Mental Health Issues in the Workplace

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I. Introduction

In the United States, approximately 1 in 5 adults experience mental illness in a given year, and approximately 1 in 25 adults experience a serious mental illness in a given year that substantially interferes with or limits one or more major life activities.[1] In 2018, mental and emotional impairments accounted for nearly one-third (30.7%) of all charges of discrimination filed with the Equal Employment Opportunity Commission ("EEOC") alleging some form of discrimination under the Americans with Disabilities Act ("ADA").[2]

Mental health issues provide unique challenges in the workplace, from whether someone is qualified for a position, to how and whether mental health issues can be accommodated. This paper will discuss some of the more prevalent issues that arise under the ADA, federal regulations, and case law regarding mental health conditions as they arise in the workplace.

II. Mental Health Conditions Covered by the ADA

Under the ADA and its amendments in the Americans with Disabilities Amendments Act ("ADAAA"), a "disability" is defined as a physical or mental impairment that substantially limits one or more major life activities.[3] A mental impairment is defined as "[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."[4] Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.[5] Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress

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1 Mental Health by the Numbers, National Alliance on Mental Illness, *available at* https://www.nami.org/learn-more/mental-health-by-the-numbers.

2 ADA Charge Data by Impairment/Bases, U.S. EEOC, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm.

3 29 C.F.R. § 1630.2(g)(1)(i).

4 29 C.F.R. § 1630.2(h)(2).

5 29 C.F.R. § 1630.2(g)(1)(ii)–(iii).

disorder), schizophrenia, and personality disorders.[6] A person is also considered "disabled" under the ADA when they have a record of such an impairment or are regarded as having a physical or mental impairment.[7]

"Mental impairments" do not include common personality traits such as poor judgment, irritability, chronic lateness, or a quick temper, unless they are symptoms of a mental or psychological disorder.[8] Likewise, a person suffering from general "stress" because of everyday job or personal life pressures would not generally be considered to have a "mental impairment" unless it is shown to be related to a mental or physical impairment.[9] *See Burdett-Foster v. Blue Cross Blue Shield of Michigan*, 574 Fed. App'x 672, 680 (6th Cir. 2014) ("Personality conflicts, workplace stress, and being unable to work with a particular person or persons do not rise to the level of a 'disability' or inability to work for purposes of the ADA." (quoting *Fricke v. E.I Dupont Co.,* 219 Fed. App'x 384, 389 (6th Cir. 2007)).

The ADA's regulations explicitly exclude several conditions from the definition of "disability," including, but not limited to, compulsive gambling, kleptomania, and pyromania, and also exclude individuals currently engaging in the illegal use of drugs.[10] The regulations define "illegal use of drugs" as the current use of drugs, the possession or distribution of which is prohibited or regulated under the Controlled Substances Act.[11] The definition does not include the use of a drug taken under the supervision of a licensed health care professional.[12]

III. Qualified Individual with a Disability

There are a number of cases that deal with the question of whether an individual's mental health condition or accommodations requested takes the individual out of the realm of being a "qualified individual" under the ADA and its amendments. Only a "qualified individual" is protected under the ADA. A "qualified individual" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position he or she holds or desires. 42 U.S.C. §12111(8). Recent cases illustrate how courts analyze the "qualified individual" question.

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[6] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, U.S. EEOC at No. 1, *available at* https://www.eeoc.gov/policy/docs/psych.html [hereinafter "EEOC Psychiatric Disabilities Enforcement Guidance"].

[7] 29 C.F.R. § 1630.2(h)(2)

[8] The Americans with Disabilities Act: Title II Technical Assistance Manual at II-2.2000, *available at* https://www.ada.gov/taman2.html [hereinafter "ADA Technical Assistance Manual"]; "EEOC Psychiatric Disabilities Enforcement Guidance at No. 2.

[9] "EEOC Psychiatric Disabilities Enforcement Guidance at No. 2.

[10] 29 C.F.R. § 1630.3.

[11] 29 C.F.R. § 1630.3(a).

[12] 29 C.F.R. § 1630.3(a)(2).

A. Not Qualified

In *Sepulveda-Vargas v. Carribbean Restaurants, LLC*, 888 F.3d 549 (1st Cir. 2018), Sepulveda-Vargas was a restaurant manager for a Burger King franchisee. Managers were required to work rotating shifts, rather than fixed shifts. He suffered post-traumatic stress disorder and major depression after being held up while making a bank deposit for his employer. Upon his return to work, he requested to work a fixed shift. This was allowed on a temporary basis, but his employer informed him he would need to return to rotating shifts. He resigned in response. He sued under the ADA. The district court, affirmed by the First Circuit, held that Sepulveda-Vargas was not a "qualified individual" under the ADA because the ability to work rotating shifts was an essential function of a managerial position. The court relied upon evidence, including the position advertisement and job description, both of which required the ability to work rotating shifts, and that rotating shifts distributed work evenly among managers and a fixed shift would be unfair to other managers. The court also rejected the argument that the temporary accommodation of a fixed shift established that the ability to work rotating shifts was not essential. The court reasoned that to accept that argument would punish and discourage employers from doing more than the ADA requires.

In *McNelis v. Pennsylvania Power & Light Co.,* 867 F.3d 411 (3d Cir. 2017), McNelis worked as an armed security officer at a nuclear power plant regulated by the Nuclear Regulatory Commission("NRC"). NRC regulations require nuclear security officers to be "fit for duty" and to maintain a security clearance. McNelis began struggling with various mental health issues and substance abuse and was treated in an in-patient psychiatric facility for three days. Upon return to work, a coworker reported erratic behavior by McNelis and McNelis was suspended and sent to a third-party psychologist, who determined McNelis was not fit for duty at that time. The power plant terminated McNelis' employment as a result. The Third Circuit, affirming the dismissal of McNelis's disability discrimination claims, held that McNelis was not qualified because he could not perform the essential functions of a nuclear security officer, namely meeting the regulatory requirement to be "fit for duty."

In *Felix v. Wisconsin Dept. of Transportation*, 828 F.3d 560(7th Cir. 2016), the plaintiff, who had various anxiety disorders, had a major panic attack at work, during which she yelled and screamed, fell to the ground, cut herself with a knife, and otherwise caused a huge commotion. The employer placed on her on FMLA leave and sent her for an independent assessment to determine whether her conduct was likely to recur; the assessment disclosed that it was likely to recur. The employer then terminated her employment. The Seventh Circuit opinion contains extensive discussion about the direct threat defense, but the court ultimately concluded that the employer was not required to prove direct threat, because the plaintiff was unqualified for her position based on the assessment.

Stevens v. Rite Aid Corp., 851 F.3d 224 (2d Cir. 2017) presented the issue of whether an employer could change a position to add a job duty that rendered the plaintiff unqualified. Stevens was a long-time pharmacist with Rite Aid. In 2011, Rite Aid began requiring its pharmacists to perform immunizations. Stevens suffered from trynaphobia, a severe fear of needles. He asked to be exempt from holding an immunization certificate and performing immunizations. Rite Aid said no and terminated him after he failed to complete immunization training. He sued for disability discrimination, failure to accommodate and retaliation. After trial, a jury awarded $2.0 million.

The Seventh Circuit reversed, concluding that on the disability discrimination claim, Stevens was not qualified for his position because he could not perform the essential function of providing immunizations. The court also analyzed his reasonable accommodation claim (which the district court had set aside after the verdict). The Seventh Circuit noted that reasonable accommodations must assist in the performance of essential functions, not in other job duties. It specifically rejected arguments that assigning a nurse to administer immunizations for him, reassigning him to a location with more than one pharmacist, or providing him with medical care for his condition were reasonable accommodations, as they did not help him perform the essential function of administering immunizations.

B. Qualified, Or at Least a Fact Issue

In *McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013), McMillan, a schizophrenic, worked as a case manager for the City, conducting annual home visits, processing social assessments, recertifying clients' Medicaid eligibility and other similar tasks. His department allowed employees to arrive for work between 9 and 10 a.m. and leave between 5 and 6 p.m. Because of medication he took for his schizophrenia, he was groggy in the morning and would report to work late, sometimes after 11 a.m. Although this was allowed for many years, his supervisor finally concluded that she could no longer approve his everyday tardiness. Ultimately, he was terminated because of his chronic tardiness. He then sued for disability discrimination. The district court granted summary judgment on among other ground that McMillan had not established a prima facie case of disability discrimination of being qualified to perform the essential functions of the position – to consistently arrive at work within the one-hour time frame allowed by his department. The Second Circuit reversed, concluding that a penetrating factual analysis revealed that physical presence at work by a specific time is not an essential function of employment. In this case, the City had tolerated McMillan's tardiness for many years, the one hour flexibility in arrival and departure times itself suggested that presence at specific times and punctuality were not essential, and it was disputed whether McMillan's tardiness substantially interfered with his ability to perform his job.

IV. Knowledge of Disability

Under the ADA, prohibited discrimination includes situations where an employer fails to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A). Generally, it is an employee's duty to request a reasonable accommodation, but there are some circumstances in which the employer must initiate an interactive process with the individual in need of the accommodation.[13] According to the EEOC's Enforcement Guidance, these instances include when the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, or

[13] 29 C.F.R. § 1630.3(o)(3).

(3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[14]

In *Rask v. Fresenius Medical Care North America*, 509 F.3d 466 (8th Cir. 2007), Elizabeth Rask worked as a patient care technician at two of Fresenius's kidney dialysis clinics, and following a series of disciplinary and attendance problems, Fresenius terminated her employment when she failed to come to work one day. Prior to her termination, Rask had admitted to her supervisors that she was having problems with her medication and "might miss a day here and there because of it." Rask had a long history of depression, which she never disclosed to Fresenius, and filed a lawsuit against Fresenius alleging her depression was a disability and the termination of her employment constituted discrimination on the basis of her alleged disability. The Eighth Circuit Court of Appeals held that regular and reliable attendance is a necessary element of most jobs, and that Rask had failed to show that she was qualified to perform the essential functions of her job. Furthermore, the Court held that Fresenius had no duty to accommodate Rask because she failed to provide sufficient notice of her need, noting that when "the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." *Rask*, 509 F.3d at 470 (8th Cir. 2007) (quoting *Wallin v. Minnesota Dep't of Corrections,* 153 F.3d 681, 689 (8th Cir. 1998)) (alterations in original).

V. Specific Accommodation Issues

Reasonable (or unreasonable) accommodations made to employees with mental impairments take a variety of forms. Some recent cases illustrate.

A. Transfer to Another Position – Reasonable

In *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779 (7th Cir. 2016), Lawler taught students with learning disabilities. Five years before she was hired for this position, she was diagnosed with post-traumatic stress disorder ("PTSD"). She performed well for years, but then suffered a relapse of her PTSD. After learning of her PTSD, the school district transferred her to a different school where she continued to teach students with learning disabilities, but also students with severe emotional and behavioral disorders. At the beginning of her second year in this new role, she was injured by a disruptive student and suffered another relapse of PTSD. She, backed by her psychologist, requested a two-week leave and transfer to a classroom with fewer students with emotional and behavioral disorders. The school district gave her the two weeks of leave, but did not transfer her and instead accelerated her performance review, rated her as unsatisfactory and terminated her in a reduction in force in which all but unsatisfactory teachers were rehired. She sued under the Rehabilitation Act, claiming that the district had failed to reasonably accommodate her. The district court granted summary judgment to the district; the Seventh Circuit reversed. The Seventh Circuit concluded that the district had failed to engage in the interactive process in response to Lawler's request to be transferred to another classroom, or even in response to some

[14] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, U.S. EEOC at No. 40, *available at* https://www.eeoc.gov/policy/docs/accommodation.html [hereinafter "EEOC Reasonable Accommodation Enforcement Guidance"].

of the performance issues that caused her to be rated as unsatisfactory. The court observed that there were seven openings for special education teachers in other schools within the district, and that the district made no effort to transfer Lawler to one of those positions. The court further noted that had the school district inquired about its long-term employee, it would have learned that many of the issues Lawler had experienced and had been cited as performance problems resulting in her unsatisfactory evaluation were likely the result of her PTSD. The court also dismissed as frivolous the school district's argument that it had accommodated Lawler by giving her the two weeks of leave. The court noted that this accommodation did not address Lawler's psychologist's concern that Lawler's PTSD was aggravated by working with students with emotional and behavioral issues. The Seventh Circuit, therefore, reversed the summary judgment and remanded the case for trial.

B. Telecommuting – Reasonable

In *Humprey v. Memorial Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2002), Humphrey, a medical transcriptionist with a very strong record of work performance, began suffering symptoms of Obsessive-Compulsive Disorder ("OCD"). The symptoms specifically affected her ability to get to work on time. Her employer allowed to work a flex-time schedule to accommodate her inability to get to work on time, but even with the flex-time schedule, she continued to be late or miss work. Her actual job performance, however, remained strong, and in her evaluations, the only issues noted were related to her attendance issues stemming from her OCD. She also received disciplinary actions based on her attendance issues. There was discussion as to whether working from home would help, and the hospital had a policy allowing transcriptionists to work from home, as long as they were not on any disciplinary actions. Because Humphrey was on disciplinary action, this option was not explored. Ultimately, the hospital terminated Humphrey because of her attendance issues, and she sued under the ADA and California law. The district court granted summary judgment on her failure to reasonably accommodate and wrongful discharge claims.

The Ninth Circuit reversed. The Ninth Circuit concluded that the hospital had failed to engage in the interactive process. Specifically, when the hospital realized the flex-time accommodation was not working, it made no further efforts to accommodate. The Ninth Circuit held that this amounted to a failure to accommodate. The court also criticized the hospital's decision not to allow telecommuting, since its reason for not doing so was the attendance issues that were a direct result of Humphrey's OCD. Finally, the court concluded that Humphrey's termination was likewise directly related to her OCD and thus reversed the summary judgment on that claim as well. *See also Goonan v. FRB of N.Y.*, 2014 U.S. Dist. LEXIS 99922 (S.D.N.Y. July 22, 2014) (telecommuting could be a reasonable accommodation to a PTSD-sufferer even though teleworking was available to strong, not weak performers, and the plaintiff was a weak performer).

C. Telecommuting – Unreasonable

On the other hand, courts have rejected telecommuting as a reasonable accommodation when onsite attendance is deemed essential. For example, in *Mason v. Avaya Comm., Inc.,* 357 F.3d 1114 (10th Cir. 2004), Mason, a service coordinator with PTSD, requested to work from home after another employee had engaged in threatening and disruptive behavior at her worksite, although she did not witness the conduct herself. As a service coordinator, Mason was responsible for

coordinating service calls, primarily using a computer, phone and fax machine. She argued that because she could perform all these duties from home, working from home was a reasonable accommodation. The employer, however, argued that as a low-level position, the service coordinators needed to be on-site for supervision and training purposes, and that no service coordinator had been allowed to work from home. Affirming summary judgment for the employer, the Tenth Circuit agreed that it was an essential function of the position to be on-site and that working from home, therefore, could not be a reasonable accommodation.

D. New Supervisor – Unreasonable

Numerous courts have held that it is not reasonable to provide an employee with a new supervisor as a reasonable accommodation. For example, in *Weiler v. HFC,* 101 F.3d 519 (7th Cir. 1996), the plaintiff was an account manager, who was diagnosed with stress-related TMJ. After her diagnosis, her supervisor gave her a poor evaluation and allegedly raised his voice. She then requested a new supervisor. When no change was made, she went on leave for depression and anxiety. After exhausting her benefits and leave, she sued for disability discrimination and failure to accommodate. The Seventh Circuit, affirming summary judgment, rejected as unreasonable her request to be transferred to a different supervisor. The court held that nothing in the ADA allows an employee to set the terms of employment, including who her supervisor will be. *See also Wernick v. FRB of NY*, 91 F.3d 379 (2d Cir. 1996) (reassignment to a different supervisor is not required under ADA).

E. New Supervisor – Reasonable

In *Calero-Cerezo v. U.S. DOJ*, 355 F.3d 6 (1st Cir. 2004), the First Circuit held that a transfer to another worksite with a new supervisor could be a reasonable accommodation for an attorney with major depression. In that case, the attorney had numerous acrimonious conflicts with her supervisor. She claimed that he treated her unfairly, that he generally harassed her, and that she was taking an anti-depressant because of the way he treated her. Evidence suggested that she (the attorney) was a difficult person, yelling at other employees. Ultimately, after several leaves of absence, she requested transfer to another office to get away from her supervisor, and her supervisor supported the request. However, the request was denied and the attorney was eventually terminated. The First Circuit, reversing summary judgment, concluded that there was a fact issue that a transfer to another office and supervisor would have been a reasonable accommodation.

F. Stress-free Environment – Not Reasonable

In *Marino v. U.S. Postal Serv.,* 25 F.3d 1037 (1st Cir. 1994), Marino, a postal clerk, was diagnosed with anxiety neurosis and received both inpatient and outpatient psychiatric care over time. One of his doctors had recommended that Marino be allowed to take a break from work if feeling stressed and go to the men's room to scream until the stress was alleviated. Marino never actually did that. After many years of employment with the postal service, Marino had several altercations with a new supervisor over work instructions. After one of these altercations, Marino, who claimed he had no memory of what happened, assaulted the supervisor. Marino was then terminated. He sued under the Rehabilitation Act. He argued that it would have been a reasonable accommodation

to protect him from stress-causing incidents at work. The First Circuit flatly rejected this, holding that it is not reasonable for an employer to have to shield employees from stress.

VI. My Disability Made Me Do It: Accommodations for Disability-Related Misconduct

The Equal Employment Opportunity Commission ("EEOC") has maintained the position that an employer does not need to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity:

> An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.[15]

In its guidance titled The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, the EEOC goes further, and states that the ADA "does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability."[16] It also elaborates on the types of conduct standards that may be applied to disabled and non-disabled employees, alike:

> The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:
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> - prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work);
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> - prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (e.g., pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work;

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[15] EEOC Reasonable Accommodation Enforcement Guidance at No. 35.

[16] The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, U.S. EEOC at No. 9, *available at* https://www.eeoc.gov/facts/performance-conduct.html [hereinafter EEOC Performance and Conduct Standards].

- require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts); and

- prohibit drinking or illegal use of drugs in the workplace.[17]

The EEOC also takes the position that, except where the punishment for the offense is termination, when a disabled employee violates a particular conduct rule because of their disability, the employer is obligated to provide a reasonable accommodation to the disabled employee to enable the employee to meet the conduct standard in the future.[18] However, because reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.[19]

In general, courts have agreed with the EEOC's stance on applying standards of conduct to disabled employees, and not requiring employers, as a reasonable accommodation, to excuse past misconduct that results from a disability. *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 90 (1st Cir. 2012) ("When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.' "); *McElwee v. Cty. of Orange*, 700 F.3d 635, 641 (2d Cir. 2012) ("A requested accommodation that simply excuses past misconduct is unreasonable as a matter of law."); *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012) ("[T]he law does not require the [defendant] to ignore misconduct that has occurred because the [claimant] subsequently asserts it was the result of a disability."); *Green v. Medco Health Sols. of Texas, L.L.C.*, 560 Fed. App'x 398, 402 (5th Cir. 2014) ("[A]n accommodation that requires an employer to ignore prior misconduct, including a violation of an attendance policy, is not the kind of reasonable accommodation mandated under the ADA."); *Parsons v. Auto Club Group*, 565 Fed. App'x 446 (6th Cir. 2014) (holding that employer was not obligated to entertain accommodation request where employee first informed employer of his disability after five-month investigation had revealed long history of employee's misconduct); *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 666–67 (7th Cir. 1995) ("[Plaintiff] is not asking for an accommodation; he is not asking [his employer] to change anything. He is asking for another chance. . . . But the ADA does not require this."); *Hill v. Kan. City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) ("[Plaintiff] did not request a disability accommodation, she asked for a second chance to better control her treatable medical condition. That is not a cause of action under the ADA."); *Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 906 (8th Cir. 2015) (holding no liability for employer that demoted employee for inappropriate comments where employee notified employer that medical condition contributed to his misbehavior only after he made the comments); *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1316 (10th Cir. 2017) ("[E]xcusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA." (quoting *Davila v. Quest Corp., Inc.*, 113 Fed. App'x 849, 854 (10th Cir. 2004)).

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[17] EEOC Performance and Conduct Standards at No. 9.

[18] EEOC Reasonable Accommodation Enforcement Guidance at No. 36.

[19] EEOC Reasonable Accommodation Enforcement Guidance at No. 36.

In *Szuskiewicz v. JPMorgan Chase Bank*, 257 F.Supp.3d 319 (E.D.N.Y. 2017), the plaintiff, a financial advisor, experienced a psychotic break in which he heard voices, suffered from delusions and harassed a co-worker, the latter of which led to a stalking arrest and a felony guilty plea. During his breakdown, the plaintiff used short-term and long-term disability leaves to cover his missed time and to obtain treatment. At the end of his long-term leave, he sought to return to work, which required him to fill out a background questionnaire since his prior position was not available. In the questionnaire, he revealed his felony plea which had occurred while he was on leave. In response to the Bank's request for more details, the plaintiff revealed his psychotic episode and the reason for the felony charge. The Bank then terminated the plaintiff for violating its anti-harassment policy, and because he had not reported his arrest and conviction promptly. He sued under the ADA, claiming he was fired because of his mental illness, which had compelled his conduct. The district court rejected this argument, holding that the ADA does not immunize a plaintiff from disciplinary action for misconduct, even when the misconduct stems from a disability.

In *McElwee v. County of Orange*, 700 F.3d 635 (2d. Cir. 2012), James McElwee suffered from a neurodevelopmental disorder that was informally identified as an autism spectrum disorder. McElwee participated in a volunteer program at Valley View Center for Nursing Care and Rehabilitation where he performed janitorial and housekeeping duties and transported nursing home residents to religious and social events. In 2009, a staff member at Valley View complained to Robin Darwin, Valley View's Assistant Administrator, that McElwee acted inappropriately towards her and made her feel uncomfortable by following her in the hallways and staring at her rear end. After an investigation into the complaint, five women reported that McElwee had behaved inappropriately toward them by engaging in various forms of sexually inappropriate behavior.

McElwee's mother called Darwin and told her that McElwee "is not like everyone else" and that he should not be discriminated against because he has a disability and because he was looking at people. She asked Darwin to call McElwee's therapist, who could better explain why he acted the way that he did. Darwin never called the therapist, and eventually terminated McElwee's volunteer services. McElwee filed suit alleging that Valley View violated the ADA by dismissing him from the volunteer program without providing him a reasonable accommodation for his mental impairment. The district court granted Valley View's summary judgment on the grounds that McElwee had not demonstrated that his mental impairment substantially impaired his ability to interact with others.

On appeal, the Second Circuit Court of Appeals affirmed the district court's decision on the grounds that even if McElwee had a disability, the reasonable accommodations that McElwee claims he was denied were not reasonable. The first accommodation McElwee proposed was that Valley View should have spoken to his therapist or "encourage[d] him to obtain particularized therapy to help him behave more appropriately in the workplace and . . . better interact with colleagues." The Court held that nothing in the record indicated that further therapy would have helped McElwee to refrain from his inappropriate conduct, either immediately or at any time in the near future.

The Court also held that McElwee's second requested accommodation—for Valley View to work with the women who complained about his behavior "to educate [them] about [McElwee's] disability or to [help them] better understand the nature of [their] concerns about [McElwee]"—was also unreasonable as a matter of law, because requiring others to tolerate misconduct is not the kind of accommodation contemplated by the ADA. The Court further held that nursing home employees, volunteers, and visitors should not be required to tolerate harassing behavior, and it would have been an undue hardship for Valley View to have to tolerate such behavior.

VII. Service Animals and Emotional Support Animals as Reasonable Accommodations

A developing trend among individuals with mental impairments is the use of service animals and emotional support animals to help manage anxiety, depression, certain phobias, and other mental emotional or psychological conditions. The issue of whether to allow one in the workplace as a reasonable accommodation has become an increasingly prevalent issue facing employers.

It is important to distinguish emotional support animals from service animals. Title III of the ADA (which prohibits discrimination on the basis of disability in public accommodations and commercial facilities) defines "service animal" to mean "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[20] Elsewhere, the regulations expand this definition to include miniature horses (as long as certain requirements are met).[21] Service animals, therefore, are *trained* to perform *work* or *tasks* for the benefit of a person with a disability. Examples of such work or tasks include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications, calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack, or performing other duties.[22] In general, places of public accommodation must allow service animals to accompany their owners anywhere they go.[23] In situations where it is not obvious that the dog is a service animal, a place of public accommodation's employees may ask (1) whether the dog is a service animal that is required because of a disability, and (2) what work or task the dog has been trained to perform. Staff are not allowed to request any documentation for the dog, require that the dog demonstrate its task, or inquire about the nature of the person's disability.[24]

In contrast, emotional support animals have not been trained to perform work or tasks. Rather, they provide a benefit merely by being present. As a result, they do not qualify as service animals, and are not governed by Title III of the ADA. Title I of the ADA (which prohibits discrimination in employment) do not specifically address using emotional support or service animals as an

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[20] 28 C.F.R. § 36.104.

[21] 28 C.F.R. § 36.302(c)(9).

[22] FAQ About Service Animals and the ADA, U.S. Department of Justice, Civil Rights Division, *available at* https://www.ada.gov/regs2010/service_animal_qa.pdf [hereinafter "Service Animals FAQ"].

[23] Service Animals FAQ.

[24] Service Animals FAQ.

accommodation. Accordingly, a request to bring an animal to work must be treated like any other request for reasonable accommodation.

In *Maubach v. City of Fairfax*, 2018 WL 2018552 (E.D. Va. Apr. 30, 2018), Stefanie Maubach alleged, among other things, that the City failed to accommodate her disability by denying Maubach the opportunity to bring her dog, Mr. B, to work. Maubach worked as a dispatcher for the City. Maubach worked the night shift with another dispatcher. Martin Nachtman supervised Maubach. Maubach worked in the City's Emergency Operations Center ("EOC"), which is a bulletproof glass enclosed and locked space containing highly sensitive equipment and multiple work stations.

In February 2016, Maubach asked Nachtman, her supervisor, if she could bring Mr. B to work. Maubach told Nachtman that having Mr. B at work would help her avoid panic attacks, which had already caused Maubach to miss work. Nachtman denied Maubach's request. At that time, Nachtman was unaware that plaintiff suffered a disability. Maubach visited a professional counselor, who agreed to write a letter recommending that Maubach be allowed to bring Mr. B to work with her to calm Maubach when she suffered a panic attack. Maubach contacted the City's personnel director concerning her request to bring Mr. B to work, and told the personnel director that Mr. B was a registered service animal. The City ultimately decided to allow Maubach to bring Mr. B to work on a trial basis. Nachtman was on vacation this time.

Upon Nachtman's return from vacation, he discovered that Maubach had brought Mr. B to work and that the EOC was covered with clumps of dog fur and dander, and that Maubach had left Mr. B's bed in the EOC. Nachtman is allergic to dogs and began suffering allergic reactions, including sneezing, watery eyes, coughing and congestion, after entering the EOC. Nachtman later received an email from a day-shift dispatcher complaining about their own allergic reaction to Mr. B's fur and dander. There were also concerns that because Maubach had to occasionally leave her post to walk Mr. B, civilians and other officers would be put at risk. Following these complaints, Maubach was not allowed to bring Mr. B to work, and Maubach went out on disability and FMLA leave. The City offered a day shift to Maubach, which is less stressful and provides more flexibility because there were more dispatchers working during the day shift. Maubach refused this offer on the grounds that she wanted to work with a friend of hers who only worked the night shift.

As a result of Maubach's extended leave and statements to the City regarding her mental health, the City requested that Maubach submit to a fitness for duty medical review. The results of this review determined that Maubach was not psychologically fit for duty as a dispatcher. Maubach never returned to work. In December 2016, she filed an EEOC complaint. Following Maubach's complaint, the City offered Maubach a new accommodation, namely to bring a hypoallergenic dog to work instead of Mr. B. Maubach refused on the grounds that (1) she would not be "bullied" into bringing a particular breed of dog to work, (2) there is no such thing as a hypoallergenic dog, and (3) she did not have the money to buy a hypoallergenic dog.

Maubach filed suit against the City, and the City moved for summary judgment. The court granted the City's motion for summary judgment with respect to Maubach's failure to accommodate claim, and held that Maubach did not participate in good faith in the interactive process to identify a

reasonable accommodation. Because Mr. B was imposing a hardship on other employees with allergies, and because Mr. B's presence caused Maubach to leave her post without proper coverage, the City was permitted to seek alternative accommodations. The court noted that Maubach was not entitled to her preferred accommodation, only a reasonable one, and that having Mr. B present with her in the EOC was not a reasonable accommodation. Moreover, Maubach did not properly consider the alternative accommodations that were offered to her. Accordingly, her failure to accommodate claim failed as a matter of law.