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Advising a Client on Disclosing a Psychiatric
Disability to an Employer
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John A. Beranbaum
Beranbaum Menken LLP

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Advising a client with a psychiatric disability on whether and how best to disclose his or her disorder to an employer is fraught with risks but also with potential benefits. The primary risk accompanying disclosure is that the employer, supervisor and/or coworkers will stigmatize and discriminate against the client. The potential benefits are that the employer will better understand the challenges the disabled client faces, and more importantly, the client can only receive a reasonable accommodation to enable him or her to perform the essential functions of the job if the employer is aware of the disability: Without such an accommodation, the workplace may pose insuperable challenges for a psychologically disabled client.

The purpose of this paper is to help attorneys counsel clients with psychiatric disabilities as to whether they should disclose their disability to their employer, and, if disclosure is the wiser course, how best to do so.

THE RIGHT TO A REASONABLE ACCOMMODATION

The Americans with Disabilities Act, as amended by the Americans with Disabilities Act Amendment Act of 2008, 42 U.S.C. §§ 12101 *et seq.*, requires an employer to provide reasonable accommodations to an employee with a disability, unless to do so would cause undue hardship. 42 U.S.C. §§ 12101-17, 12201-13. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."² Typical reasonable accommodations are making existing facilities physically accessible; job restructuring; part-time work or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; and reassignment to a vacant position.³

Generally, employees with mental health disabilities have functional limitations distinct from those of employees with physical disabilities. Experts have identified the following problems that employees experience due to psychiatric disabilities:

- Screening out environmental stimuli;
- Trouble concentrating;

2. Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act ("EEOC Guidance – Reasonable Accommodation") (EEOC Oct. 17, 2002), *available at* <http://www.eeoc.gov/policy/docs/accommodation.html> (quoting 9 C.F.R. pt. 1630 app. § 1630.2(o) (1997)).

3. *Id.*, (citing 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2)(i-ii)).

- Maintaining stamina;
- Interacting with coworkers or a supervisor;
- Handling time pressures and multiple tasks;
- Responding to negative feedback and change;
- Problems following a particular schedule;
- Absences from work;
- Medication side-effects; and
- Frequent medical appointments.⁴

Courts have approved the following kind of workplace accommodations to address the functional impairments experienced by employees with mental disorders:

- Late arrival time due to sedative effect of medication;
- Flexible hours/work schedule;
- Flexible hours/work schedule;
- Working from home/telecommuting;
- Removing particularly stressful responsibilities;
- Additional training;
- Time off/leaves of absence; and
- Transferring jobs.

TRIGGERING THE INTERACTIVE PROCESS

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., 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

4. See Center for Psychiatric Rehabilitation, "How does mental illness interfere with work performance?" (Oct. 8, 2012), *available at* <http://www.bu.edu/cpr/reasaccom/employ-func.html> (adapting Mancuso, L.L. (1990), "Reasonable accommodations for workers with psychiatric disabilities," 14 *Psychosocial Rehabilitation J.*, 2 at 3-19); National Alliance on Mental Illness, "Your Rights Fact Sheet," *available at* www2.nami.org/factsheets/supportedemployment_your_rights.fs.pdf.

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); *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").

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 with the employee aimed at determining the employee's limitations and the possible ways of accommodating them. See *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir.) (*en bane*), vacated on other grounds, 535 U.S. 391 (2002). 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. As the Court in *Bultemeyer v. Fort Wayne Comm. Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996), stated,

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 halfway, 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).

As part of the interactive process, the employer and the disabled employee "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). The interactive process is mandatory, as is the requirement that both participate in good faith. *Barnett*, 228 F.3d at 1112, quoting 29 C.F.R. Pt. 1630, App. § 1630.9.

RISKS OF DISCLOSURE: STIGMA

While, with some limited exceptions, the law generally requires an employee with a mental disability to disclose the nature of his or her

medical condition in order to obtain a reasonable accommodation, doing so involves dangers for the employee. At the heart of these risks and dangers is the tremendous stigma attached to mental illness.

Studies ranking health conditions by degrees of stigma show that mental health disorders generate some of the strongest negative attitudes, to a degree comparable to persons with AIDS or ex-convicts, and there has been little change over the last three decades.⁵ 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 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, and 29% reported being unwilling to engage in social interactions with a "troubled" person (defined as having mild worrying, sadness, nervousness, and/or sleeplessness with no functional impairment).⁶

Not surprisingly, the stigma against people with mental illness operates in full force in the workplace. A survey showed that 90% 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.⁷

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

- The mentally ill are not competent to fulfill the task and social demands of employment;
- They are prone to violence and dangerous behavior at work;
- Mental illnesses are not legitimate illnesses and, therefore are not entitled to accommodations;
- Employment will make people with mental illness more ill; and

5. M.L. Baldwin and S.C. Marcus, "Stigma, Discrimination, and Employment Outcomes Among Persons with Mental Health Disabilities," *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 53-54.

6. B.G. Link et al, *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 Am. J. Public Health 9 at 1331-32 (1999).

7. I. Schultz et al., "Employer Attitudes Towards Accommodations in Mental Health Disability," *reprinted in Work Accommodation and Retention*, at 326, 335.

- Employing people with mental health disabilities will weaken workplace productivity.⁸

THE DISCLOSURE DILEMMA

Employees with mental illness must decide whether to disclose the disability to his or her employer in order to receive a needed accommodation knowing that to do so may subject them to discrimination and ostracism. It is the fear of being stigmatized that is the main reason for employees' non-disclosure of mental illness. Employees interviewed for a study vividly described the stigma they can expect to experience upon revealing their mental illness to an employer or coworkers:

"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."

"...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."

"If people knew you have a psychiatric disability, they treat you worse... They treat you different... They look at you different, they talk to you different, and they act different towards you because they think something's wrong with you."⁹

WHETHER TO DISCLOSE A MENTAL DISABILITY¹⁰

There are a number of reasons that an employee might want to disclose his or her mental disability apart from requesting a reasonable accommodation. Those reasons include: when applying for a job, explaining gaps in employment; explaining symptoms, hospitalizations, crisis issues at work; gaining the understanding of supervisors and coworkers; relieving

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8. T. Krupa, "Employment and Serious Mental Health Disabilities," *reprinted in Work Accommodation and Retention, supra* at 91, 92; *see also* Schultze, *supra* at 326, 335.
 9. S. G. Goldberg and M.B. Killeen, The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment, 11 *Psychology, Public Policy, and Law* 3 at 477, 425.
 10. The discussion in this section of the paper is derived in large part from K. L. McDonald-Wilson, "Disclosure of Mental Health Disabilities in the Workplace," *reprinted in Work Accommodation and Retention*, at 199, 201, Table 10.1, "Reasons for choosing to disclose or not disclose"; and Goldberg et al. *supra*, 463-500.

the stress of keeping secrets and cover stories; and reducing isolation at work by sharing personal information with others.

- Notwithstanding these other reasons for disclosure, typically the issue arises when the client is having problems in performing his or her job, as reflected in a poor job evaluation, or in getting along with coworkers or a supervisor.

The following are the kinds of questions that the attorney and client should consider when deciding whether the client should disclose his or her mental disability to the employer: What kind of difficulties is the client having performing the job? Is there a close connection between the disability and the perceived inadequacies in the client's performance that can be explained through disclosure?

What difficulties is the client having with supervisors or coworkers? Does he or she feel picked on or treated worse than non-disabled peers? Has the client been criticized or received poor evaluations because of problems attributable to a mental disability? What assistance does the client need to perform the job? 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 hold off the accommodation request to give more time for the employer to appreciate the client's work, or until the client is well liked and respected by coworkers and supervisors? Or does the client need immediate action to preserve his or job?

WHEN, WHAT AND HOW TO DISCLOSE

Although there is no hard and fast rule as to when employees should request an accommodation, they need to do so before the performance problems become too serious. By law, reasonable accommodations are prospective in nature. If the employee requests a reasonable accommodation after he or she already has received a poor job evaluation or disciplinary action due to a mental disability, it may be too late. Employers are not required to rescind discipline, even terminations, based on disability-related conduct which occurred before the employer was aware of the employee's disability and need of an accommodation.¹¹ Nevertheless,

11. *See* EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities ("EEOC Guidance – Psychiatric Disabilities"), Question No. 31 (EEOC Mar. 25, 1997), *available at* <http://www11i.eeoc.gov/policy/docs/psych.html>; EEOC Enforcement Guidance: The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, 5-6,

requesting a reasonable accommodation even after the client has received a bad review or is put on a performance improvement plan may still help, giving time for the client to turn things around or, at the very least, slow down the seemingly inevitable termination.

If the client, with the attorney's counsel, decides to disclose his or her disability to the employer, consideration must be given to whom the disclosure should be made: the supervisor? Human Resources? a trusted co-worker? Some employers require an employee requesting a reasonable accommodation to use in-house forms. The request does not have to be in writing, but in the event there is a dispute as to whether and when the employee asked for an accommodation, it is best that the request is documented in writing.¹³ The Job Accommodation Network, a service of the U.S. Department of Labor's Office of Disability Employment Policy providing free information about reasonable accommodations to employees and employers, has made available to the public a sample accommodation request.¹⁴

There are no "magic words" that must be used in requesting a reasonable accommodation.¹⁵ It is enough that individuals requesting a reasonable accommodation inform their employer that they need a change at work for a reason related to a medical condition.¹⁶ While additional information is not required to trigger the employer's obligation to engage with the employee in the interactive process, it is usually useful. Thus, the accommodation request ordinarily should identify the specific job functions affected by the client's medical condition and for which assistance is needed. In addition, so as to counter any impression that the client is dysfunctional, it has been advised that along with identifying the activities with which the client needs help performing, the accommodation request emphasize the job functions that the client *can* successfully

10 (EEOC Jan. 20, 2011), *available at* <http://www.eeoc.gov/facts/performance-conduct.html>.

12. K. Bouton, "Quandary of Hidden Disabilities: Conceal or Reveal?" *New York Times*, Sept. 21, 2013, *available at* <http://www.nytimes.com/2013/09/22/business/guandry-of-hidden-disabilities-conceal-or-reveal.html?>

13. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act ("EEOC Guidance- Reasonable Accommodation"), Question No. 3 (EEOC Oct. 17, 2002), *available at* <http://www.eeoc.gov/policy/docs/accommodation.html>.

14. See Job Accommodation Network, "Ideas for Writing an Accommodation Request Letter," *available at* <https://aslgan.org/media/accommrequestltr.html>.

15. *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003).

16. EEOC Guidance- Psychiatric Disabilities, Question No. 17.

perform, and any accomplishments earned at the job.¹⁷ Likewise, it is recommended that the impairment be described in benign terms, such as, "in recovery," "successfully treated," "biochemical imbalance," "a mental health condition," an "illness that is managed."¹⁸

When an employee requests an accommodation and the employee's disability and need for accommodation is not obvious, the employer may require that the employee support the request with medical documentation.¹⁹ The EEOC gives the following example of a situation where the employer's request for medical documentation is permissible:

An employee asks for time off because he is "depressed and stressed." Although this statement is sufficient to put the employer on notice that he is requesting accommodation, the employee's need for accommodation is not obvious based on this statement alone. Accordingly, the employer may require reasonable documentation that the employee has a disability within the meaning of the ADA and, if he has such a disability, that the functional limitations of the disability necessitate time off.²⁰

There are distinct limitations as to the scope of the medical documentation that the employer may request, however. The request for medical documentation must be job-related and consistent with business necessity. While an employer may require an employee to provide medical documentation sufficient to substantiate that the employee has an ADA-qualified disability and needs the requested reasonable accommodation, an employer may not ask for the employee's complete medical records containing information unrelated to the disability and need for accommodation.²¹

THE ROLE OF THE MENTAL HEALTH PROFESSIONAL

Rather than waiting for the employer to request medical documentation, the lawyer may decide to include as part of the client's accommodation request a letter from the client's health care provider outlining the employee's disability and how the requested accommodation would help the client perform the essential functions of the job. Of course, the health

17. MacDonald-Wilson et al, *supra* at Appendices A and B, 209-15, Table 10.1.

18. *Id.*

19. EEOC Guidance- Psychiatric Disabilities, Question No. 21; Job Accommodation Network, "Employees Practical Guide to Requesting and Negotiating Reasonable Accommodations Under the Americans with Disabilities Act" at 8, *available* at <https://askjan.org/EeGuide/>.

20. *Id.*

21. EEOC Guidance- Reasonable Accommodation, Question No.6.

care provider may only give the employer medical information if the client asks him or her to do so and signs a release.

The EEOC, as part of its guidance on a mental health care provider's role in the job accommodation process, has laid out the kind of information that the mental health professional should submit in support of a patient's accommodation request²²:

1. The provider's professional qualifications and the nature and length of your relationship with the client.
2. The nature of the client's mental health condition, even if the client is currently not experiencing symptoms (e.g., because of the use of medication or because the condition is in remission). If the client asks that the specific diagnosis not be disclosed, the provider may state the general type of disorder (e.g., "an anxiety disorder"), or describe how the condition substantially limits a brain/neurological function or some other major life activity.
3. The client's functional limitations in the absence of therapy, medication, and any other treatment, and without such treatment the extent to which the condition *would limit* a major life activity, including concentrating, interacting with others, eating, sleeping, learning, reading, communicating, or thinking). If the symptoms of the condition come and go or are in remission, describe the limitations during an active episode.
4. The need for a reasonable accommodation. Explain how the client's condition makes changes at work necessary. For example, if your client needs an accommodation to perform a particular job function, you should explain how the client's symptoms *-as they actually are, with treatment-* make performing the function more difficult, *limiting the discussion to the specific problems that may be helped by a reasonable accommodation*. Also explain to the employer why your client may need an accommodation such as a schedule change (e.g., to attend a therapy appointment during the workday) or time off (e.g., to adjust to a new medication, receive treatment, or recover).
5. Suggested Accommodation(s). If the provider is aware of an effective accommodation, the provider may suggest it as one possible

22. EEOC, The Mental Health Care Provider's Role in a Client's Request for a Reasonable Accommodation at Work (May 1, 2013), available at http://www.eeoc.gov/eeoc/publications/ada:_mental_health_provider.cfm.

accommodation, without precluding the possibility of alternative accommodation.

It is ordinarily not advisable for the accommodation request to come from the lawyer. A lawyer's intervention may mark the employee as a trouble maker and potential litigant, and thus hurt the development of a productive employment relationship.

CONCLUSION

Advising a mentally ill client on whether to disclose his or her disability to an employer is laden with complications. On the one hand, the client's right to a needed workplace accommodation usually requires such disclosure. On the other hand, revealing one's mental illness brings with it the risk of bias and ostracism. Whatever the ultimate conclusion as to whether to disclose the client's mental disorder, the lawyer needs to display a great deal of sensitivity to the client's feelings and be knowledgeable about the client's impairment, functional limitations, and the practicalities of the workplace, all while being well grounded in the law governing the right to reasonable accommodations. Counseling mentally ill clients on these issues requires much forethought and open communication between the client and the attorney, and often times with a health care professional. It can be a challenging endeavor, and one with a significant impact on the success of the client's continued employment.