health Disabilities," reprinted in *Work Accommodation and Retention*, at 53–54.
[20] *Id.*
[21] B.G. Link et al, *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, Am. J. Public Health Vol. 89, No. 9 (1999) at 1331–32.
[22] Baldwin, cited *supra* note 15, at 56, 57.
[23] Schultze, cited *supra* note 13, at 326, 335.

2. Compared to hearing or mobility impairments, psychiatric disabilities are the least preferred disabilities by employers when considering job applications; once aware of their disability, employers rate people with mental illness as less employable than those with physical disabilities.[24]

3. In a survey of businesses, it was found that 68% of them made special efforts to hire minorities; 41% to hire people with general medical disorders; and 31% to hire people with mental disorders.[25]

4. Common prejudices found in the workplace against people with mental disabilities include:

5. The mentally ill are not competent to fulfill the task and social demands of employment;

a They are prone to violence and dangerous behavior at work;

b. Mental illnesses are not legitimate illnesses and, therefore, are not entitled to accommodations;

c. Employment will make people with mental illness more ill; and

d. Employing people with mental health disabilities will weaken workplace productivity.[26]

C. Self-Stigma

1. "[D]evaluation that is at the core of stigma and discrimination becomes internalized by people with mental illness, and compromises their sense of entitlement to valued social resources such as employment."[27]

2. Both direct and indirect stigma has a long-term psychological effect on people with mental health disorders, including feelings of anger, isolation, discouragement and sadness.[28]

VII. The Disclosure Dilemma

A. As discussed below, an employer is not obligated to make a reasonable accommodation to an employee's mental disability unless the individual discloses

[24] K. L. McDonald-Wilson, "Disclosure of Mental Health Disabilities in the Workplace," reprinted in *Work Accommodation and Retention*, at 199.
[25] Baldwin, cited *supra* note 15, at 58.
[26] Krupa, cited *supra* note 7, at 97; *see also* Schultze, cited *supra* note 13, at 326, 335.
[27] P.W. Corrigan and J.R. O'Shaughnessy, *Changing Mental Illness Stigma as it Exists in the Real World*, Rehabil. Psycho. 52(4):451-57 (2007).
[28] S. G. Goldberg and M.B. Killeen, *The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment*, , Psychology, Public Policy, and Law, Vol. 11, No. 3, 2005, 463–500 at 491, *citing* O.F. Wahl, *Mental Health Consumers' Experience of Stigma*, Schizophrenia Bulletin, 25, 467-78 (1991); O.F. Wahl, *Telling is Risky Business: Mental Health Consumers Confront Stigma*, NJ: Rutgers Univ. Press (1991).

the nature of the disability and need for the accommodation. *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1013 (7th Cir. 1997) (plaintiff had "failed to present anything at all regarding whether she informed [the defendant] of her alleged … disability and her need for accommodation, let alone what should have or could have been done for her"); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) ("[a]n employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations -- a duty dictated by common sense lest a disabled employee keep his disability a secret and sue later for failure to accommodate"); *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, 1218 (8th Cir.), *cert. denied*, 528 U.S. 821 (1999) ("Only [the employee] could accurately identify the need for accommodations specific to her job and workplace."); *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894 (D.C. Cir. 1998) (employee with bipolar disorder could not state a claim under the Rehabilitation Act when he never told his employer of his mental illness and never requested accommodations.). *See also James v. Hyatt Regency Chicago*, 707 F.3d 775, 782 (7th Cir. 2013); *Wilbourn v. Chicago Transit Auth.*, No. 14 CV 6327, 2015 WL 1002879, at *3 (N.D. Ill. Mar. 2, 2015).

B. But revealing a mental disability can be perilous, or seemingly so, putting the employee at risk of ostracism, a hostile work environment, and other forms of discrimination, including termination.

1. Fear of stigma is the main reason for employees' non-disclosure of mental illness.[29] Employees interviewed for a study described the stigma coming from disclosure of one's mental illness as follows:

> "Once you're labeled mentally ill, they automatically assume there's a big difference…To a certain extent, I've noticed that normal people, even though they might not work as well, they're tolerated more on a regular job than mentally ill people are…I've also noticed that if you don't watch, the boss will put more on a mentally ill person to do, especially if that mentally ill person doesn't complain."
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> "…the downside of disclosure is that I can't be invisible…I'm thinking that I'm in this pretty bad situation where I want to blend in anonymously…I'll be angry that I had to reveal the most intimate part of myself to people who I would not want to do that with."
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> "If people know you have a psychiatric disability, they treat you worse… They treat you different… They look at you different, they talk to you

[29] McDonald-Wilson, cited *supra* note 20, at 14, 197.

different, and they act different towards you because they think something's wrong with you."[30]

2. Myths, fears, and stereotypes about psychological or psychiatric disabilities still abound. Employer bias against people with mental disabilities, along with *perceived* fears about safety, potential liability, and insurance rates, create a serious barrier to continued employment once information about a person's disability is divulged.[31] *See, e.g., Quiles-Quiles v. Henderson*, 439 F.3d 1, 3–4 (1st Cir. 2006) (upon receipt of medical documentation, supervisor called plaintiff "crazy" on a daily basis and publicly joked about how he saw a psychiatrist and took medication for his condition); *Doe v. Salvation Army*, 443 F.3d 1050, 1051 (6th Cir. 2008) (employer stopped job interview upon learning that client took psychotropic medication due to its fears of liability); *Josephs v. Pacific Bell*, 432 F.3d 1006, 1011, 1016 (9th Cir. 2005), *amended and superseding*, 443 F.3d 1050 (9th Cir. 2006) (employer thought employee could not perform any job within the company based on his having been found not guilty in a criminal case many years earlier and having spent three years in a psychiatric facility; employer was "not going to bring someone like that back"); *Lizotte v. Dacotah Bank*, 677 F. Supp. 2d 1155, 1165 (D.N.D. 2010) (employer "blown away" that a person who attempted suicide is not in jail); *Stokes v. City of Montgomery*, No. 2:07-cv-686-WHA, 2008 WL 4369247, at *2–3 (M.D. Ala. Sept. 25, 2008) (perception that police officer was unfit after she attempted suicide and revealed that she continued to receive treatment for depression); *Burris v. Safeway, Inc.*, No. CV-04-0477, PCT-PGR, 2006 WL 2731113, at *4 (D. Ariz. Sept. 25, 2006) (employer made sarcastic comments about plaintiff's need to take psychiatric medications and feeling stressed, referred to her department as the "mental ward." and expressed concern that she has a potential for violent retaliation).[32]

3. Some courts have recognized the dilemma people with psychiatric disabilities face when seeking workplace accommodations: "We realize, of course, that someone with a disability may be reluctant to discuss it with

[30] Goldberg, cited *supra* note 24, at 477, 485.

[31] With regard to perceived impairments, many "are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic." *Van Zande v. Wisconsin State Department of Administration*, 44 F.3d 538, 541 (8th Cir. 1995).

[32] The myths, fears and stereotypes that the ADA seeks to combat may even exist in the judiciary, making it difficult to enforce the law on behalf of plaintiffs with mental illness. Comments such as these are illustrative: "Paranoid schizophrenia often entails the sort of violent outbursts (or threats of violence) that an employer need not accommodate." *Wilson v. Chrysler Corp*., 172 F.3d 500, 513 (7th Cir. 1999) (Easterbrook, J., concurring), *rehearing with suggestion for rehearing en banc denied*, 236 F.3d 827 (7th Cir. 2001). Judge Posner begins the recitation of facts in one case by noting that the plaintiff "had a manic fit." *Miller v. Runyon*, 77 F.3d 189, 190 (7th Cir. 1996). *See* S. Stefan, *Hollow Promises: Employment Discrimination against People with Mental Disabilities*, (American Psychological Assn. 2002), at 272 n.12.

anyone, particularly his/her employer." *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 331–32 (3d Cir. 2003). This is especially true where the underlying problem implicates one's mental or emotional stability. *Id., citing Taylor v. Phoenixville School District*, 184 F.3d 296, 315 (3d Cir. 1999) (noting that "[d]isabled employees, especially those with psychiatric disabilities, may have good reasons for not wanting to reveal unnecessarily every detail of their medical records ... the information may be irrelevant ... and ... could be embarrassing, and might actually exacerbate workplace prejudice.").

4. Additionally, people with mental disabilities may actually be incapable of clearly articulating an accommodation request. *See, e.g., Bultemeyer v. Fort Wayne Comm. Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996) ("bearing in mind the seriousness of his mental illness, it is evident that Bultemeyer's actions were a product not of a cold, calculating intellect, but of an irrational fear. … These were not the deliberate actions of a mentally sound man who just didn't want to go to work, they were the product of mental illness. We understand that the irrationality of these fears may be frustrating to FWCS, but as Bultemeyer's employer, FWCS had a duty to engage in the interactive process and find a reasonable way for him to work despite his fears"); *see also Walsted v. Woodbury Co.*, 113 F. Supp. 2d 1318, 1335 (N.D. Iowa 2000) (observing that it should have been obvious that the plaintiff, who had an intellectual disability, might need an accommodation).

VIII. Disclosure Is a Pre-Requisite for Accommodation Unless the Employer Has Independent Knowledge

A. Because an employer is only required to accommodate "known" disabilities, people with psychiatric disabilities have no choice but to disclose their conditions if they need an accommodation. *See, e.g., Richio v. Miami-Dade Cnty*., 163 F. Supp. 2d 1352, 1363 (S.D. Fla. 2001) (employer had no obligation under the ADA to accommodate employee with depression by extending her FMLA leave where employee had not advised employer that she suffered from depression, but had only stated that she was suffering from unspecified "emotional problems"); *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 261 (1st Cir. 2001) (plaintiff, who suffered from bipolar disorder, failed to provide adequate notice when she stated only that she needed an accommodation as to conflicts at work by referencing the fact that she was seeing a therapist, not that she had "depression"); *Gesegnet v. J.B. Hunt Transp., Inc.*, No. 3:09-CV-828-H, 2011 WL 2119248, at *6 (W.D. Ky. May 26, 2011) (no failure to accommodate applicant with bipolar disorder during the hiring process because he did not sufficiently disclose his condition and his inability to tolerate being confined to small spaces).

B. Medical documentation that is not specific enough to establish a need for accommodation due to psychiatric impairment may result in no accommodation and no legal recourse. *See, e.g., Goos v. Shell Oil Co.*, 451 F. App'x 700, 702–03 (9th Cir. 2011) (Goos did not participate in good faith in the interactive process because Goos neglected to inform the employer that she and her psychiatrist believed she

could not return to work as a machinist due to perceived discrimination in the machine shop; by withholding this information, Goos prevented Shell from learning that it should consider reassigning hers).

C. Cases and authorities finding that either the employer had notice of disability and, therefore, was obliged to provide the accommodation, or finding the employee's accommodation request was sufficient to trigger the interactive process: *Taylor v. Phoenixville Sch. Dist*., 184 F.3d 296, 313–15 (3d Cir. 1999) (plaintiff's son informed employer that his mother had been diagnosed with bipolar disorder and would need accommodations when she returned to work; if employer needed more information, it was required to ask for it); *Bultemeyer v. Fort Wayne Cmty. Schools,* 100 F.3d at 1286 (letter requesting a position that was "less stressful" was sufficient in light of the employer's knowledge of plaintiff's mental disability); *Walters v. Mayo Clinic Health Sys.-EAU Claire Hosp., Inc*., 998 F. Supp. 2d 750, 764–65 (W.D. Wis. 2014) (plaintiff requested understanding of her mental health condition and asked employer "to give her some room for that" and requested "help" because she was "going through some very hard emotional and personal issues" and that she had "some mental illness issues from some traumatic experiences in my past that were resurfacing during this time"); *Barnes v. Northwest Iowa Health Cr.*, 238 F. Supp. 2d 1053, 1088–89 (N.D. Iowa 2002) (employer's unilateral decision that accommodation was unduly burdensome circumvented the purpose of the ADA's interactive process requirement and precluded plaintiff from requesting accommodation); *Hedberg v. Ind. Telephone Co*., 47 F.3d 928, 934 (7th Cir. 1995) (the ADA and Rehabilitation Act do "not require clairvoyance," but a reasonable employer could be expected to inquire into an unidentified disability whose unspecified symptoms allegedly prevent an employee from coming to work for months at a time).

D. Cases and authorities where plaintiff's notice to employer was insufficient: *Hoppe v. Lewis Univ*., 692 F.3d 833, 840 (7th Cir. 2012) (plaintiff made no attempt to tell defendant what the nature of her disability was and there was no reason to believe that defendant knew that she suffered from depression, anxiety, dizziness, or any other disability); *Kobus v. The College of St. Scholastica, Inc.*, 608 F.3d 1034, 1039 (8th Cir. 2010) (plaintiff revealed only that he needed time off for stress and depression, which was insufficient notice that he had a disability and required accommodation); *Hunt–Golliday*, 104 F.3d at 1012 (insufficient notice that plaintiff's mental condition was a disability for which she required accommodation); *Boyle v. Lynch*, 5 F. Supp. 3d 425, 434 (W.D.N.Y. 2014) (notice of disability must be contemporaneous with request for accommodation); *Carr v. Boeing Co*., No. C13-1753-JCC, 2014 WL 3056807, at *5–6 (W.D. Wash. July 7, 2014) (plaintiff's *post hoc* requests for additional leave in connection with years-old notice of disability was inadequate to place employer on notice under ADA); *Maack v. Sch. Bd. of Brevard Cnty*., No. 6:12-CV-612-ORL-28, 2013 WL 6050749, at *12 (M.D. Fla. Nov. 15, 2013) (doctor's note restricting plaintiff to an 8-hour work shift constituted inadequate notice under the ADA); *Hickmon v. TECO Energy*, No. 8:10-cv-1147-T-30MAP, 2012 WL 39582, at *5 (M.D. Fla. Jan. 9, 2012) ("[P]ointing to a physician's note regarding light duty or part-time work, without something more,

is insufficient to constitute a request for an accommodation under the ADA.").

IX. The Practicalities of Providing Legal Advice regarding Disclosure[33]

A. Does the employee need an accommodation? If so, disclosure will probably not be optional. The issue will be how to disclose and how much to disclose.

B. Other Reasons for Disclosure Besides the Need for Accommodation

1. In applying for a job, explaining gaps in employment;

2. To explain symptoms, hospitalizations, crisis issues at work;

3. To gain the understanding of supervisors and coworkers;

4. To relieve the stress of keeping secrets and cover stories; and

5. To reduce isolation by sharing personal information with others.

C. Reasons Militating Against Disclosure

1. Client does not need an accommodation and privacy concerns outweigh any practical benefits of disclosure or could create problems the client does not already have.

2. To prevent being treated negatively or differently by supervisors and coworkers;

3. To prevent having one's behavior being attributed to mental illness;

4. To prevent being perceived as less competent;

5. To prevent the mental disability influencing employment decisions;

6. To prevent needing to work harder to prove one's worth;

7. To blend in.

D. Considerations in deciding how, when and what to disclose[34]

1. What difficulties is the client having performing the job?

2. What difficulties is the client having with supervisors or coworkers?

3. Has the client been criticized or received poor evaluations because of problems with his or her work that may be attributable to a mental disability?

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[33] These considerations come from MacDonald-Wilson et al, cited *supra* note 20, at 201, Table 10.1, "Reasons for choosing to disclose or not disclose." *See also* Goldberg et al, cited *supra* note 24.

[34] These questions are derived from MacDonald-Wilson et al, cited *supra* note 20, Appendices A and B at 209–15, and Goldberg et al, cited *supra* note 24.

4. What accommodation(s) does the client need and how urgent is the need for accommodation? If the client does not request an accommodation, is he or she in danger of being disciplined or fired? Would it be possible to wait until the employer appreciates the client's work, or until he/she is well liked and respected by coworkers and supervisors or does the client need immediate action to preserve his or job?

5. Is there a close connection between the disability and the perceived inadequacies in the client's performance that can be explained through disclosure?

6. Evaluate to whom the disclosure should be made: the supervisor? Human Resources? a trusted co-worker?

7. If disclosure is made, consider what and how to disclose

   a. Identify the specific medical condition, or give enough information to place employer on notice that the client requires accommodation due to a medical condition;

   b. Identify the specific job functions affected by the client's medical condition and for which assistance is needed;

   c. Emphasize the job functions the client *can* perform, accomplishments on the job, etc. Use positive language to describe the impairment: "in recovery," "successfully treated," "biochemical imbalance," "a mental health condition," an "illness that is managed."

   d. Specify what accommodation is being requested or request assistance in identifying the right assistance so that the client can continue to perform the essential functions of the job.

X. Interactive Process

A. General Principles

1. Once an employee asks for a reasonable accommodation, or the employer recognizes that the employee needs an accommodation but is unable to request one, the employer is obligated to initiate an interactive process aimed at determining the employee's limitations and possible ways of accommodating them. *See Barnett v. U.S. Air, Inc*., 228 F.3d 1105, 1112 (9th Cir.) (*en banc*), *vacated on other grounds*, 535 U.S. 391 (2002) *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002), *appeal after remand*, 105 F. App'x 892 (9th Cir. 2004); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997); *Taylor*, 184 at 314–17; *Bultemeyer*, 100 F.3d at 1284. Additionally, the employer is required to initiate an interactive

process when the disability is obvious or known to the company, and appears to be interfering with job performance.[35]

2. The interactive process is mandatory and requires both parties to participate in good faith. The legislative history makes clear that employers are required to engage in an interactive process with employees in order to identify and implement appropriate reasonable accommodations. The Senate Report to the ADA explained that: "[a] problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations … employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation." S.Rep. No. 101-116, at 34 (1989); *see also* H.R.Rep. No. 101-485, pt. 2, at 65 (1990), U.S. Code. Cong. & Admin. News 1990, at 303, 348.

3. All that is needed to trigger the interactive process is a request by an employee or someone on her behalf for assistance in the workplace due to a disability. She does not have to specifically use the word "accommodate" or any other "magic words." *See Conneen*, 334 F.3d at 332 (3d Cir. 2003)*; Taylor,* 184 F.3d at 312; *Zivkovic*, 302 F.3d at 1089 ("An employee is not required to use any particular language when requesting an accommodation but need only inform the employer of the need for an adjustment due to a medical condition.") (internal quotation and citation deleted); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984, 1001 (W.D. Texas 2012) (employee must explain that the adjustment sought is related to a medical condition, but employee need not mention ADA or use phrase "reasonable accommodation," because "[p]lain English will suffice."); *Burress v. City of Franklin, Tenn*., 809 F. Supp. 2d 795, 813 (M.D. Tenn. 2011) ("Although employees must initiate this discussion process, the ADA does not require employees to use the magic words accommodation or even disability.") (internal quotes omitted).

4. Where psychological conditions are at issue, the ADA may impose a higher standard of care on the employer and require less of the employee to trigger the interactive process. *Bultemeyer*, 100 F.3d at 1285; *Taylor*, 184 F.3d at

[35] "Application of this general rule [that a request for accommodation is a prerequisite to liability for failure to accommodate] is not warranted, however, where the disability is obvious or otherwise known to the employer without notice from the employee. The notice requirement is rooted in common sense. Obviously, an employer who acts or fails to act without knowledge of a disability cannot be said to have discriminated based on that disability. Moreover, the notice requirement prevents an employee from keeping her disability a secret and suing later for failure to accommodate. These concerns are not relevant when an employer has independent knowledge of an employee's disability. The rule requiring a request for accommodation [does not apply] in such circumstances." *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008), *quoting Felix v. N.Y. Transit Authority*, 154 F. Supp. 2d 640, 657 (S.D.N.Y. 2001).

313.[36] The information that must be included in the employee's initial notice depends on what the employer knows. *Taylor,* 184 F.3d at 313. Once the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs. *Id.* at 315.

5. The interactive process requires that the employer accurately assess both the disability and its limitations and the range of potential accommodations that can be utilized to accommodate the disability. 29 C.F.R. § 1630.2(o)(3) provides in relevant part: "To determine the appropriate reasonable accommodation it may be necessary for [an employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

6. The phrase "may be necessary" is merely a recognition that in some circumstances the employer and employee can easily identify an appropriate reasonable accommodation. "Any doubt that the EEOC views the interactive process as a mandatory obligation is resolved by the EEOC's interpretive guidance, which states that 'the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.'" *Barnett,* 228 F.3d at 1112, *quoting* 29 C.F.R. Pt. 1630, App. § 1630.9. *See also* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, ¶ 5 (2002).

7. Both parties bear responsibility for determining what accommodation is necessary. *Mengine,* 114 F.3d at 420; *Beck,* 75 F.3d at 1135. Neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. "A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Id.*

8. An employer that obstructs or delays the interactive process, or fails to communicate by way of initiation or response, and thereby depletes the range

[36] *Bultemeyer*, 100 F.3d at 1285 ("In a case involving an employee with mental illness, the communication process becomes more difficult. It is crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary.… [P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation,' particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." (internal quotation and citation omitted).

of possible accommodations, is not fulfilling its duty to engage in the process in good faith. *Colwell v. Rite Aid*, 602 F.3d 495, 504 (3d Cir. 2010); *Taylor*, 184 F.3d at 311. The process would be an exercise in futility if employers could constrict the range of potential accommodations by policies that are not consistent with the Act, or impede the process from taking place at all. This reduces the chances that potential accommodations will be discovered and increases potential for litigation, all contrary to what Congress intended. *Cf. Taylor*, 184 F.3d at 316. *See Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (*en banc*) (an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a disabled employee, and thereby violate the ADA).

9. If the employee could have been reasonably accommodated but for the employer's lack of good faith, the employee will prevail on her failure to accommodate claim. *See Armstrong v. Burdette Tomlin Memorial Hosp.*, 438 F.3d 240, 246 (3d Cir. 2006); *see also Colwell*, 602 F.3d at 504–05; *Donahue v. Conrail*, 224 F.3d 226, 235 (3d Cir. 2000); *Taylor*, 184 F.3d at 317, 319.

10. However, an employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible. *See Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009) ("Prior cases establish that a disabled plaintiff alleging that an employer failed to properly engage in the interactive process must also establish that the interactive process would have likely produced a reasonable accommodation."); *see also Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012); *Dargis v. Sheahan*, 526 F.3d 981, 988 (7th Cir. 2008).

11. Cases where courts found the employer responsible for the breakdown of the interactive process: *Humphrey v. Memorial Hospitals Assoc*., 239 F.3d 1128, 1139 (9th Cir. 2002), *cert. denied*, 535 U.S. 1011 (2002) (employer failed to engage in the interactive process as a matter of law where it rejected the employee's proposed accommodations by letter and offered no practical alternatives); *Deane*, 142 F.3d at 149 ("the single telephone conversation ... hardly satisfies our standard that the employer make reasonable efforts to assist [the employee], to communicate with him in good faith, and to not impede his investigation [for employment]").

12. Cases where courts found the employee responsible for the breakdown of the interactive process: *Conneen*, 334 F.3d at 331 (affirming summary judgment because plaintiff failed to advise the employer that she needed a previous accommodation reinstated); *Beck*, 75 F.3d at 1135 (doctor's note only requested accommodation for depression including reduced workload, which employer provided; plaintiff failed to specify that she needed anything the employer did not try to provide). *See also Taylor*, 184 F.3d at 313–15; *Goos*, 451 F. App'x at 702–03; *McGill v. Callear***,** 973 F. Supp. 20, 23

(D.D.C. 1997), *aff'd in part sub. nom McGill v. Munoz*, 172 F.3d 920 (D.C. Cir. 1999), and *rev'd in part sub nom McGill v. Munoz*, 203 F.3d 843 (D.C. Cir. 2000) (Rehabilitation Act).

XI. Conduct-Based Accommodations

Cases revolving around mental health impairments often involve an adverse employment action that is pending or already happened. Many of the cases where the employee has already been subjected to an adverse action involve disability-related misconduct.

A. General Rule: An employer may discipline an employee—whether he or she has a disability or not—if the employee violates a workplace conduct standard, so long as the workplace conduct standard is (1) "job-related for the position in question and is consistent with business necessity," and (2) other employees are held to the same standard. 42 U.S.C. § 12112(b)(6); *see also* The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, §§ 8–9 (EEOC Jan. 20, 2011); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, ¶¶ 35, 36 (October 17, 2002) (same) and EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, ¶ 30.

B. Employers may use the same evaluation criteria for employees with disabilities as they do for people without such disabilities. The ADA does not require an employer to "accommodate" mentally disabled employees by accepting behavior that the employer would normally punish if committed by a non-disabled employee. In other words, the ADA does not require an employer to ignore violations of workplace rules and conduct requirements, even if the person has a disability and even if the conduct was caused by the disability. *See* Applying Performance and Conduct Standards, *supra*, ¶ 9.

C. Accommodations are prospective. Although there is no hard and fast rule as to when an employee should request an accommodation, they should do so before performance problems arise or before they become too serious. Employers are not required to rescind discipline, even terminations, based on disability-related conduct which occurred before the employer was placed on notice that the employee had a disability and might require accommodation. EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, ¶ 31; Applying Performance and Conduct Standards, *supra,* ¶ ¶ 5– 6; 10.

D. If the employee waits too long to request an accommodation, there may be nothing a lawyer can do to preserve their employment, even if the conduct is caused by the disability. Applying Performance and Conduct Standards, *supra*, ¶ 9. *See, e.g., Little v. FBI*, 1 F.3d 255, 259 (4th Cir.1993); *see also Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387 (D. Mass. 1994) ("While the ADA ... protects an individual's status as an alcoholic, it is clear that a company need not tolerate misconduct such as intoxication on the job"); *Neilsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1182 (6th Cir. 1997) (ADA protects

individual's status as an alcoholic but does not insulate him from the consequences of his actions).

E. However, the employer cannot fire an employee for misconduct or performance problems that flow from a failure to provide a reasonable accommodation when the employer knew about the disability before the misconduct took place and after the duty to engage in the interactive process and/or provide accommodations has been triggered. *See, e.g.*, *Humphrey v. Memorial Hospitals Ass'n*, 239 F. 3d 1128 (9th Cir. 2001) *(*conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for discipline, particularly where it is the employer's failure to reasonably accommodate a known disability that leads to the performance inadequacies*); Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 143 (2nd Cir. 1995); *Hildebrand v. Dollar General Corp*., 2013 WL 3761291, at *8–9 (M.D. Tenn. July 16, 2013). On the other hand, employees cannot assume that notice of their disability will forever trigger the employer's duty, so providing notice from time to time may be necessary to preserve the right to accommodation and to protect against adverse job actions based on manifestations of disability. *See Conneen*, 335 F.3d at 333.

F. If the discipline is something less than termination, the employer may ask the employee about the disability, or otherwise respond to the employee's disclosure in order to prevent future misconduct. EEOC, Applying Performance Conduct Standards at ¶10.

G. Specific Conduct Issues

1. ***Attendance***: Federal courts generally affirm that an employer can lawfully terminate an employee for excessive absenteeism even when the absences are due to a disability covered by the ADA if regular attendance is an essential function of the position, such as when an employee must perform a job on-site. *Conneen*, 334 F.3d at 329 (regular starting time is an essential function); *see also Samper v. Providence St. Vincent Med. Ctr*., 675 F.3d 1233**,** 1238 (9th Cir. 2012); *Vandenbroek v. PSEG Power CT LLC*, 356 F. App'x 457, 460 (2d Cir. 2009); *Brenneman v. MedCentral Health Sys*., 366 F.3d 412, 418–19 (6th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002); *Earl v. Mervyns, Inc*., 207 F.3d 1361, 1366 (11th Cir. 2000) (punctuality is an essential function); *Tyndall v. Nat'l Educ. Ctrs., Inc*., 31 F.3d 209, 213–14 (4th Cir. 1994); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec*. Co., 201 F.3d 894, 899 (7th Cir. 2000); *Nowak v. St. Rita High School*, 142 F.3d 999, 1003 (7th Cir.1998) (noting that a teacher "who does not come to work cannot perform the essential functions of his job"); *Corder v. Lucent Technologies, Inc*., 162 F.3d 924, 928 (7th Cir. 1998) (attendance was an implied essential function of a job as an account support representative).

2. ***Getting along with coworkers***: *See McKane v. UBS Financial Services., Inc*., 363 F. App'x 679, 682 (11th Cir. 2010) (employer did not violate the ADA

by refusing to move the employee's office away from other employees so that he would not have to interact with them. Maintaining peaceful relations with coworkers was an essential function of the job); *Theilig v. United Tech Corp.*, 415 F. App'x 331, 333 (2d Cir. 2011) (employee's request to have no contact with any coworkers or with his two supervisors, based on a psychiatric evaluation that the employee's return to the workplace posed a risk of workplace violence or suicide, was unreasonable as a matter of law).

3. ***Getting along with supervisors***: An employee is not entitled to a change in supervisor as an accommodation for stress, depression, or anxiety. *See*, *e.g.*, *Flynt v. Biogen Idec, Inc*., No. 3:11-cv-22, 2012 WL 4588570, at * 4 (S.D. Miss. Sept. 30, 2012); *Larson v. Commonwealth of Virginia, Department of Transp*., No. 5:10-cv-00136, 2011 WL 1296510, at *2 (W.D. Va., Apr. 5, 2011). However, altering management tactics, including adjusting the level of supervision, is one form of reasonable accommodation for mental disabilities. *See* Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities, Question 26; *Battle v. United Parcel Service*, 438 F.3d 856 (8th Cir. 2006), *cert. denied*, 550 U.S. 598 (2007) (requiring supervisor to provide agenda to curtail abusive managerial tactics).

4. ***Disruptive or anti-social behavior***: *Sever v. Henderson*, 381 F. Supp. 2d 405 (M.D. Pa. 2005), *aff'g,* 220 F. App'x 159 (3d Cir. 2007) (employee, with post-traumatic stress disorder and obsessive compulsive disorder, was fired for making statements and gestures of violence against his co-workers). If an employer knew about an employee's disability before the employee engaged in disruptive or anti-social behavior related to his or disability, and the disability-related misconduct played a role in the decision to discipline, the employee may have a cause of action for discrimination, analyzed through the *McDonnell-Douglas* framework. *See e.g., Wills v. Superior Court*, 195 Cal. App. 4th 143, 166 (Cal. Ct. App. 2011*), as modified on denial of rehearing* (May 12, 2011), *review denied* (Jul 20, 2011) (interpreting FEHA as authorizing an employer to distinguish between disability-related misconduct and the disability itself in the narrow context of threats or violence against coworkers); *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1094 (9th Cir. 2007) (holding that an employer violated the ADA by discharging an employee whose misconduct was caused by bipolar disorder).

5. ***Substance abuse***: Employers may hold an employee who is alcoholic or who engages in the illegal use of drugs to the same standards of performance and behavior as other employees. 42 U.S.C. § 12114(c)(4); EEOC, Applying Performance and Conduct Standards, ¶ 24; *Daft v. Sierra Pacific Power Co.*, 251 F. App'x 480, 482–83 (9th Cir. 2007).

H. Direct Threat

1. An employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the

individual would pose a "direct threat." A direct threat is a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." 42 U.S.C. § 12182 (b)(3); 29 C.F.R. § 1630.2(r). *See also* EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, ¶¶ 33–35; *Calandriello v. Tennessee Processing Center*, No. 3:08-1099, 2009 WL 5170193, at * 8–9 (M.D. Tenn. Dec. 15, 2009) (holding that terminating an employee with bipolar disorder because of fear of potential violence by that employee was a legitimate nondiscriminatory reason for the termination).

2. Employers must avoid stereotypes about mental disabilities, however, and may not assume that employees with mental disabilities automatically pose workplace threats. Rather, an employer's apprehension must be based on legitimate safety concerns. *Lizotte v. Dacotah Bank*, 677 F. Supp. 2d 1155 (D.N.D. 2010). Moreover, employers must apply the "direct threat" standard uniformly and may not use safety concerns to justify exclusion of persons with disabilities when persons without disabilities would not be excluded in similar circumstances. *Id.*; EEOC Guidance on Psychiatric Disabilities, *supra.*

3. Employers relying on direct threats posed by employees with a disability must identify the specific conduct that constitutes the direct threat, and must determine, on an individualized basis, the: 1) nature, duration, and severity of the risk; 2) probability that the potential injury will actually occur; and 3) possibility that reasonable modifications of policies, practices, or procedures will mitigate the risk. 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r).

4. Whether a person constitutes a direct threat must be analyzed case by case, based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available medical evidence. *Haynes v. City of Montgomery,* No. 2:06-CV-1093-WKW, 2008 WL 4495711, at *4–5 (M.D. Ala. Oct. 6, 2008) (upholding jury verdict that employee was not a direct threat, and that city's belief that firefighter on anti-anxiety medication posed a significant risk to safety was not grounded in medical or other objective scientific evidence; no individualized assessment undertaken); *cf. Donahue v. Conrail,* 224 F.3d 226, 232 (3d Cir. 2000) (plaintiff was a direct threat in his job as a train dispatcher because he could not dependably remain conscious due to a heart condition); *Rednour v. Wayne Tp.*, 51 F. Supp. 3d 799, 824 (S.D. Ind. 2014) (rejecting direct threat defense where employer ignored its own doctor and relied on internet research and non-medical opinions).

5. The ADA places the burden on the employer to substantiate its claim that an employee could not safely perform the job even with accommodation. *See Mantolete v. Bolger,* 767 F.2d 1416, 1423–24 (1985); *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. March 20, 2006); *Hargrave v. Vermont,* 340 F.3d 27, 35 (2d Cir. 2003); *Lovejoy-Wilson v. Noco Motor*

Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001) (rejecting direct threat defense where employer failed to prove that plaintiff's epilepsy posed a significant risk of substantial harm even though plaintiff had brief, almost daily seizures); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999); *Verzeni v. Potter*, 109 F. App'x 485, 492 (3d Cir. 2004). Accordingly, an interactive process is necessary for a direct threat determination. *See Bombreys v. City of Toledo*, 849 F. Supp. 1210, 1216–17 (N.D. Ohio) (diabetic police officers may not be excluded as "direct threats" without individualized inquiry)*; Lafata v. Dearborn Heights School Dist. No. 7*, No. 13-cv-10755, 2013 WL 6500068, at *11 (E.D. Mich. Dec. 11, 2013) (direct threat defense found "doomed" by the failure to engage in an interactive process).

XII. Types of reasonable accommodations: flexible or modified schedule

A. Late arrival time

1. *McMillan v. City of New York*, 711 F.3d 120, 123 (2d Cir. 2013) (social services case manager, suffering from schizophrenia, consistently came in late due to side-effect of his medication; in reversing summary judgment, the court found that arriving at work at a specific time was not an essential function of plaintiff's job and that he could make up his tardiness by using time banked from when he worked more than the regular work week).

2. *Conneen*, 334 F.3d at 328–29, 331–32 (where bank manager was frequently tardy due to the sedative effect of medication, the court held that showing up at work at 8:00 A.M. to set a good example for other employees was not an essential job function; however, plaintiff's failure to accommodate claim failed because the plaintiff did not make the employer aware that she needed the schedule modification on a permanent, not temporary, basis).

3. *But see Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2d Cir. 1992) (a later start time was not a reasonable accommodation for a head nurse whose supervisory duties required her to be present during an early morning change in shifts).

B. Flexible hours/work schedule

1. *Solomon v. Vislack*, 763 F.3d 1, 9–11 (D.C. Cir. 2014) (in reversing summary judgment under the Rehabilitation Act, finding that flexible work hours may be a reasonable accommodation for a budget analyst who never missed a deadline despite frequently arriving late to work as a result of his intensifying depression)

2. *Breen v. DOT*, 282 F.3d 839, 843 (D.C. Cir. 2002) (modifying schedule to give clerical worker an extra hour of work a day in order to allow him

uninterrupted time to do filing, followed by one day off every other week, was a reasonable accommodation to his obsessive compulsive disorder).

C. Part-time work

1. *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 171–72 (1st Cir. 1998) (affirming preliminary injunction requiring employer to provide four weeks of part-time work at the completion of paid leave for a carpenter who suffered a mental breakdown as a result of years-long sexual harassment; upholding finding of irreparable harm where medical evidence suggested that returning to work was essential to plaintiff's recovery and that his disability would worsen the longer he was out of work).

2. *Lowe v. Hamilton Cnty. Dep't of Job & Family Servs.*, No. 1:05-CV-117, 2012 WL 1931667, at *6 (S.D. Ohio May 29, 2012) (denying summary judgment regarding plaintiff's claim that employer failed to provide her 30 days of part-time work in preparation for her return to working full-time as an accommodation to her depression, ADHD and severe anxiety disorder).

3. *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 542–43 (S.D.N.Y. 2009) (finding that Revlon failed to reasonably accommodate a depressed employee who, upon returning from an extended leave of absence, sought to work part-time for a few weeks in order to transition to full-time status; "Revlon argues that it provided sufficient accommodation to plaintiff's disability by permitting Reilly to take her 12-week FMLA leave and then giving her ten additional weeks of paid disability leave for her depression. Providing legally-required FMLA leave is not any sort of accommodation; it is a requirement of law. Providing paid disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work.")

4. *But see Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000) (request by plaintiff for a part-time position upon returning from leave for her depression was not a reasonable accommodation where no part-time positions existed, and employer was not obligated to create such a position).

D. Shortened work week or workday

1. Shortened work week or workday is a reasonable accommodation

a. *Klaes v. Jamestown Bd. of Pub. Utilities*, No. 11-CV-606, 2013 WL 1337188, at *9 (W.D.N.Y. Mar. 29, 2013) (plaintiff, an engineer, adequately pled a failure to accommodate claim where he requested to be removed from his on-call schedule in order to help with his sleep apnea and depression was reasonable).

b. *Cf. Menes v. CUNY Univ. of New York*, 92 F. Supp. 2d 294, 304 (S.D.N.Y. 2000) (holding that the employer reasonably accommodated plaintiff's depression by giving him a three-day work week, but that even with reduced schedule, the employee was unable to perform the essential functions).

c. *See also* S. Stefan, *Hollow Promises*, cited *supra* note 32, at 175: "Requirements that are related to minimizing labor costs and maximizing employer profits (often at the expense of employee health) should not be considered essential functions. Otherwise, any employer could determine that working 50, 60, 70, or more hours a week is an essential function of each position."

2. Shortened work week or workday is not a reasonable accommodation

a. *Pagonakis v. Express, LLC*, 534 F. Supp. 2d 453, 461 (D. Del. 2008), *aff'd in part, rev'd in part and remanded*, 315 F. App'x 425 (3d Cir. 2009) (the district and appellate courts accepted defendant's assertion that working at least 40 hours a week was an essential function of a store co-manager job, and consequently determined that plaintiff's requests for flexible hours to accommodate her head injury, cognitive disorder, depression and adjustment disorder were unreasonable. *Note: The court so rules despite the fact that over a six-year period, in three different jobs with defendant, plaintiff had worked a flexible schedule*).

b. *Simmerman v. Hardee's Food Systems, Inc.*, No. 94–6906, 1996 WL 131948, at *5 (E.D. Pa. Mar. 22, 1996), *aff'd*, 118 F.3d 1578 (3d Cir. 1997) (Table) (granting summary judgment against restaurant manager who sought to work 40 hours a week because of her depression where employer insisted that a 50-hour work week, including night shifts, was an essential function of the job).

E. Shift changes: working during the day or on a fixed schedule

1. A 1989 Senate Report on the ADA states: "Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts…. Allowing constant shifts or modified work schedules are examples of means to accommodate the individual with a disability to allow him or her to do the same job as a non-disabled person."[37]

[37] S. Rep. No. 101-116, at 31 (1989), quoted in S. Stefan, Hollow Promises at 184.

2. Cases holding shift change/fixed schedule is a reasonable accommodation

a. *Gile v. United Airlines, Inc*., 213 F.3d 365, 374 (7th Cir. 2000) (upholding jury verdict for data entry operator whose employer refused to transfer her to the day shift in accommodation to her depression; the fact that the plaintiff had not fulfilled defendant's technical bidding process was deemed no defense).

b. *E.E.O.C. v. Union Carbide Chemicals & Plastics Co.*, No. CIV.A. 94–103, 1995 WL 495910, at *2 (E.D. La. Aug. 18, 1995) (finding triable issue as to whether the employer was obliged to accommodate lab technician's bipolar disorder by relieving him of working 12-hour rotating shifts and allowing him to work an eight hour shift, or a permanent day or night schedule).

c. *Cf. Krocka v. Bransfield*, 969 F. Supp. 1073, 1088–89 (N.D. Ill. 1997), *aff'd sub nom. Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000) (dismissing depressed police officer's failure to accommodate claim because the Police Department had already granted plaintiff's accommodation request by removing him from the grave yard shift, although it had not yet made an official announcement).

3. Cases holding shift change/fixed schedule is not a reasonable accommodation

a. *Shepheard v. New York City Corr. Dep't*, 360 F. App'x 249, 251 (2d Cir. 2010) (affirming summary judgment because police captain with major depression and anxiety disorder was unable to do her job even if assigned a regular midnight shift as an accommodation, regardless of her psychiatrist's note to the contrary).

F. Working from home/telecommuting

1. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship, Question 34: "Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship."

2. Cases where working from home is a reasonable accommodation

   a. *Humphrey*, 239 F.3d at 1136–37 (reversing summary judgment where a triable issue existed as to whether a medical transcriptionist with obsessive compulsive disorder could have performed her essential job duties working at home, given that other medical transcriptionists worked from home. The court rejected the employer's argument that Humphrey's record of tardiness and absenteeism justified the denial of the accommodation: "It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated.")

   b. *Goonan v. Fed. Reserve Bank of New York*, 916 F. Supp. 2d 470, 482–83 (S.D.N.Y. 2013), *reconsideration denied*, No. 12 CIV. 3859 JPO, 2013 WL 1386933 (S.D.N.Y. Apr. 5, 2013) (denying motion to dismiss where employee whose PTSD was triggered by working at his office building located near the site of the World Trade Center bombing, sought transfer to another building or to telecommute; the employee's proposed accommodation was reasonable while the Bank's alternatives, including moving him away from the window, a white noise machine, multi-spectrum lights, were not).

   c. *Jacques v. DiMarzio, Inc*., 200 F. Supp. 2d 151, 161 (E.D.N.Y. 2002), *as supplemented* (May 6, 2002), *aff'd*, 386 F.3d 192 (2d Cir. 2004) (*see* below at p. 29, re changing supervisory methods).

3. Cases where working from home is not a reasonable accommodation

   a. *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (*en banc*) (holding that working from home on an as-needed basis was not a reasonable accommodation for a re-sale buyer in a highly interactive job who had irritable bowel syndrome, and previous attempts to telecommute with a flexible schedule had proven unsuccessful).

   b. *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1123–24 (10th Cir. 2004) (affirming summary judgment against employee with PTSD who wanted to work at home because she feared a potentially violent co-worker; an at-home accommodation was held unreasonable on its face because it sought to eliminate an essential function of plaintiff's service coordinator position).

   c. *Vande Zande v. State of Wis. Dept. of Admin*., 44 F.3d 538, 544–45 (7th Cir. 1995) (Posner, J.) (paraplegic/ulcers) (holding that working from home, where "productivity would be greatly reduced" is not a

reasonable accommodation; but "[t]his will no doubt change as communications technology advances, but is the situation today.")

d. *Fierce v. Burwell*, No. CIV. RWT 13-3549, 2015 WL 1505651, at *5 (D. Md. Mar. 31, 2015) (plaintiff, coping with depression and learning difficulties, experienced increasing tensions with her supervisor, that led her to request an accommodation that included working from home one-day a week; the court dismissed plaintiff's failure to accommodate claim because while working from home would presumably have alleviated her depression, she failed to show that telework was necessary to perform the essential functions of the job).

XIII. **Types of reasonable accommodations: time off/ leaves of absence**

A. 29 C.F.R. pt. 1630, App. § 1630.2(o) (EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act): a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment."

1. 29 C.F.R. pt. 32, App. A(b) (Department of Labor regulations to Rehabilitation Act: a reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization").

B. Time off/ leave of absences is a reasonable accommodation

1. *Humphrey v. Memorial Hosp. Assn.*, 239 F.3d at 1135 ("[T]he ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation." All that is required is a showing that the leave of absence "could plausibly have enabled [the plaintiff] adequately to perform her job.")

2. *Criado v. IBM Corp*, 145 F.3d 437 (1st Cir. 1988) (affirming jury verdict where plaintiff took disability leave because of his anxiety disorder and depression but and her psychiatrist, at its completion, requested additional leave without a specific return date to allow her condition to improve; the court held that the additional leave was reasonable, noting that plaintiff's doctor believed that, with the leave, he could ameliorate plaintiff's condition to the point that she could return to work as a productive employee. There was no real burden on IBM since it had a policy giving all its employees 52 weeks of paid disability leave).

3. *Rascon v. U.S. West Communications, Inc.,* 143 F.3d 1324, 1334–35 (10th Cir. 1998) (affirming bench trial judgment for plaintiff and holding that a leave of absence to enable plaintiff to receive nearly five months of intensive treatment for his PTSD was a reasonable accommodation given that his

doctors expected the treatment to "improve" plaintiff's work, and defendant would not suffer an undue burden since its leave policy allowed for longer leaves than plaintiff sought).

4. *Baucom v. Potter*, 225 F. Supp. 2d 585, 592 (D. Md. 2002) (granting summary judgment for *plaintiff* under Rehabilitation Act on his claim that a Postal Service failed to reasonably accommodate his alcoholism and depression when it refused to permit him to use his accumulated leave time to receive in-patient treatment where, according to his doctor, it was reasonably likely that following the treatment he would be able to safely return to his duties).

5. *Norman v. S. Guar. Ins. Co.*, 191 F. Supp. 2d 1321, 1335 (M.D. Ala. 2002) (holding that a triable issue existed as to whether plaintiff, a 14-year employee responsible for inputting new insurance rate filings and suffering from major depression, anxiety attacks and a personality disorder, could perform the essential functions of her job with a reasonable accommodation of "unlimited time off" since the parties disagreed whether her job duties were time-sensitive).

6. *Shannon v. City of Philadelphia*, No. CIV.A. 98-5277, 1999 WL 1065210, at *6 (E.D. Pa. Nov. 23, 1999) (finding a jury question existed as to whether plaintiff's request for an additional three months of unpaid leave for treatment of his major depression following 12 weeks of FMLA leave was reasonable, where plaintiff's physician had opined that plaintiff would be "fully fit" to return to work in three to six months and was "hopeful" that her symptoms would "resolve nearly entirely" within a year).

7. *Powers v. Polygram Holding, Inc.*, 40 F. Supp. 2d 195, 199–202 (S.D.N.Y. 1999) (holding that a reasonable jury could find that plaintiff's request for a fourth consecutive leave request, or, in all, 17 weeks of leave, was reasonable even though the predicted return date for plaintiff, who suffered from manic depression, was uncertain; stating, "no person recovering from clinically diagnosed mental illness, especially while suffering symptoms of this illness, can give an absolute date as to when his symptoms will ameliorate to the point that he will be able to return to work. To require such certainty … would be to eviscerate much of the protection afforded under the ADA.")

C. Cases where time off/leave of absence is not a reasonable accommodation

1. *Hill v. Walker*, 737 F.3d 1209, 1217 (8th Cir. 2013), *aff'g*, 918 F. Supp. 2d 819 (E.D. Ark. 2013) (holding that a three-week leave was not a reasonable accommodation because upon returning to work, plaintiff, a social services caseworker diagnosed with depression and anxiety, would continue refusing to handle a stressful client, which was an essential function of the job).

2. *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 380–81 (7th Cir. 2003) (Easterbrook, J.) (while reversing summary judgment on plaintiff's FMLA claim, the court upheld the dismissal of the ADA claim, finding that extended time off was not a reasonable accommodation because plaintiff's depression and sleep disturbance were so severe that he was unable to stay awake at work and was extremely suspicious of co-workers, rendering him incapable of working. The court declared categorically: "Inability to work for a multi-month period removes a person from the class protected by the ADA," adding that time off, however, may be an apt accommodation for intermittent illnesses, such as arthritis and lupus. *This is a troubling decision. Byrne's depression was, indeed, episodic. The opinion notes that he had "four years of highly regarded service" before his difficulty staying awake surfaced; it was for less than three weeks when he exhibited the most severe symptoms, at which point he was fired; and, as it turned out, with treatment, he "surmounted his mental difficulties" within two months of his discharge*)

3. *Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000) (three-month leave request was unreasonable where plaintiff, suffering from severe depression and anxiety disorder, failed to state when she could reasonably be expected to return to work).

4. *Barfield v. Donahoe*, No. 13 C 1518, 2014 WL 4638635, at *4–5 (N.D. Ill. Sept. 17, 2014) (holding that neither the ADA nor the Rehabilitation Act requires multi-month medical leaves) (collecting cases).

5. *Carrson v. Fedex Ground Package Sys., Inc.*, No. CIV 05-1951-AA, 2006 WL 3751266, at *5 (D. Or. Dec. 15, 2006) (defendant's denial of the request for an extended leave of absence was justified where the plaintiff's physician did not indicate the nature of his symptoms, whether they were treatable, and whether the leave would enable him to return to work).

6. *Chinchillo v. Powell*, 236 F. Supp. 2d 18, 25 (D.D.C. 2003) (holding that because there was no reasonable assurance that plaintiff's performance was likely to improve immediately or in the distant future, even with time off for treatment of his severe depression, defendant was not required to provide such an accommodation).

7. *Richio v. Miami-Dade Cnty.*, 163 F. Supp. 2d 1352, 1358 (S.D. Fla. 2001) (holding that the employer did not have to give plaintiff, an inspector, additional leave at the end of her FMLA leave to accommodate her depression, since it had already made the accommodation of placing her in a less stressful, clerical job and allowing her to leave early if necessary).

XIV. Types of reasonable accommodation: job restructuring

A. Removing stressful responsibilities

1. *Hill v. Walker*, 737 F.3d 1209, 1217 (8th Cir. 2013) (see above at p. 27).

2. *Beair v. Summit Polymers*, No. CIV.A. 5:11-420-KKC, 2013 WL 4099196, at *8 (E.D. Ky. Aug. 13, 2013) ("transferring an employee solely so she will be subjected to less supervision is not a reasonable accommodation.")

3. *Bolstein v. Reich*, Civ. A. No. 93-1092, 1995 WL 46387 (D.D.C. Jan. 19, 1995) (accommodation request by an attorney with chronic depression and severe personality disturbance for more supervision, less complex assignments and elimination of appellate work was not reasonable because it would eliminate the very duties justifying his GS-14 grade, and, moreover, he refused reassignment to a lower grade job where he could have performed essential functions).

B. Aggravation-free work environment

1. *Gonzagowski v. Widnall*, 115 F.3d 744, 747–48 (10th Cir. 1997) (affirming summary judgment where Air Force computer specialist was unable to do his job because of an anxiety disorder which was exacerbated by his supervisor and the introduction of a new program language. The court observed that the employer had temporarily assigned the plaintiff a new supervisor as an accommodation, yet the plaintiff nonetheless suffered anxiety when he learned that the original supervisor was still reviewing his work. The court rejected the recommendation of the plaintiff's psychologist that plaintiff be given a work environment with less stress and criticism because "it is unreasonable to require an employer to create a work environment free of stress and criticism.")

2. *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 161 (E.D.N.Y. 2002), *as supplemented* (May 6, 2002) (denying summary judgment as to whether it was a reasonable accommodation for a packager and assembler of electric guitars who had bipolar disorder, to continue to work at home or in a more isolated space in the factory, where the employer did not claim that such working arrangements would pose an undue hardship), *aff'd*, 386 F.3d 192 (2d Cir. 2004).

3. *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 442 (6th Cir. 1991)(where plaintiff, who became extremely anxious and depressed at the slightest hint of rejection or criticism, was already working in the least stressful job at the plant, it would be unreasonable to require defendant to place him in a virtually stress-free environment and immunize him from any criticism as an accommodation to his disability).

4. *Franklin v. City of Slidell*, 969 F. Supp. 2d 644, 655 (E.D. La. 2013)(in dismissing plaintiff's claims, finding that it was not reasonable to require the City to eliminate all except "administrative duties" held by a senior corrections officer who suffered acute stress disorder, for to do so would be,

in effect, to create a new "light duty" job, something the employer was not obliged to do).

5. *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 149, 811 N.Y.S.2d 381, 388 (1st Dept. 2006) (holding that plaintiff, a client financial analyst with depression and anxiety disorder, upon returning from disability leave, made an accommodation request unreasonable as a matter of law in asking for an alternative position with "no customer or people contact," and, in any event, no such position existed)

C. Job sharing

1. *Katz v. Metro. Life Ins. Co*., No. 95 CIV. 10075 (RPP), 1998 WL 132945, at *5 (S.D.N.Y. Mar. 20, 1998) (dismissing failure to accommodate claim where the employer had offered a sales representative with depression and anxiety disorder a job sharing arrangement and the sales representative refused, instead seeking an alternative position or part-time work. Because the defendant offered plaintiff a reasonable accommodation, it was not obligated to offer him other accommodations.)

D. Eliminating mandatory OT

1. *Johnson v. City of Blaine*, 970 F. Supp. 2d 893, 912 (D. Minn. 2013) (dismissing failure to accommodate claim where patrol officer sought to be relieved of mandatory overtime so she could go to group therapy and treatment. The court found that mandatory overtime was an essential part of the patrol officer job, referred to in the job description and collective bargaining agreement).

XV. Types of reasonable accommodation: transfer

A. Transfer is found to be a reasonable accommodation

1. *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1237–38 (9th Cir. 1999), *opinion amended on denial of reh'g*, 201 F.3d 1211 (9th Cir. 2000), *cert. denied*, 530 U.S. 1243 (2000) (reversing summary judgment and finding that defendant had failed to produce evidence that plaintiff's request for a transfer would create an undue hardship for the County. On the contrary, transferring plaintiff due to his anxiety disorder would not interfere with other employees' expectations because the County's transfer list is unranked and transfers are distributed in an ad hoc manner at the discretion of the hiring department).

2. *Mustafa v. Clark Cnty. Sch. Dist*., 157 F.3d 1169, 1176 (9th Cir. 1998) (holding that a reasonable jury could find that it was reasonable to transfer to a non-classroom setting a teacher who had developed severe depression, panic disorder and PTSD from sexual misconduct charges brought against

him. Plaintiff's doctors had recommended the transfer and the school district failed to present evidence that it was not feasible).

3. *Cf. Duda v. Board of Education of Franklin Park Public School District No. 84*, 133 F.3d 1054, 1059–60 (7th Cir. 1998) (school janitor stated an ADA claim when the school district, after learning of his mental illness, transferred him to a location in which he was forced to work alone and instructed him not to speak to anyone).

B. Transfer is found not required as a reasonable accommodation

1. *Burchett v. Target Corp*., 340 F.3d 510, 518 (8th Cir. 2003) (holding that the employer was not required to transfer plaintiff as a reasonable accommodation where it had already restructured her work load and reduced her work hours in accordance with her doctor's orders, and she was able to perform her current job).

2. *Corder v. Lucent Technologies Inc*., 162 F.3d 924, 928 (7th Cir. 1998) (holding that "Lucent went the extra mile and then some for Corder," a 23-year employee suffering from severe depression and anxiety, by accommodating her unpredictable need for time off; that Lucent required her to work in a larger office, further from her home, so that other employees would be available to cover for her when she was absent did not represent a failure to accommodate).

3. *Diaz v. City of Philadelphia*, No. CIV.A. 11-671, 2012 WL 1657866, at *11-12 (E.D. Pa. May 10, 2012), *aff'd*, 565 F. App'x 102 (3d Cir. 2014) (where police officer developed irritable bowel syndrome, depressive disorder and anxiety as a result of sustained sexual harassment, the court held that the police department had adequately accommodated plaintiff by, among other things, granting her a leave of absence, and that it was not required to re-assign her to an inside, non-patrol positon. The Court deferred to police department's judgment that plaintiff's mental state made her incapable of handling any police work, and while acknowledging that the reasonableness of an accommodation is ordinarily a jury question, here, "we are satisfied that when dealing with the unique situation of police officers and issues related to their mental health it would be ill-advised to second-guess the personnel decisions of a police department.")

4. *Holland v. Shinseki*, No. 3:10-CV-0908-B, 2012 WL 162333, at *11 (N.D. Tex. Jan. 18, 2012) (dismissing plaintiff's failure to accommodate claim where nurse, suffering from major depression, panic, anxiety and acute stress disorder, sought reassignment to a permanent position but had already sufficiently accommodated when the hospital transferred her to temporary positions with a modified work schedule, and the hospital was not required to reassign plaintiff to her preferred positions).

5. *Martinsky v. City of Bridgeport***,** 814 F. Supp. 2d 130, 149-–0 (D. Conn. 2011), *aff'd*, 504 F. App'x 43 (2d Cir. 2012) (finding that the police department was not required to accommodate a police officer with a panic disorder by keeping him off patrol duty and assigning him permanently to booking or the canine unit since such permanent assignments would violate either departmental policy or the collective bargaining agreement).

XVI. Types of reasonable accommodations: changing supervisors

A. A supportive supervisor facilitates the work tenure of people with mental health disabilities.[38]

B. EEOC Enforcement Guidance *Reasonable Accommodation and Undue Hardship* at question 33 ("[a]n employer does not have to provide an employee with a new supervisor as a reasonable accommodation.")

C. The great majority of cases hold that changing supervisors is not a reasonable accommodation

1. *Ozlek v. Potter*, 259 F. App'x 417, 420 (3d Cir. 2007) (holding that transferring plaintiff away from his management team to accommodate his depression, anxiety disorder and obsessive compulsive disorder, was unreasonable as a matter of law under the Rehabilitation Act).

2. *Cardenas-Meade v. Pfizer, Inc.,* 510 F. App'x 367, 372 (6th Cir. 2013) (while not precluding the reasonable accommodation of changing supervisors, holding that the administrative costs of transferring plaintiff, who alleged that her supervisors' abusive and discriminatory treatment caused her mental illness, outweighed the benefits, pointing out that the plaintiff was in a probationary trial period and had already failed her required final examination).

3. *Kennedy v. Dresser Rand Co.,* 193 F.3d 120, 122–23 (2d Cir.1999) (declining to adopt a per se rule that a request for transfer to a new supervisor is unreasonable as a matter of law, but ruling that there is a rebuttable presumption that such a transfer is unreasonable; in this case, it was deemed unreasonable because plaintiff requested not only that she change supervisors but also that she have no contact with her old supervisor – a virtual impossibility if she were to fulfill her job duties).

4. *Weiler v. Household Fin. Corp.,* 101 F.3d 519, 526 (7th Cir. 1996) ("Weiler's solution is that she return to work under a different supervisor. But that decision remains with the employer. In essence, Weiler asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility.")

[38] M. Cobiere et al, Work Accommodation and Natural Supports for Maintaining Employment, Psychiatric Rehabilitation Journal (2014), No. 2, 90-98, at 95-96.

5. *Alsup v. U.S. Bancorp*, No. 2:14-CV-01515-KJM, 2015 WL 224748, at *6-7 (E.D. Cal. Jan. 15, 2015) (dismissing complaint because transfer to another supervisor is a *per se* unreasonable accommodation under either California law or the ADA) (collecting cases).

D. Cases finding changing supervisors is a reasonable accommodation

1. *Lucas v. City of Philadelphia*, No. CIV.A. 11-4376, 2012 WL 1555430, at *5 (E.D. Pa. May 2, 2012) (motion to dismiss), 2013 WL 2156007, at *27–28 (E.D. Pa. May 17, 2013) (motion for summary judgment) (plaintiff made out a claim of failure to accommodate where he alleged that his supervisors' racial harassment caused him clinical stress and anxiety that would be exacerbated if he returned to the same location under the same supervisors, and, therefore, he required a transfer to another office location as a reasonable accommodation; plaintiff, however, lost on summary judgment because he had not informed defendant of his anxiety disorder before requesting the transfer).

2. *Johnson v. Billington*, 404 F. Supp. 2d 157, 167 (D.D.C. 2005) (denying motion for summary judgment as to failure to accommodate claim where plaintiff, with known bipolar disorder, requested a transfer away from his supervisor who was harassing him because of his disability, thereby preventing him from doing his job; the court called the situation more than a mere "personality conflict," and distinguished it from cases where the plaintiff did not allege disability-based supervisory harassment, but simply that supervisor was causing him or her stress).

3. *Diaz v. Fed. Express Corp.*, 373 F. Supp. 2d 1034, 1061 (C.D. Cal. 2005) (holding that there was a question of fact whether attendance deficiencies would be ameliorated if plaintiff, who, according to his psychiatrist, suffered depression stemming from the abusive treatment of his supervisors, worked in the same position under different supervisors).

4. *Geuss v. Pfizer*, 971 F. Supp. 164, 174–75 (E.D. Pa.1996) (in a non-mental disability case, the court affirmed a jury's verdict in favor of an asthmatic employee who sought a transfer away from a new supervisor and back to his old supervisor at a different location, ruling that an employer is required to offer a transfer to another facility when, as here, the employer has a practice of doing so).

5. *Kamali v. Calif. Dept. of Transportation*, B247756 and B250408, 2015 WL 1254469 (Ct. App. 2d Dept. Mar. 17, 2015) (under California Fair Employment and Housing Act, upholding jury verdict that defendant failed to reasonably accommodate plaintiff's depression and anxiety when it refused to transfer him away from his supervisor who triggered stress for plaintiff).

6. *Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 402-06, 798 A.2d 648, 658–60 (App. Div. 2002) (under the New Jersey Law Against Discrimination, reversing summary dismissal of plaintiff's claim that defendant Superior Court violated its duty of reasonable accommodation when it failed to transfer plaintiff away from a supervisor whose management style exacerbated her stress-related physical and mental conditions; distinguishing *Gaul* on grounds that plaintiff's medical condition preceded her working for the supervisor and she was not demanding a transfer, as allegedly Gaul did, from any prolonged stress).[39]

7. *Cf. Dalton v. Centers for Disease Control & Prevention & Agency for Toxic Substances & Disease Registry*, No. 14-13654, ___ F. App'x ___, 2015 WL 968756, at *5 (11th Cir. Mar. 6, 2015) (holding that under the Rehabilitation Act, the CDC had already reasonably accommodated plaintiff by offering her a position with a new supervisor, in a different location in order to minimize her anxiety and decrease the risk of the exacerbation of her mood symptoms; holding that employer was not obligated to accommodate plaintiff in any other fashion).

8. *Cf. Whalen v. City of Syracuse*, No. 5:11-CV-0794 LEK/TWD, 2014 WL 3529976, at *8 (N.D.N.Y. July 15, 2014) (assuming that separating the plaintiff from the supervisor who triggered his depression and anxiety by putting them on separate work crews could be a reasonable assumption, but finding that the employer had separated them and the harassment continued, and, moreover, the plaintiff preferred his original work crew).

E. Cases finding that in lieu of changing supervisors, modifying supervisory methods can be a reasonable accommodation

1. EEOC Guidance on Psychiatric Disabilities at question 26 (a reasonable accommodation may necessitate changes in supervisory methods, including alternative ways of communicating assignments, providing instructions or training by the medium most effective for the individual, e.g., in writing, conversation, email; providing the employee additional training; modifying training materials; and adjusting the level of supervision or structure, e.g. offering more detailed day-to-day guidance, feedback or structure).

2. *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 864 (8th Cir. 2006), *cert. denied*, 550 U.S. 598 (2007) (*see* below at p. 35).

[39] *Tynan* was distinguished by *Fronczkiewicz v. Magellan Health Servs., Inc.*, No. 11-CV-7542 JEI/AMD, 2014 WL 3729185, at *6–7 (D.N.J. July 25, 2014), and *Boyce v. Lucent Technologies*, No. A-5929-05T2, 2007 WL 1774267, at *6–7 (N.J. Super. Ct. App. Div. June 21, 2007), on the grounds that, unlike in *Tynan*, the plaintiffs in those cases had failed to present evidence of a vacant position to which they could re-assigned.

3. *American Federation of Gov't Employees v. Baker*, 677 F. Supp. 636, 638–39 (N.D. Cal. 1987) (pursuant to regulations under § 501 of the Rehabilitation Act requiring the federal government to become a model employer, holding that the U.S. Mint violated its duty of reasonable accommodation when it made five disabled employees working as coin checkers responsible for meeting a daily quota; the change was "traumatic" to the plaintiffs and the U.S. Mint had no supervisory or other employees with specialized training in employment of the disabled and did not seek outside help; the court ordered the employer to hire a rehabilitation specialist to determine and implement individual accommodations for each plaintiff).

4. *Cf. Pavone v. Brown*, 1997 WL 441312, at *8 (N.D. Ill. July 29, 1997), *aff'd*, 165 F.3d 32 (7th Cir. 1998) (affirming judgment for defendant on failure to accommodate claim where Veterans Administration already had twice transferred the plaintiff, a veteran with PTSD, at his request; suggesting that plaintiff might have raised an accommodation claim about bullying supervision, but failed to do so).

5. *But see Connor v. Quest Diagnostics, Inc.*, 298 F. App'x 564, 565 (9th Cir. 2008) (affirming summary judgment regarding plaintiff's claim that Quest refused to accommodate his disability by adjusting its supervisory methods because he did not identify the existing supervisory methods incompatible with his disability or indicate how Quest should have changed them).

XVII. Types of reasonable accommodation: transferring from stressful coworkers as a reasonable accommodation

A. *Theilig v. United Tech Corp.,* 415 F. App'x 331, 333 (2d Cir. 2011) (affirming decision that plaintiff's request to work from home for two months with no direct contact with co-workers and supervisors was unreasonable as a matter of law even where his psychiatrist feared that he posed a risk of workplace violence or suicide).

B. *Gaul v. Lucent Technologies Inc*. 134 F.3d 576, 581 (3d Cir. 1997) (holding that a "transfer to a position where [the plaintiff] would not be subjected to prolonged and inordinate stress by coworkers" was unreasonable as a matter of law in that it was impractical since employer would have to transfer plaintiff whenever he was "stressed out by a coworker or supervisor"; the administrative costs would be excessive, and such an order would represent unwarranted judicial interference with an employer's organizational matters).

C. *Tyler v. Ispat Inland Inc.*, 245 F.3d 969, 974 (7th Cir. 2001) (affirming summary judgment, finding that an employee's request to be transferred back to a work site from which the employer had already removed him at his request was not a reasonable accommodation, especially where the plaintiff, diagnosed with Atypical Depression, had feared the very coworkers he would be working with if transferred back).

D. *Sapp v. Potter*, No. 1:07-CV-00650, 2012 WL 3890259, at *12 (E.D. Tex. July 26, 2012) *report and recommendation adopted*, No. 1:07-CV-650, 2012 WL 3890257 (E.D. Tex. Sept. 7, 2012), *aff'd sub nom., Sapp v. Donohoe*, 539 F. App'x 590 (5th Cir. 2013) (the plaintiff, diagnosed with major depression, dysthymia, panic disorder, and/or personality disorder, needed to work in isolation, but such an accommodation would have prevented her from performing the essential functions of her supervisory job).

XVIII. Types of reasonable accommodation: communication facilitation/assistance

A. Notice of agenda items

1. *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 864 (8th Cir. 2006), *cert. denied*, 550 U.S. 598 (2007) (upholding jury verdict that UPS failed to accommodate a manager with depression, anxiety, and obsessive-compulsive disorder; a new supervisor made the plaintiff memorize useless information from daily operations reports which he quizzed him on, and then berated him in front of other employees if answered incorrectly; finding that jury could reasonably conclude that plaintiff's request for an agenda, and more specifically, advance notice of the categories of information from the daily operations report that he and his supervisor would discuss, was reasonable. *Note: the supervisor's conduct seems so bizarre as to raise the question whether he was aware of plaintiff's disability and deliberately picked on him because of it.*)

B. Close supervision

1. *Stopka v. Med. Univ. of SC*, No. CIV.A. 2:05-1728-CWH, 2007 WL 2022188, at *1 (D.S.C. July 11, 2007) (holding that a medical resident with acquired dyslexia from brain injury causing difficulty with reading, short-term memory and synthesizing complex information, was reasonably accommodated with the provision of close supervision and a reduced patient load, yet he still could not perform the essential duties of the job).

2. *Golez v. Kerry, Inc*., No. C 07-05984 SI, 2008 WL 5411493, at *1 (N.D. Cal. Dec. 29, 2008) (finding triable issues of fact as to the reasonableness of an accommodation of limited hours and close supervision for a maintenance mechanic who had a brain tumor/brain surgery upon his return to work).

3. *Walsted v. Woodbury Cnty*., IA, 113 F. Supp. 2d 1318, 1329 (N.D. Iowa 2000) (plaintiff, in the borderline mentally retarded range and having a kindergarten education, worked satisfactorily as a custodian for eight years, but after twice being found guilty of stealing (one time as a prank on a co-worker, the other taking worthless validation stickers), she was fired. The court denied summary judgment as to plaintiff's failure to accommodate and terminations claims, finding that defendant was aware of her mental disability and need to accommodate it, but failed to engage in the interactive

process and accommodate her with extra guidance, supervision, close watching, and assistance in the form of detailed explanations of instructions).

C. Helper/mentor

1. *Lane v. Clark Cnty*., No. 2:11-CV-485 JCM NJK, 2013 WL 592912, at *1 (D. Nev. Feb. 13, 2013) (a senior storekeeper at a juvenile correctional center, on leave for almost a year because of severe anxiety, major depression, and panic attacks, proposed through his doctor that he be accommodated with a life coach and mentor and be given permission to stop working for indefinite periods of time if he suffered panic attack. The court ruled that even with the requested job modifications, plaintiff would be unable to work sustained periods of time and not fulfill the job's essential functions).

D. Additional Training

1. Reasonable accommodations might include, inter alia, special training. 42 U.S.C. § 12111(9)(B).

2. *Luera v. Convergys Customer Mgmt. Grp., Inc.,* No. 7:12-CV-316, 2013 WL 6047563, at *10 (S.D. Tex. Nov. 14, 2013) (in a case brought under the Texas Commission on Human Rights Act, a plaintiff with major depression who worked as a trainer for an on-call center, requested upon return from FMLA leave: 1) six weeks of training on new software system; 2) two days' notice before a shift change to adjust his medication; and 3) transition time before having to train a "full-time" class. Without stating that any of the requests were facially unreasonable, the court held that the employer had fulfilled its accommodation commitment in giving plaintiff significantly less training and transition time than requested due to extenuating circumstances, i.e., the termination of two other trainers).

3. *Kennelly v. Pennsylvania Tpk. Comm'n*, 208 F. Supp. 2d 504, 514 (E.D. Pa. 2002) (Rehabilitation Act) (a recently hired emergency response worker developed a panic disorder when defendant ignored his requests for additional training responding to medical emergencies; although the employer claimed that it was unaware of plaintiff's disability when he requested the training, the court held: "Given the temporal proximity of [plaintiff's] requests for additional training and the fact that his perceived lack of training caused his breakdown, there is an factual issue as to whether his request for training constituted a request for a reasonable accommodation.")

E. Help with application form

1. *Kemer v. Johnson*, 900 F. Supp. 677, 685-86 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir. 1996), *cert. denied*, 519 U.S. 985 (1996) (ADA and Rehabilitation Act) (dismissing claim by GSA applicant with depressive neurosis and a schizotypal personality disorder that defendant failed to accommodate him by assisting with the employment application because 1) he failed to show that his disability interfered with his ability to fill out the application; and 2) defendant, in fact, provided a reasonable accommodation in the form of an oral explanation of the deficiencies in the submitted application, transmitting the submitted application along with a blank application, and inviting him to complete properly the blank application and resubmit it).

F. Assistance from coworkers

1. *Karlik v. Colvin*, 14 F. Supp. 3d 700, 709 (E.D. Mich. 2014) (the plaintiff, a Social Security claims representative, with dyslexia and ADHD, had good people skills but alleged he could not remember instructions from one day to the next, required a lot of assistance from his coworkers, frequently made errors in his work, and could not complete his assignments on time. In response, the employer restricted him from asking for assistance from coworkers, and when his performance did not improve, put him on performance improvement plans and then terminated him. The court held that there were questions of material fact as to whether plaintiff had proposed reasonable accommodations – none of which the employer implemented – including providing audio text books, helping to ensure an environment with minimal distractions, removal of the prohibition against communicating with coworkers for assistance, restructuring the job to highlight his good interviewing skills or transferring him to a service representative position).

2. *Flowers v. City of Tuscaloosa*, No. 7:11-CV-01375-JEO, 2013 WL 625324, at *12 (N.D. Ala. Feb. 14, 2013) (where a custodian, diagnosed with anxiety and depression that, according to the City's examining psychologist, rendered it "doubtful that [she] will be able to maintain proper composure with sustained contact with individuals she perceives as trying to harm or mistreat her," requested to work as a team with another employee to allay her fears, the court held this was not a reasonable accommodation since there was no evidence that actual or perceived safety concerns prevented plaintiff from performing her job).

XIX. Types of reasonable accommodation: physical space accommodations

A. EEOC Guidance on Psychiatric Disabilities at question 24: reasonable accommodations may include physical changes to workplace, such as room dividers, partitions, soundproofing or visual barriers to accommodate limitations in concentration. Other accommodations include moving individual away from noisy machinery, reducing workplace noise that is adjustable, such as lowering volume or

pitch of telephones; permitting individual to wear headphones or block out distractions.

B. *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 977 (7th Cir. 2009) (in reversing summary judgment, finding that transferring teacher to a classroom with natural light was reasonable accommodation to her seasonal affective disorder).

XX. Types of reasonable accommodation: job coach

A. 29 C.F.R. pt. 1630 app. § 1630.9 ("an employer, under certain circumstances, may be required to provide modified training materials or a temporary 'job coach' to assist in the training of an individual with a disability as a reasonable accommodation.")

B. EEOC Guidance on Psychiatric Disabilities at question 27: "An employer may be required to provide a temporary job coach to assist in training, and may be required to allow a job coach paid by public or private social service agency to accompany the employee at the job as a reasonable accommodation."

1. Provision of job coach held a reasonable accommodation

a. *Menchaca v. Maricopa Cmty. Coll. Dist.*, 595 F. Supp. 2d 1063, 1072 (D. Ariz. 2009) (finding that it was a reasonable accommodation to provide a job coach to a student counselor suffering from mental impairments of traumatic brain injury and PTSD with whom she could meet almost weekly for about an hour to discuss plaintiff's activities and assist her with goal-setting, decision-making, and communication skills).

b. *E.E.O.C. v. Dollar Gen. Corp.*, 252 F. Supp.2d 277, 291 (M.D.N.C. 2003) (denying summary judgment where the parties disputed whether the employee, who had moderate mental retardation, could perform the job independently; ruling that the assistance of a job coach was reasonable for so long as necessary to train the employee to perform her job independently, but noting that providing a full-time coach to do more than training is not reasonable).

2. Provision of a job coach held not a reasonable accommodation

a. *Davis v. Wal-Mart Stores, Inc.*, No. CV-09-1488-HU, 2011 WL 2729238, at *19 (D. Or. 2011), *report and recommendation adopted*, 2011 WL 2212992 (D. Or. July 12, 2010) (appointing a job coach for a store employee with borderline intellectual functioning and expecting the job coach to accompany the employee on a permanent basis or to be contacted whenever a problem arose was "likely unreasonable.")

b. *Kleiber v. Honda of Am. Mfg., Inc.*, 420 F. Supp. 2d 809, 822 (S.D. Ohio 2006) *aff'd*, 485 F.3d 862 (6th Cir. 2007) (holding that

"although the use of a temporary job coach to assist in the training of a qualified disabled individual can be a reasonable accommodation, a full-time job coach providing more than training is not a reasonable accommodation," in a case where plaintiff was brain damaged and required "intensive coaching initially and ongoing to handle activities of low to moderate demands.")

XXI. Types of reasonable accommodation: Reinstatement after employee's disability-influenced resignation

A. *Wooten v. Acme Steel Co.,* 986 F. Supp. 524, 529 (N.D. Ill. 1997), (granting summary judgment regarding plaintiff's claim that defendant failed to accommodate him when it refused to reinstate him after he had resigned during a severe depressive episode, holding, categorically, that reinstatement is not a reasonable accommodation. The court stated, "The only accommodation that the complaint can fairly be read to request consistent with Wooten's allegations about his uncontrollable depression is reinstating him whenever he resigns during a depressive episode. We cannot conclude that the ADA requires such extreme measures." *In fact, as reflected by the opinion, Wooten worked for defendant for nine years, received a promotion and performed his job well; his depression was episodic and not "uncontrollable"; he asked for a one-time accommodation of reinstatement while the court presumed that his illness would cause him to do so continually*).

B. *Smith v. State*, 759 N.W.2d 812 (Iowa Ct. App. 2008) (Table) (plaintiff, disabled by depression, resigned in an emotional state due to a family crisis, and within days requested that the resignation be withdrawn and she be reinstated. The court ruled that whether or not she was a former employee, plaintiff was an "applicant" for reinstatement, entitled to a reasonable accommodation under 42 U.S.C. § 12112(b)(5)(A) (discrimination construed as failing to provide reasonable accommodation to a qualified individual with a disability "who is an applicant or employee"). Smith, therefore, made out a claim, when the employer failed to engage in the interactive process upon her request for reinstatement).

C. *Cf. Bultemeyer v. Fort Wayne Cmty. Sch.,* 100 F.3d 1281, 1286 (7th Cir. 1996) (the court observed that only a few hours after its decision to terminate plaintiff, the school district received a letter from his psychiatrist recommending a transfer to a less stressful school; at that point, the defendant should have reconsidered its termination decision and engaged in the interactive process).

XXII. Types of reasonable accommodation: Service Dog

A. 29 CFR Pt. 1630, App. §1630.2(o): "it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee."

B. *McDonald v. Dep't of Envtl. Quality,* 351 Mont. 243, 259, 214 P.3d 749, 760 (2009) (holding that under Montana law the duty of reasonable accommodation

encompasses not only providing a service dog to a disabled employee but also installing mats in the hallways of the workplace to prevent the service dog from slipping and falling while assisting the disabled employee. "[W]ithout [the service dog, the employee] had to perform her job duties under limitations to which similarly situated employees were not subjected, such as recurring dissociative episodes, difficulty walking, and the risk of falling…. The notion that she was required to endure these conditions to the absolute breaking point before she could be deemed to 'need' an accommodation is contrary to the purposes of the MHRA and the ADA, and we accordingly reject it.")

C. *Branson v. W.*, No. 97 C 3538, 1999 WL 1186420 (N.D. Ill. Dec. 10, 1999) (granting an injunction requiring the employer to allow a paraplegic to be accompanied by her service dog at work, after the jury found that the defendant had failed to identify and make a reasonable accommodation for the plaintiff).

XXIII. Personal needs/monitoring medication is not a reasonable accommodation

A. 29 C.F.R. Pt. 1630, App. § 1630.9: the reasonable accommodation "obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide."

B. EEOC, *Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities*, question number 28 ("Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a barrier that is unique to the workplace. When people do not take medication as prescribed, it affects them on and off the job.") *See also* EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship*, question 36.

C. *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 296 (5th Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999) ("[Plaintiff] mischaracterizes the decision to take or not to take medication for his condition as an accommodation option available to [employer]. Because this personal decision rests solely with [plaintiff], [employer] was not in a position to 'accommodate' him in this way. Thus, we find this argument wholly without merit.")

D. *Brookins v. Indianapolis Power & Light Co*., 90 F. Supp. 2d 993, 1004–05 (S.D. Ind. 2000) (employer is not obligated as a reasonable accommodation to schedule an appointment for plaintiff with a psychiatrist who would prescribe medications).

XXIV. Rehabilitation treatment

A. *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1109 (Fed. Cir. 1996) (holding that under Government Employee Rights Act, 2 U.S.C. §§ 1201 *et seq.*, the federal government was required to give an employee with alcoholism restricted-duty status and the opportunity for in-patient treatment, but there was no requirement that the employer make a retroactive accommodation, wiping clean disciplinary actions caused by disability and before the disability was disclosed).