**Employment Rights for Employees Living with Mental Illness**

By Joyce E. Smithey

Mental health disorders are prevalent and affect millions of employees each year, with only a fraction of those employees using mental health services and receiving treatment. Often these conditions are exacerbated by difficulty in the workplace. An increasing number of employees are seeking a reasonable accommodation under the Americans with Disabilities Act ("ADA) and leave under the Family and Medical Leave Act ("FMLA") to address these common disorders. When employers do not understand mental health problems, or fail to understand that those problems can be treated, they act on those misunderstandings in employment decisions. Not surprisingly, a growing number of employees with mental disorders are turning to the legal system to enforce their rights to accommodations and leave for these disorders. How can we best help our clients who suffer from one of these mental health impairments?

**Mental Health Impairments under the ADA**

The ADA expressly covers, "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities." According to the Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance on the ADA and Psychiatric Disabilities, mental impairment encompasses major depression, bipolar disorder, anxiety disorders (including panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.[i]

### *1. Is my client disabled as defined by the ADA?*

A diagnosis, alone, is not sufficient to meet the threshold requirement that an employee has a disability under the ADA. The ADA defines a "disability" as a "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).[ii] The Fourth Circuit interprets "major life activities" to include "'activities that are of central importance to daily life' and 'that the average person in the general population can perform with little or no difficulty.'" *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999). To guide courts in this inquiry, the EEOC provides a non-exhaustive list of major life activities, including "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Accordingly, plaintiffs need to reference how their mental disabilities substantially limit their abilities to learn, concentrate, think, work and communicate.[iii]

### *2. My client is covered under the ADA. Now what?*

Employers need only reasonably accommodate the known mental limitations of an individual with a disability, and accordingly the employee is obligated to initiate the process for an accommodation. 42 U.S.C. § 12112(b)(5)(A). EEOC regulations refer to the process as "an informal, interactive process with the qualified individual." 29 C.F.R. Section 1630.2(o)(3).

### *3. My client did not provide information about her limitations because she was embarrassed. Is that a problem?*

Courts are split on whether an employer has any obligations if an employee does not provide sufficient information to the employer. In the Eighth Circuit, when an employee identified her clinical depression and asked to miss an occasional day of work due to problems with her medication but did not identify her limitations from the impairment, the court granted summary judgment for the employer due to her failure to identify those limitations. *Rask v. Fresenius Medical Care North America*, 509 F.3d 466, 470 (8th Cir. 2007). However, the Third and Seventh Circuits have held otherwise. The Seventh Circuit has 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 . . . [T]he employer must make a reasonable effort to determine the appropriate accommodation . . ."

*Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285-86 (7th Cir. 1996).

As for courts within the Fourth Circuit, the Fourth Circuit has favorably cited Third Circuit cases holding once an employee provides enough information for the employer to understand that the employee has a mental health disorder, the employer has the burden to take steps to attempt to obtain any missing information or fix deficiencies. *Wilson v. Dollar General Corp.*, 717 F.3d 337 (4th Cir. 2013) (employer's duty to engage in interactive process is triggered when the employee discloses the impairment and expresses a desire for an accommodation).This is consistent with the EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Question 17 (1997).

### *4. The employer asked my client to undergo a medical examination and answer questions. Can the employer do that?*

The ADA strictly prohibits an employer from seeking medical information unless the request is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4). The EEOC has read this prohibition to permit medical inquiries when the employer has a reasonable belief based on objective evidence that an employee's ability to perform a job is impaired by a medical condition.[iv]

When can an employer require a medical examination? In *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1308 (11th Cir. 2013), the court upheld the dismissal of an ADA claim brought by an employee who was required to attend a psychiatric fitness-for-duty evaluation. In that case, the employee completed the evaluation and was cleared to return to work. He subsequently brought suit alleging that the employer violated the ADA by requiring him to undergo the evaluation. The employer claimed it was concerned about the employee's emotional stability after the employee made threatening comments and said someone was "going to pay for this." The court held the evaluation was job-related and consistent with business necessity since the employee's mental state could pose a threat to the safety of other employees. In *Kroll v. White Lake Ambulance Auth.*, 2014 FED App. 0195P (6th Cir. 2014), the employer's requirement of psychological counseling constituted an ADA medical exam. In *Kroll*, an employee began an affair with her married coworker, and as the relationship unraveled, she became increasingly emotional at work. The supervisor expressed concern regarding her "immoral" sexual conduct and required the employee to undergo psychological counseling. The

employee refused, and the employer fired her. The court determined that the supervisor lacked sufficient objective evidence to conclude that the employee was impaired in the performance of her essential job functions or that she posed a direct threat to the safety of others. Accordingly, the court found a genuine dispute of material fact as to whether the psychological counseling ordered by the employer was job-related and consistent with business necessity. In *United States EEOC v. Dillard's Inc.*, 25 Am. Disabilities Cas. (BNA) 1610 (S.D. Cal. Feb. 9, 2012), the employer's requirement of a sick leave note with illness information violated the ADA. In the *Dillard's Inc.* case, the employer required an employee to disclose the nature of an absence and the condition being treated before categorizing it as excused. The court went on to explain that an employer can require its employees to submit a doctor's note specifying the date on which the employee was seen, stating that the absence from work was medically necessary, and stating the date on which such employee would be able to return to work, but the employer could not require an employee to submit a doctor's note disclosing the underlying condition for which he or she was treated.

Generally, an employer must keep all medical information it learns about an applicant or employee confidential and must keep this information separate from general personnel files. Under the following circumstances, however, an employer may disclose that an employee has a mental disability: (1) to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee's work restrictions; (2) to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in the event of an emergency; and (3) to individuals investigating compliance with the ADA and similar state and local laws. 42 U.S.C. § 12112(d)(3)(B).[v]

### 5. *My client triggered the employer's obligation to reasonably accommodate. What accommodations should have been considered?*

Accommodations that have helped employees with psychiatric disabilities to more effectively perform their jobs include offering telecommuting, part-time work hours, job sharing, adjustments in the start or end of work hours, breaks, on-site job coaches, and leave. Leave granted as an ADA accommodation also may count against the employee's 12-week FMLA entitlement if the impairment qualifies as a "serious health condition." If a disabled employee on FMLA leave cannot return to work after 12 weeks, the employee may be entitled to an extended leave as an ADA accommodation.

However, "the ADA do[es] not require an employer to give a disabled employee 'an indefinite period of time to correct [a] disabling condition' that renders him [unable to work]." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 466 (4th Cir. 2012). In *Reed v. Maryland*, 21 Wage & Hour Cas. 2d (BNA) 1282 (D. Md. Feb. 7, 2013), the court held that the plaintiff failed to state a claim because he sought leave to treat depression until such time as he was able to return to work, without advising when that would occur. The court held, "A defendant does not violate the ADA by terminating the employment of a plaintiff whose disability would require the defendant 'to wait indefinitely' for the plaintiff to be ready to work again." *Id.*

### 6. *My client was terminated for misconduct caused by her mental illness. Does that violate the ADA?*

In the EEOC's 2008 Enforcement Guidance on Applying Performance and Conduct Standards to Employees with Disabilities, the EEOC affirms that an employer may discipline an individual with a mental disability for violating a work conduct standard even though the misconduct may have resulted from or been caused by the psychiatric impairment. Courts in the Fourth Circuit have followed the EEOC's position, allowing the employer to lawfully take disciplinary action in those circumstances. "[M]isconduct- even misconduct related to a disability- is not itself a disability" and may be a basis for dismissal. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 n. 3 (4th Cir. 1997). *See also Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 214-15 (4th Cir. 1994) (finding that dismissal of an employee for attendance problems did not constitute discrimination, even if her disability caused her absences). The Fourth Circuit recently considered the issue in *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454 (4th Cir. 2012), a case involving a student suffering from ADHD and anxiety disorder:

> By the time Halpern requested that the Medical School implement his special remediation plan, he had already engaged in numerous unprofessional acts that warranted his dismissal, including acting abusively towards staff, multiple unexcused absences, repeated failures to meet deadlines, and tardiness. Thus, Halpern sought not a disability accommodation, but "a second chance to better control [his] treatable condition." *Hill v. Kan. City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999). This, however, "is not a cause of action under the ADA." *Id.* A school, if informed that a student has a disability with behavioral manifestations, may be obligated to make accommodations to help the student avoid engaging in misconduct. But, the law does not require the school to ignore misconduct that has occurred because the student

subsequently asserts it was the result of a disability. Halpern's argument that he was owed an opportunity to continue at the Medical School and correct his misbehavior is, therefore, without merit.

**Seeking Leave under the FMLA for Mental Health Conditions**

The FMLA requires that employers with 50 or more workers provide eligible employees with up to 12 weeks of leave each year to care for (a) the employee's own health needs, (b) a newborn or newly placed adopted or foster child, or (c) a seriously ill child, spouse or parent. Employees who believe that their rights under the FMLA have been violated have the choice of filing a civil lawsuit or filing a complaint with the Secretary of Labor. 29 U.S.C. § 2617.

***1. Does my client's mental health condition qualify for FMLA protection?***

Under the FMLA, an employee is entitled to 12 weeks of unpaid leave to care for his or her "serious health condition." A "serious health condition" includes any "illness, injury, impairment, or physical or mental condition" that involves inpatient care or continuing treatment by a "health care provider." 29 U.S.C. § 825.114(a)(2)(i). A "health care provider" can include clinical psychologists and clinical social workers, as well as physicians. 29 C.F.R. § 825.118(b).

Leave for mental health conditions is protected in the same manner as leave for a physical condition. The regulations interpreting the FMLA list several different circumstances under which a mental condition may be covered by the statute. Mental illness may be a serious health condition, but only if it results in the inability to work or perform other regular daily

activities due to the condition, treatment, or recovery, and meets the other requirements of a "serious health condition." 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.113(d). For example, if an employee is unable to perform the essential functions of her job and is receiving treatment from a psychiatrist who has placed her on drug therapy treatment, then the employee may be eligible for FMLA leave. As another example, an employee who requires inpatient care for her psychiatric condition may also be entitled to FMLA leave. Examples of instances where the courts have found FMLA affords protection include anxiety, depression, and panic attacks.[vi]

***2. Is it possible my client's mental health condition may not be a disability under the ADA but still qualify for protected leave under the FMLA?***

While there are some parallels between the ADA and the FMLA, the ADA's definition of "disability" is different than the FMLA's "serious health condition." In *Hurlbert v. St. Mary's Health Care System, Inc.*, 439 F.3d 1286 (11th Cir. 2006), the Eleventh Circuit explained that the district court had applied the wrong test when it equated the meaning of "inability to work" with the ADA inquiry into whether a person is substantially limited in the major life activity of working. Accordingly, the district court had erroneously concluded that the plaintiff was not incapacitated for the requisite period under the FMLA because he was able to continue working at one of his two jobs.

***3. How should my client notify her employer of the need for FMLA leave?***

While employees are not required to use precise words, courts have found that generalized complaints of stress, anxiety, or depression, without more, are not enough to place an employer on notice that the employee seeks protection under the FMLA. *Kobus v. College of*

*St. Scholastica, Inc.*, 608 F.3d 1034, 1037, n. 3 (8th Cir. 2010). Employees must provide sufficient information for employers to know the leave may qualify for protection, and courts are split on whether employees are required to reveal the actual diagnosis. Some Maryland courts have insisted on a requirement that the employee mention the covered medical reason for his or her leave request. For example, in *Peeples v. Coastal Office Prods.*, 64 Fed. Appx. 860 (4th Cir. 2003), the employee did not trigger his employer's duties under the FMLA because he was deliberately evasive and misled his employer as to his true conditions of depression and anxiety. However, other Maryland courts have not required an employee to identify the covered medical reason with a leave request.[vii]

### *4. Can the employer require FMLA requests to be supported by a medical certification?*

An employer may require that requests for medical leave be supported by a certification of the health care provider. 29 U.S.C. § 2613. Not only can employers require medical certification, but employers can enforce rigorous notice policies. In *Honeycutt v. Balt. County*, 2007 U.S. Dist. LEXIS 46320 (D. Md. June 18, 2007), the plaintiff argued that her depression and posttraumatic stress disorder impeded her ability to contact her supervisor within a specific window of time each day. The court rejected her argument because she did not offer medical documentation to that effect. Accordingly, unless an employee can document his or her medical inability to follow rigorous notice procedures, employers are allowed to enforce those policies.

Upon an employee's return to work from FMLA leave, employers may also require an employee to provide certification from a health care provider stating that the employee is able to resume work and can perform the essential functions of the job. An employer may contact that health care provider for clarification or authentication; however, it cannot require a second or third fitness-for-duty certification. When an employer decides to clarify a release to return to work, an employee's return to work cannot be delayed more than two days while inquiry is made.

5. ***My client needs to attend weekly therapy appointments for her mental health condition. Can she use FMLA leave?***

Leave for a serious health condition is permitted whenever "medically necessary." 29 U.S.C. § 2612(b). An employee may take leave on an intermittent or reduced schedule basis. Intermittent leave is taken in periodic blocks of time, such as a day or a few hours, whereas a reduced leave schedule decreases the employee's daily or weekly work hours. 29 C.F.R. § 825.1117.

**Conclusion**

The ADA and FMLA protect our clients who have mental disabilities and remain powerful tools for attorneys to ensure disabled employees receive fair treatment in the workplace. Until the stigma associated with these illnesses is overcome, these statutes can give those affected by mental illness the assistance needed to succeed and excel in the American workplace.

[i] In 1997, the EEOC issued detailed enforcement guidance concerning employers' obligations relative to mental disabilities. The text is available on the EEOC's website at http://www.eeoc.gov/docs/psych.txt.

[ii] The mere fact that an employee satisfied the criteria for receiving benefits under workers' compensation does not mean that the employee will be considered disabled under the ADA. The work-related injury may not be severe enough to "substantially limit" a major life activity.

[iii] *Herbig v. Lockheed Martin*, 28 Am. Disabilities Cas. (BNA) 497 (D. Md. June 17, 2013) (finding it plausible that plaintiff's depression and anxiety substantially limited her ability to work when doctor ordered her to work two hours less than what an average person would be able to work on a daily basis); *Pisani v. Balt. City Police*, 2013 U.S. Dist. LEXIS 114988 (D. Md. Aug. 14, 2013) (plaintiff did not plausibly allege that his stress and anxiety limited one or more of his major life activities when complaint alleged that, after seeing a psychologist, plaintiff learned "how to control [the] problem"); *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454 (4th Cir. 2012) (defendant conceded that plaintiff's Attention Deficit Hyperactivity Disorder ("ADHD") and anxiety disorder constitute disabilities giving rise to protection under the ADA); *Whittington v. Wash. Suburban Sanitary*, 17 Wage & Hour Cas. 2d (BNA) 864 (D. Md. Mar. 28, 2011) (anxiety and hypertension fit within ADA definition); *McCullough v. Prince George's County*, 2010 U.S. Dist. LEXIS 16450 (D. Md. Feb. 24, 2010) (defendant conceded plaintiff's impairments of hypertension and post-traumatic stress disorder qualify as a disability under the ADA).

[iv] *See* the EEOC's Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, No. 915.002 (available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html).

[v] An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices without violating ADA confidentiality requirements.

[vi] *Krenzke v. Alexandria Motor Cars, Inc.*, 289 Fed. Appx. 629 (4th Cir. 2008) (employee sufficiently demonstrated a serious health condition because evidence showing that the employee was incapacitated for more than three consecutive days and received treatment two or more times demonstrated that the employee's condition involved continuing treatment by a health care provider). *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1294-96, 1299 (11th Cir. 2006) (noting that there was a genuine issue of material fact as to whether plaintiff's anxiety constituted a chronic serious health condition, which precluded summary judgment on the issue); *Young v. U.S. Postal Serv.*, 79 M.S.P.R. 25, 1998 WL 350359 (M.S.P.B. 1998) ("[T]he evidence shows that the appellant suffered from a serious health condition, i.e., depression and anxiety, . . . "); *Rohrer v. People's Cmty. Health Ctrs.*, 26 Am. Disabilities Cas. (BNA) 1077 (D. Md. June 27, 2012) (no dispute that plaintiff engaged in protected activity when she availed herself of her rights under the FMLA due to her "chronic recurrent depression" diagnosis); *Vasconcellos v. Cybex Int'l*, 962 F. Supp. 701 (D. Md. 1997) (plaintiff alleged sufficiently serious health condition in describing her panic attacks related to sexual harassment in the workplace). *But see Perry v. Jaguar of Troy*, 353 F.3d 510 (6th Cir. 2003) (child with learning disabilities, Attention Deficit Disorder ("ADD"), and hyperactivity did not have "serious health condition").

[vii] *Krenzke v. Alexandria Motor Cars, Inc.*, 289 Fed. Appx. 629 (4th Cir. 2008)(holding that plaintiff with extreme stress and anxiety provided employer with sufficient notice that she was entitled to leave under the FMLA because her doctor submitted a note indicating the employee needed extended leave for medical reasons) and *Greene v. YRC, Inc.*, 987 F. Supp. 2d 644 (D. Md. 2013) (employer had adequate notice of leave when employee notified a colleague of his anxiety, had a telephone conversation with his supervisor, and provided a note saying employee was "having health issues").