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MENTAL, PSYCHIATRIC, AND INTELLECTUAL DISABILITIES

By

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I. INTRODUCTION

Most Washington employers are covered by at least two different statutes prohibiting disability discrimination in employment: the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"), and the Washington Law Against Discrimination, Chapter 49.60 RCW ("WLAD"). Both statutes protect persons with mental disabilities from discrimination because of the presence of (or the perception or record of) the disabling condition. Both also require reasonable accommodation for mental disabilities of applicants for employment and of employees who are otherwise able to perform the essential functions of a job.

II. OVERVIEW OF MENTAL, PSYCHIATRIC, AND INTELLECTUAL DISABILITIES UNDER FEDERAL AND STATE DISABILITY LAW

A. "Mental Impairments" Under the ADA

The ADA covers employers with 15 or more employees, including state and local governments. The ADA protects persons with disabilities from discrimination because of the presence of a mental or physical impairment that substantially limits a major life activity. The ADA also requires that employers provide reasonable accommodation to assist disabled employees in performing essential job functions.

The ADA protects qualified individuals who are (a) disabled, (b) regarded as being disabled, and/or (c) have a record of disability.

The first question that arises in evaluating any disability-related issue is whether the individual has a "disability" protected under the ADA. The ADA defines "disability" as a (a) physical or mental impairment (b) that substantially limits (c) one or more of the major life activities of an individual. Individuals must satisfy all three components of this definition in order to meet the general test.

1. Definition of "Mental Impairment"

The ADA expressly includes "mental impairments" as protected disabilities. However, neither the ADA nor its applicable regulations identify specific protected mental impairments; rather, a general categorical description is set forth. A mental impairment is defined in the regulations as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). Examples include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") classifies and describes many mental disorders and is often referred to in mental disability cases, but not all of the conditions listed in the DSM-IV qualify as disabilities under the ADA. Both work-related and non-work-related impairments may require accommodation.

Congress specifically excluded several conditions from the definition of a "disability," such as various sexual behavior disorders (transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders not resulting from physical impairments), compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current use of illegal drugs.

2. Substantially Limited

An impaired individual is "substantially limited" with respect to a "major life activity" when the individual either cannot perform a major activity that the average person in the general population can perform or is significantly restricted as to the manner, duration, or condition under which the individual performs the activity compared to the average person in the general population. Key factors to consider in making this determination include:

(a) the nature and severity of the impairment;

(b) the duration or expected duration of the impairment; and

(c) the permanent or long-term impact resulting from the impairment.

The following are significant points to remember in this regard:

- Short-term or temporary conditions, such as an inability to work for only one month, generally are not considered substantially limiting under the ADA.

- To be substantially limited in the major life activity of working, an employee must be incapable of performing a class or broad range of jobs; inability to perform only one particular job or a small number of jobs is not substantially limiting for purposes of the ADA.

- Both the positive and negative effects of mitigating measures must be taken into account in determining whether an individual's impairment substantially limits any major life activity. This means that if an individual has an impairment that is controlled by medication or devices to the extent that the condition no longer limits a major life activity, the individual is not considered disabled under the ADA.

The EEOC guidelines state that chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For example, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia that may remit and intensify, sometimes repeatedly, over the course of several months or several years may be substantially limiting impairments.

3. Major Life Activity

The definition of "major life activity" is flexible and in many cases will include such things as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, sleeping, or working.

B. Mental Disability Under the WLAD

The WLAD prohibits discrimination based on disability, including sensory, mental, and physical disabilities. The WLAD lacks the specificity of the ADA and has been interpreted broadly to cover a wide range of abnormal medical conditions. Like the ADA, the WLAD requires that employers provide reasonable accommodation to assist disabled employees in performing essential job functions.

Under the WLAD, the definition of "disability" has been largely developed by the courts and has the following elements:

- a sensory, mental, or physical "abnormality,"

- that is medically cognizable or diagnosable or exists as a record or history, and

- that substantially limits the individual's ability to perform his or her job.

See Hill v. BTI Income Fund-I, 144 Wn. 2d 172 (2001); Pulcino v. Fed. Express Corp., 141 Wn.2d 629 (2000); WAC 162-22-020. Unlike the ADA, which expressly excludes certain conditions from coverage, the WLAD does not contain any statutory exceptions. On the other hand, the element of the WLAD definition that ties the determination of whether an individual is "disabled" to whether he or she can perform his or her job duties is in certain respects narrower than the ADA definition.

In addition, under state law, as under the ADA, the cause of the abnormal mental condition is not a factor. Both work-related and non-work-related conditions may be disabilities that require accommodation.

C. Who Is a "Qualified" Individual With a Disability?

1. General Test

State and federal laws do not protect all individuals who can demonstrate that they are disabled. Instead, only those "qualified" individuals with a disability are covered. In order to satisfy this definition, an individual must demonstrate that he or she

(a) has a disability as defined above and

(b) can perform the essential functions of the employment position held or desired

(c) with or without reasonable accommodation.

A qualified individual with a disability is defined as someone who possesses the requisite skill, experience, education, and other job-related requirements and who can perform the essential functions of the job with or without reasonable accommodation.

The first step in determining whether mentally disabled individuals are "qualified" is to assess whether they meet all selection criteria that are related to job performance, safety, or some other aspect of the position with or without reasonable accommodation. Then, supervisors must determine whether the disabled individuals can also perform the "essential functions" of the position held or desired, with or without reasonable accommodation. This analysis is intended to ensure that individuals with disabilities who can

perform the core job functions are not denied employment opportunities solely because they cannot perform the marginal tasks of a position.

It is important to keep in mind that the determination of whether an individual is "qualified" is based on the individual's mental condition at the time the relevant employment decision is made. Speculation at this juncture regarding the employee's future condition (e.g., that severe depression will recur) should not take place.

2. The "Essential Functions" of the Job

State and federal disability laws protect only those individuals who are capable of performing the essential functions of either their own position or an alternate job with or without reasonable accommodation. An employer is not required to accommodate disabled employees or applicants by eliminating their responsibility for performing an essential function of a job. As a result, it is critical to identify exactly which functions are "essential" and which are "marginal."

The first step in this analysis is to consult the employer's written job description for the relevant position. Other sources may be consulted for guidance as needed. The EEOC advises that a function may be essential because (a) the position exists to perform the function, (b) there are a limited number of employees available who could perform the function, or (c) the function is highly specialized.

Also relevant to this decision are (a) the employer's judgment of what is an essential function, (b) a written job description, (c) the amount of time spent performing the function, (d) the consequences of not requiring someone in the job to perform the function, and (e) the work experience of people who are performing the job or have done so in the past.

D. What Does It Mean to Be "Regarded as" Having a Mental Impairment?

1. Overview of a "Regarded as" Claim

Even if an individual does not actually have a disability, the individual nevertheless may fall within the protection of both state and federal disability laws because he/she is "regarded as" being disabled. Under the ADA, an individual may establish a "regarded as" claim where (a) an employer mistakenly believes the individual has an impairment that substantially limits a major life activity or (b) the employer mistakenly believes that an actual, nonlimiting impairment substantially limits a major

life activity. Under state law, an individual must establish that his/her employer or potential employer perceived that the individual had a disability and discriminated against that individual as a result of the perceived disability.

2. Practical Tips to Avoid "Regarded as" Claims

An employee may claim that he/she was "regarded as" disabled in a variety of circumstances. Observing the following guidelines will ensure that an employer limits its exposure for "regarded as" disabled claims:

- All decisions that relate to an employee's abilities must be based on factual assessment rather than on assumptions or stereotypes to avoid giving rise to "regarded as" disabled claims.

- Supervisors and others must take care to ensure that they do not use the terms "disability," "accommodation," or similar language loosely in written and oral communication or when dealing with employees with injuries or illnesses. All personnel must use the appropriate terminology when dealing with employees with injuries and medical limitations. Supervisors and others should avoid referring to employees' limitations as "disabilities" and instead speak of "medical conditions," "limitations," "restrictions" and "impairments." Likewise, adjustments that enable nondisabled employees with minor medical conditions to return to work should not be called "accommodations."

E. What Does It Mean to Have a "Record of" an Impairment?

1. Overview of "Record of" an Impairment

As in the "regarded as" situation discussed above, an individual with a "record of" a mental disability is protected under the ADA and the WLAD even if the individual does not currently have a mental disability. For example, a 30-year old employee who suffered from severe depression throughout his mid-twenties, including a nine-month leave to treat that depression, may have a record of a qualifying disability, even if he no longer exhibits any of the symptoms of major depression. Significantly, however, the record must establish that the individual had a covered disability at some point under state or federal law as defined above. For example, the fact that an employer has records establishing that an employee was hospitalized two years ago in connection with appendicitis and a routine appendectomy does not establish a "record of" a disability because appendicitis in most cases will not constitute a disability under

federal or state law. In addition, an individual must demonstrate that a supervisor or other decision maker is aware of the records in question in order to state a claim under this section of the law.

2. Practical Tips Regarding "Record of" an Impairment

Because an individual must show that a decision maker is aware of the record, it is particularly important to segregate all medical records and records relating to a request for accommodation apart from the employee's personnel file.

F. Association With a Disabled Person

1. Overview of Association With a Disabled Person

The ADA prohibits discriminating against any person because of an association with an individual with a disability. For example, a supervisor could not refuse to hire an individual because his/her child has an intellectual disability.

2. Practical Tips Regarding Association With a Disabled Person

Consistent with an employer's policy of treating all individuals with respect and dignity, supervisors and employees should refrain from inappropriate inquiries or comments concerning an employee's affiliation with individuals with disabilities. Inappropriate behavior in this regard should not be tolerated, and appropriate corrective action should be taken promptly.

III. FEDERAL AND WASHINGTON STATE COURT GUIDANCE ON SELECTED MENTAL DISABILITIES

A. "Stress" and "Depression"

"Stress" and "depression" may or may not be considered impairments, depending on whether these conditions result from an underlying physical impairment or a mental or psychological disorder. The EEOC advises that an employee suffering from general stress because of job or personal life pressures would not necessarily have an impairment.

B. Interacting With Others

In McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), the plaintiff, Richard McAlindin, was diagnosed with anxiety, panic, and somatoform disorders. Mr. McAlindin sought and was granted leave due to "work stress,"

which was ultimately extended for a year. When Mr. McAlindin finally returned to work, he filed a lawsuit alleging violations of the ADA. In addition to finding that sleeping and sexual relations are major life activities, the court held that interacting with others is an "essential life function, like walking and breathing" and is therefore a major life activity under the ADA. Citing to the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (the "EEOC Guidelines"), the court stated that mere trouble getting along with coworkers is not sufficient to show a substantial limitation of a major life activity and that not just any cantankerous person will be deemed substantially limited in a major life activity. Instead, a plaintiff must show that his relations with others are characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary. For Mr. McAlindin, his disorder ranged from a more subtle impairment in engaging in meaningful discussion to a total inability to communicate at times. Thus, he had presented a sufficient level of severe problems to warrant denial of summary judgment.

C. Concentration

At least one federal court has determined that concentration does not constitute a major life activity. Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir. 1999). However, the EEOC Guidelines advise that an individual would be substantially limited if she or he was easily and frequently distracted, meaning that his/her attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if she or he experienced her/his "mind going blank" on a frequent basis. The examples provided by the EEOC are as follows:

> An employee who has an anxiety disorder says that his mind wanders frequently and that he is often distracted by irrelevant thoughts. As a result, he makes repeated errors at work on detailed or complex tasks, even after being reprimanded. His doctor says that the errors are caused by his anxiety disorder and may last indefinitely. This individual has a disability because, as a result of his anxiety disorder, his ability to concentrate is significantly restricted as compared to the average person in the general population.
>
> An employee states that he has trouble concentrating when he is tired or during long meetings. He attributes this to his chronic depression. Although his ability to concentrate may be slightly limited due to depression (a mental impairment), it is not significantly restricted as compared to the average person in the general population. Many people in the general population have difficulty concentrating when they are tired or during long meetings.

D. Alcohol and Drug Addictions

Alcoholism generally qualifies as a protected disability under the ADA and state disability laws. As a result, individuals with past or current alcohol problems who are able to perform the job in question are protected from discrimination. However, an employer may lawfully prohibit the use of alcohol in the workplace and hold alcoholic employees to the same qualification, performance, and attendance standards as other employees, even if the employee's failure to meet those standards results from alcoholism.

Supervisors lawfully may discipline or terminate an employee who is using alcohol or is impaired by alcohol during work hours. Nevertheless, individuals with alcoholism in some circumstances may be entitled to a reasonable accommodation, such as a leave of absence or modified work schedule, to allow them to enter a rehabilitation facility or seek counseling. Furthermore, an employer may not treat an alcoholic employee differently from other employees because of his or her alcoholism. For example, an employer may not discharge an alcoholic employee after one incident of arriving at work intoxicated while others who arrived at work intoxicated were allowed to keep their jobs.

Past addiction to illegal drugs is a protected disability under the ADA and state disability laws. As a result, supervisors may not consider former drug addiction for any purpose relating to hiring, promotion, or discipline in the workplace environment. In contrast, current drug use is not protected under federal law, and supervisors lawfully may discipline or terminate an employee on this basis. Under the WLAD, however, current drug use may be a protected disability. In addition, current drug users may in certain circumstances be entitled to a leave of absence to seek treatment under the FMLA.

In Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001), an employee, Karen Brown, brought an ADA claim after she was terminated following an arrest on drunk driving and drug charges. Ms. Brown was arrested on November 10, 1996, and was in jail for five days. Ms. Brown attended a court-ordered rehabilitation program from November 15, 1996, until February 12, 1997. She was ultimately terminated for abandoning her job under the employer's policy that three unexcused absences warranted termination. Ms. Brown argued that she was entitled to protection under the ADA's safe harbor regarding individuals who participate in a supervised rehabilitation program and are no longer engaging in the illegal use of drugs. The court held that the safe harbor provision only applies to employees who have refrained from using drugs for a significant period of time and that because of Ms. Brown's recent use of drugs on November 10, not a sufficient length of time had passed. In addition, the court held that it was proper for the employer to terminate Ms. Brown under its policy because an employer

may hold an employee who engages in the illegal use of drugs or is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

E. Sexual Identity Issues

In Doe v. Boeing, 121 Wn.2d 8 (1993), the court held that plaintiff's gender dysphoria (transsexualism) did not meet the definition of a disability under the WLAD. In Doe, the plaintiff was a biological male who informed her supervisors that in order for her to qualify for sex reassignment surgery that she would have to live full-time for one year in the social role of a female. The employer informed Doe that until she had her surgery she could wear either male or unisex clothing (including blouses, sweaters, slacks, lipstick, and earrings), but that she could not wear obviously feminine clothing such as dresses, skirts, or frilly blouses and that she was not to use the women's restrooms. After receiving several complaints regarding her attire and use of the women's restrooms, Doe was given a disciplinary warning. After violating the dress code again, Doe was terminated for failure to follow directives on acceptable attire. Doe's transsexualism had not interfered with her ability to perform her job duties. The court held that Doe's gender dysphoria was not a disability under state law because she was not discriminated against *because of* her abnormal condition. Further, the court found that the employer had reasonably accommodated the employee's condition because it provided the means necessary for Doe to perform her job.

F. Ability to Perform Job

Disparate treatment and failure to provide reasonable accommodation claims brought by a plaintiff who suffered from migraine headaches and a depressive disorder were dismissed when the plaintiff failed to show that his abnormal condition substantially limited his ability to perform his job. Roeber v. Dowty Aerospace Yakima, 116 Wn. App. 127, review denied, 150 Wn.2d 1016 (2003). In Roeber, the plaintiff had received regular promotions and salary increases. His annual reviews indicated that he was a competent, valued employee who generally worked well with others—although it was noted that on occasion he came across "too strong." The plaintiff was terminated after he engaged in an altercation with a coworker and later stated to his supervisor and an investigating police officer that he would have killed the coworker if he had a gun. The court held that although the plaintiff established that he had an abnormal condition, he did not show that the migraines or the depressive disorder substantially limited his ability to perform his job.

G. Former Employees

A former employee in Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000), brought an action alleging that the former employer and the administrator of its disability plan violated the ADA and the WLAD by providing greater benefits for physical disabilities than for mental disabilities. The plaintiff, Helen Weyer, suffered from severe depression and became completely unable to work. Ms. Weyer quit her job and received benefits under her insurance policy for two years. Had Ms. Weyer been afflicted with a physical disability, she likely could have received benefits until she was 65. The court held that because Ms. Weyer was totally disabled and no longer an employee that she was not a "qualified individual" under the ADA and therefore could not bring suit. The ADA is limited only to job applicants and current employees capable of performing essential functions of available jobs. The court stated that "one must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit under Title I."

H. Time to Complete Tasks Qualifies as a Substantial Limitation

In Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), the plaintiff, a medical transcriptionist, suffered from obsessive-compulsive disorder ("OCD"). Ms. Humphrey engaged in a series of obsessive rituals that hindered her ability to arrive at work on time, or at all. These rituals included repeatedly washing and brushing her hair, dressing very slowly, and checking and rechecking to make sure that she had papers that she needed. After receiving several disciplinary warnings regarding her attendance, Ms. Humphrey was diagnosed with OCD. She requested an accommodation for her disability and was granted a flextime arrangement under which she could begin work at any time within a 24-hour period on days that she was scheduled to work. Ms. Humphrey next requested a leave or to be allowed to work from home, which requests were both denied because of her previous disciplinary warnings. As a result of her OCD, Ms. Humphrey continued to be late and absent and was eventually terminated.

The Ninth Circuit held that the employer violated the ADA when it denied the plaintiff's request for leave or to work from home, stating that 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. Further, the court noted that caring for oneself is a major life activity under the ADA and includes performing basic activities such as getting up in the morning, bathing, dressing, and preparing and obtaining food. The court held that while Ms. Humphrey's OCD did not render

her unable to care for herself, it did cause her to need inordinately more time than others, and thus she was substantially limited as to that major life activity.

I. No Duty to Reassign to Different Supervisor

There is no duty under the WLAD to accommodate an employee's disability by providing him or her with a new supervisor. In Snyder v. Medical Service Corp. of Eastern Washington, 145 Wn.2d 233 (2001), the court held that it was permissible for an employer to refuse to reassign an employee with post traumatic stress disorder ("PTSD") to a different supervisor. Similarly, in Wilson v. Wenatchee School District, 110 Wn. App. 265 (2002), even where an employee alleged that his anxiety disorder was related *solely* to his specific supervisor, the court held that the employer had no duty to transfer an employee to a different supervisor.

J. Nexus Between Accommodation and Medical Necessity

An employee alleging that his employer failed to accommodate his disability at the summary judgment phase or at trial must be able to establish that the requested accommodation was medically necessary. In Riehl v. Foodmaker, Inc., 152 Wn.2d 138 (2004), an employee was fired after seven years of employment. When he reapplied for a job, the employer refused to rehire him. The employee, who suffered from depression and PTSD, sued the employer under the WLAD for lack of disability accommodation during his employment and for disparate treatment during the firing and rehiring process. The court noted that when the disability and need for accommodation are obvious, such as for a broken leg, the medical necessity burden will be met upon notice to the employer. However, in the case of depression or PTSD, a doctor's note may be necessary to satisfy the plaintiff's burden to show that some accommodation is medically necessary. The nexus requirement ensures that an employer is not required to provide unnecessary accommodations.

K. Intellectual Disabilities

According to the EEOC, an individual is considered to have an intellectual disability when (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18. "Adaptive skill areas" include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work. The EEOC has prepared a helpful fact sheet with common questions and answers regarding persons with intellectual disabilities: http://www.eeoc.gov/facts/intellectual_disabilties.html.

IV. DISCLOSURE OF A MENTAL DISABILITY

Unlike some physical disabilities, mental disabilities may be far less easy for an employer to detect and to understand. Similarly, employees with mental disabilities may be unclear about whether and when they must disclose their disability to their employer.

A. Application and Interview

Before a job offer is made, an employer may not require a job applicant to take a medical examination or ask about a person's disability. However, the employer can ask an applicant questions about his/her ability to perform job-related functions, as long as the questions are not phrased in terms of a disability. The following are examples of questions that are permissible if they relate to performance of the job:

- Can the applicant put files in alphabetical order?
- Can the applicant place items in numerical order?

If an applicant voluntarily tells an employer that he or she has a disability or if the disability is otherwise obvious, an employer may only ask questions regarding the need for a reasonable accommodation and/or what kind of accommodation may be needed. At the pre-offer stage, an employer is also prohibited from asking a third party (such as a job coach, family member, or social worker attending an interview with an applicant) any questions that it would not be permitted to ask the applicant directly.

Employers are required to provide reasonable accommodation to applicants with disabilities to allow them to successfully complete the application process for a position sought. Employers should provide accommodation to an applicant during the application process if necessary, even if the employer believes it will be unable to provide the reasonable accommodation on the job. If the need for the requested accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability. The employer may require the applicant to provide documentation from an appropriate professional concerning his/her disability and functional limitations. The EEOC Guidelines stress that the employer should make it clear to the applicant why it is requesting such information, i.e., to verify the existence of a disability and the need for an accommodation. The employer may request only information necessary to accomplish these limited purposes.

Supervisors may not reject or penalize a qualified applicant with a disability because the individual requires a reasonable accommodation in order to perform the position, provided that the applicant actually can perform the job with

accommodation. An exception to this rule may arise in those circumstances where the accommodation would cause an undue hardship or the individual would pose a direct safety threat.

B. Job Offer

After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to job performance or access to benefits/privileges of the job, but only if (1) all entering employees in the same job category are asked this question or (2) the applicant has voluntarily disclosed the existence of a disability and the supervisor could reasonably believe that the applicants will need reasonable accommodation.

C. During Employment

During employment, an employer may make a disability-related inquiry or medical examination of an employee only if it is "job-related and consistent with business necessity." This requirement is met when an employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition, or (2) an employee will pose a direct threat due to a medical condition. The EEOC Guidelines provide the following two illustrative examples:

Example A: A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. There is no indication, however, that his failure to learn his route is related in any way to a medical condition. Because the employer does not have a reasonable belief, based on objective evidence, that this individual's ability to perform his essential job function is impaired by a medical condition, a medical examination (including a psychiatric examination) or disability-related inquiries would not be job-related and consistent with business necessity.

Example B: A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin around-the-clock labor negotiations during the next several weeks. The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk

of substantial harm to himself and others. There is no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings. The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

D. Confidentiality

Employers must keep all information concerning the medical condition or history of its applicants or employees confidential. This includes any information that an employee voluntarily discloses to an employer. Following are a few limited exceptions to the confidentiality requirements under the ADA:

- Supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- First aid and safety personnel may be told if the disability might require emergency treatment; and
- Government officials investigating compliance with the ADA must be given relevant information upon request.

V. WHAT IS A "REASONABLE ACCOMMODATION" FOR A MENTAL DISABILITY?

A. Reasonable Accommodation

Both federal and Washington state law impose an affirmative obligation on employers to provide reasonable accommodation to qualified individuals with disabilities to allow them to perform essential job functions. Simply stated, an accommodation is any change in the work environment or adjustment in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

1. When Is Reasonable Accommodation Required?

The point at which an accommodation request is made or an employer learns of a possible need for an accommodation is significant because it triggers the employer's obligation to determine (a) whether the employee is covered under the ADA and/or the applicable state disability law, and (b) what, if any, accommodation is warranted or feasible. Generally, any notification that a job modification is needed because of a mental

impairment or that a medical condition interferes with one's ability to work will be sufficient to trigger this inquiry; no "magic" words or explicit use of the terms "accommodation," "disability," or "ADA" is required.

Under the ADA, an employer is obligated to make reasonable accommodation only to the "known" limitations of a qualified individual with a disability. Some disabilities that are obvious (e.g., an applicant appears at an interview in a wheelchair), but most mental disabilities are not. If a disability is not readily apparent and the individual does not inform the employer of the disability and resulting limitations, the employer generally will not be responsible for failing to make reasonable accommodation.

Under Washington law, the employer's obligation to explore reasonable accommodation is triggered as soon as the employer or any supervisor becomes aware that the employee's condition interferes with the employee's ability to work in his/her position, even if the employee does not raise this issue with his/her supervisor.

Additionally, the employer will be charged with knowledge of a disability requiring accommodation if such information is relayed to the employer by a third party, including an employee's coworkers, his or her doctor, or an employee assistance program. Supervisors should learn to recognize employee comments or suggestions that may flag such issues and report those situations to human resources.

Because one purpose of the disability laws is to discourage stereotyping and the making of assumptions about individuals who are or appear to be disabled, it generally is not appropriate for supervisors to suggest that an employee may need an accommodation. An exception to this rule may arise in the rare case where it appears that an employee needs an accommodation but is unable to communicate this request to the employer because of his or her mental condition. In addition, it is appropriate to ask an employee who appears to be having difficulty performing his/her job duties because of a medical condition whether there is anything the employer can do to help.

2. Employers Are Not Required to Provide Unreasonable Accommodations or Those That Would Result in "Undue Hardship"

Employers are not required to provide accommodation, even to qualified individuals with disabilities, in certain situations. Those situations include when the accommodation would pose an undue hardship, conflict with the

terms of a collective bargaining agreement, or result in a direct threat to the health and safety of other employees. In these circumstances, an employer must consider whether alternate accommodations exist that do not present these difficulties.

(a) Undue Hardship

Accommodations that would impose an undue hardship on an employer's operations or business will not be deemed "reasonable" under the ADA and state disability laws. In evaluating whether an accommodation falls within this category, supervisors must evaluate:

- the nature and cost of the accommodation;
- the financial resources and number of employees at the facility where the individual is located;
- the impact of the cost of the accommodation on those resources and operations;
- the overall financial resources and size of the company;
- the impact of the accommodation on the operation of the facility and the ability of other employees to perform their jobs;
- the nature of the operations, including the composition, structure, and function of the workforce and the distance between the facility in question to other employer facilities; and
- whether the accommodation conflicts with the provisions of a collective bargaining agreement.

Although the impact of an accommodation on the ability of other employees to perform their job duties is a factor, an employer cannot establish undue hardship by showing only that an accommodation would have a negative effect on employee morale. Even though an employer may demonstrate that an accommodation would be an undue hardship if it unduly disrupts the company's operations, the employer will not be able to claim undue hardship if the disruption occurs as a result of other employees' fears or prejudices about the individual's disability.

The employer has the burden of proving that a particular accommodation imposes an undue hardship, and it is very difficult to prove that an accommodation would be an undue hardship. As a result, it is important that such determinations be based on a careful assessment of objective evidence. Your legal counsel should always be consulted prior to denying an accommodation on the basis of undue hardship.

(b) Direct Threat

The ADA and state disability laws do not require an employer to employ disabled individuals in positions where they present a "direct threat" or pose a significant risk of substantial harm to others that cannot be eliminated or reduced by any reasonable accommodation. In such circumstances, supervisors may lawfully refuse to hire an applicant or discharge an employee who poses such a threat. Furthermore, an employer is not required to provide an accommodation if the accommodation would result in the employee's posing a direct threat.

An individual does not pose a "direct threat" simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability. The employer must identify the specific behavior that would pose a direct threat. A determination that an individual poses a direct threat must be based on substantial evidence concerning the employee or applicant's ability to safely perform the essential functions of a particular job. The following are factors that should be considered in this regard:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur;
- the imminence of the potential harm; and
- the availability of reasonable accommodations to minimize or eliminate the risk.

In conducting this analysis, supervisors should rely on information such as information from the employee, medical knowledge, input from the individual's health providers, government guidance, and objective evidence, rather than subjective perceptions, irrational

fears, attitudes, or stereotypes about the nature or effect of a particular disability.

B. What Is an Employer's Obligation Once It Is Aware of the Need for Accommodation?

1. An Employer Must Promptly Engage in an Interactive Process With the Individual to Identify an Appropriate Accommodation.

As soon as a member of management is aware of a possible need for an accommodation, an employer representative must promptly meet with that individual to discuss the possibility of accommodation. The process of identifying whether and to what extent a reasonable accommodation is required is flexible and involves management, the individual, and health care professionals. Supervisors should consult with human resources as soon as they learn that an employee or applicant may need an accommodation. Human resources must engage in an interactive process with the individual to learn about his or her limitations, need for accommodation and barriers to performance and to analyze job functions to identify essential and nonessential job tasks. Human resources will often consult with the supervisor throughout the process or ask the supervisor to be actively engaged in the process. The interactive process requires that the employer communicate with the employee and explore possible accommodations in good faith.

2. Practical Tips Regarding the Interactive Process

The following are some points that human resources should keep in mind during the interactive process:

- Take a close look at the particular job involved. Make sure you understand its actual purpose and essential functions.

- Consult with the individual with a disability to understand his or her abilities as they relate to the job. Identify those functions that the employee is having trouble performing. Are those functions marginal or essential?

- Obtain a competent medical opinion to determine how the mental condition affects the employee's abilities, whether there are any medical restrictions, and what accommodations should be considered.

- Consult with the individual to identify what accommodations he or she believes are needed. While maintaining confidentiality, consult with the supervisor or with employees who perform the job about other ways that it may be performed.

- After you have developed a list of potential accommodations, consider the effectiveness of each potential accommodation. An accommodation must allow the employee to perform essential job duties or to enjoy equal benefits or privileges.

- Consider whether the accommodations requested would present an undue burden on the operations of the employer. Loss of essential operational flexibility may be an undue hardship. Be very careful about rejecting effective accommodations on grounds of undue cost. Your legal counsel should be consulted prior to rejecting an accommodation on this basis.

- Choose an appropriate reasonable accommodation that serves the needs of the employer as well as the employee. A reasonable accommodation must be effective, but it need not necessarily be the best accommodation or the one the employee requests.

- Keep in mind that the employer's obligation to accommodate disabled employees does not depend on how the disabling injury occurred (e.g., whether it occurred on or off the job) and that "difficult" employees have the same rights under the ADA and WLAD as other employees.

- If an employee with a disability alleges discrimination or harassment, those allegations should be treated seriously and investigated. If an investigation reveals that an employee engaged in discrimination or harassment, prompt and effective remedial action should be taken, consistent with the employer's policy and practice.

3. Privileges and Benefits of Employment

An employer is required to provide reasonable accommodation to allow qualified individuals with disabilities to enjoy the privileges and benefits of employment equal to those enjoyed by similarly situated employees without disabilities. The EEOC has explained that privileges and benefits of employment include, but are not limited to, employer-sponsored (a) training, (b) services (for example, EAPs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (c) parties or other social

functions (for example, parties to celebrate retirements and birthdays and company outings). If an employee with a disability needs a reasonable accommodation in order to access and participate in these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

4. Duty May Continue if Accommodation Is Unsuccessful.

Providing reasonable accommodation is often an ongoing duty. If an accommodation is unsuccessful, the supervisor or human resources must consider whether a more effective alternative is available. Courts have held that the employer's duty to engage in an interactive process with the employee to find a reasonable accommodation continues when the employer becomes aware the first accommodation is not working.

In contrast, an employer's duty to accommodate may end when the employee rejects a reasonable accommodation offer. Employers should attempt to work with individuals with disabilities to evaluate any accommodations they request, but the employer is not required to grant an employee's request for a specific accommodation if an alternate, less burdensome or less costly, but nonetheless effective accommodation can be made. A disabled individual is not required to accept an accommodation, aid, opportunity, service, or benefit. However, by refusing a necessary reasonable accommodation, the individual will no longer be considered a qualified individual with a disability if he or she cannot perform the job without accommodation.

5. Duty to Accommodate May Extend After the Employment Relationship Ends.

In Washington, when an employee has been discharged or has been forced to resign because he or she is unable to perform his/her job duties due to a medical condition, an employer may have an ongoing duty to attempt to accommodate the employee after the employment relationship ends. If this situation arises, contact your legal counsel for guidance. Typically, notices of open job positions should be sent to former employees for a reasonable period of time if the employee left work for health reasons. At the time of termination, employees should also be told in writing to check with the employer for open positions if they want to work for the employer in the future.

C. If Accommodation Is Required, the Employer Must Provide an Accommodation That Is Effective.

A key consideration in determining the best way to accommodate a qualified person is an accommodation's effectiveness. An "effective" accommodation is one that enables the disabled individual to perform the essential functions of the job in question. The employer is entitled to choose which effective accommodations it will offer. It does not have to be the accommodation preferred by the individual, although consideration should be given to the disabled person's preferences. Further, the employer need not provide an accommodation that is not medically necessary. Identifying effective accommodations requires a case-by-case approach, as accommodations must be tailored to match the needs of the particular individual to the work environment in question. The following briefly discusses particular accommodations that may be "reasonable" in some mental disability cases.

1. Job Restructuring

Job restructuring is a potential reasonable accommodation under the ADA and the WLAD. Although an employer is never required to reassign or eliminate the essential functions of a position, it may be possible in some circumstances to restructure a job by altering the time or manner in which an essential function is performed. Likewise, it may be reasonable to redistribute, trade, or eliminate nonessential, marginal job functions of a position.

Example: A crew of three employees works the concession stand of a baseball stadium. One of the employees has an intellectual disability. He helps stock the counter with candy and snacks; at closing time he cleans the counters and equipment and restocks the counters with supplies. However, he cannot perform the marginal function of counting money at closing time. The marginal functions of another concession stand employee include placing empty boxes and trash in designated bins at closing time, which is something that the employee with an intellectual disability can perform. Switching the marginal functions performed by the two employees is a reasonable accommodation.

2. Reassignment to Open Positions

If there is no reasonable accommodation that would allow the employee to perform his/her current position, or if the only possible accommodation in the employee's current position would place an undue hardship on the employer, consideration must be given to whether the employee can be reassigned to a vacant position of comparable pay and benefits. The

following important points should be kept in mind when considering reassignment as an accommodation:

- The employee must be qualified to perform the essential job functions of the new position with or without accommodation.

- The employer has an affirmative obligation to assist an employee in this situation in identifying vacant positions for which he/she may be qualified and in applying for those positions.

- Reassignment may be to a lower-level position, but only if there are no vacant equivalent positions for which the employee is qualified with or without reasonable accommodation. If no such position exists or the employee is not qualified for the position, reassignment is not required.

- Promotion is not required as a reasonable accommodation. However, a disabled employee must be given the opportunity to compete for a promotion if he or she chooses to do so.

- An employer is not required to create a new position or to bump another employee to provide reasonable accommodation.

3. Leave as an Accommodation

A leave of absence may be a reasonable accommodation for an employee who needs time off from work because of a mental disability. The determination of how much leave to provide to an employee and when to provide it is fact-specific.

Full-time employees with a "serious health condition" may be eligible for 12 weeks of leave under the FMLA whether or not such leave is "reasonable" within the meaning of the ADA. Employees returning from FMLA leave, moreover, are entitled to restoration to their own or an equivalent position in virtually all circumstances. If the employee is returned to a different position, the new position must be equivalent in terms of job duties and status and must provide equal pay and benefits.

Although employees considered mentally disabled under the ADA and state disability laws will not always meet the FMLA's "serious health condition" standard, in some circumstances they will. As a result, supervisors faced with a request for leave should evaluate the request in light of the FMLA, the ADA, and the applicable state disability law and should coordinate

leave granted under the FMLA and disability laws (and an employer's benefit/leave policies) where appropriate.

The time off may be paid or unpaid and may include the use of vacation and sick leave where the employee has these benefits available. The employee with a disability will be allowed to exhaust accrued paid leave first and then take unpaid leave. For example, if employees are entitled to 10 days of paid leave, but an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and five days of unpaid leave.

An employee must not be penalized or disciplined for taking leave as an accommodation. For example, the employee cannot be disciplined under an attendance policy or considered less favorably than other employees for purposes of selecting an employee for promotions or other job opportunities.

Although an employer is not required to provide paid leave as an accommodation, some employees may be entitled to benefits pursuant to the employer's short- or long-term disability benefits plans. In addition, if the leave is for a work-related injury, the employee may be entitled to time loss payments under the workers' compensation scheme.

(a) Lengthy or Indefinite Leave

An indefinite leave of absence may be a reasonable accommodation under certain circumstances, but courts typically find that employers need not grant requests for indefinite leave. The employee may be entitled to up to 12 weeks' leave under the FMLA, however, even if the leave requested is indefinite and not reasonable under the ADA.

The supervisor and/or human resources should remain in touch with the employee during the leave in order to plan for the employee's return. If the employee's request for leave does not specify a return date, or if the employee needs continued leave beyond that originally granted, the employer may require the employee to provide periodic updates on his/her condition and possible date of return. Under these circumstances, the supervisor and/or human resources may contact the employee to inquire as to when the employee expects to return to work. By contrast, where the employer has granted leave for a fixed period and the employee has not requested additional leave, the employer *cannot* require the employee to provide periodic updates.

(b) Intermittent Leave or Sporadic Absences

An employee may ask for intermittent leave (for example, taking off one day per week) or may need to take sporadic days or blocks of time off for medical treatment or other reasons. Under disability laws, an employer must allow a disabled employee to take intermittent leave and/or take sporadic days or blocks of time off when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.

The employer must carefully assess whether allowing this type of leave could significantly disrupt the employer's operations—that is, cause undue hardship—or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs. If allowing this type of leave poses an undue hardship, the employer must consider alternate reasonable accommodations, such as temporary or permanent reassignment to accommodate the request for intermittent leave.

The FMLA specifically authorizes intermittent leave in some circumstances.

(c) Employee Must Be Returned to Same Position

When an employee takes leave, he/she must be returned to the same position at the conclusion of the leave unless undue hardship would result or the employee is medically unable to return to his/her former position, even with reasonable accommodation.

(d) Possible Reasons for Denying Leave

If an otherwise qualified mentally disabled employee requests leave as an accommodation, that leave can be denied only if the employee is not entitled to FMLA leave and only in the following circumstances:

- Granting the leave would result in an undue hardship;
- Another reasonable accommodation is offered instead; or
- Granting the leave would not render the employee qualified for the position (for example, the employee is currently

unable to perform his required job duties and has offered no evidence to support an assertion that a leave of absence would allow him to do so).

4. Light Duty as an Accommodation

Employers are not required to create a temporary or full-time light duty job where no such position currently exists as a means of accommodating disabled individuals. However, if a vacant light duty position exists for which the individual is qualified, the individual should be offered that position. This offer should be made regardless of whether the employee's injury is work-related or not. In other words, light duty positions cannot be reserved only for employees who have work-related injuries.

5. Modified or Flexible Work Schedule as an Accommodation

In some circumstances, modifying an employee's work schedule may be a reasonable accommodation. Examples in this category include altering arrival and departure times, providing additional unpaid breaks during the day, and changing the time when certain job functions are performed. Some medications taken for psychiatric disabilities can cause extreme grogginess and lack of concentration in the morning. Depending on the job, a later schedule could enable an employee to perform essential job functions. In most cases, supervisors will not be required to provide an open-ended work schedule.

Example: A grocery stock worker with a mental disability is scheduled to attend group counseling sessions on Tuesdays, during working hours. Her employer could grant her request for a modified work schedule, allowing her to leave two hours early each Tuesday to attend the counseling sessions, and to make up for the time by beginning work two hours early on Tuesdays.

These accommodations are not required where they would place an unreasonable burden or undue hardship on the employer. For example, if a particular job function must be performed at a particular time, such as sorting and labeling outgoing packages prior to mail pickup, then the employer is not required to allow an employee to perform this function at a different time. Furthermore, if there is another reasonable accommodation that will allow the employee to perform the essential functions of his/her position, the employer may elect to provide that accommodation rather than a modified work schedule.

If an employee requests to work fewer hours, this request should also be evaluated as a request for FMLA leave.

6. Acquisition or Modification of Equipment or Devices

Example: A receptionist with an intellectual disability has difficulty remembering the telephone numbers of office workers when transferring calls. As a reasonable accommodation, the employer purchased a large-button telephone with a speed dial and clearly labeled buttons with the names of office staff.

7. Work Station Placement

Physical changes to the workplace may be effective accommodations for individuals with mental disabilities.

Example: An employer relocates a data entry employee with an intellectual disability and Attention Deficit Disorder from a large open area where employees work side by side to a quieter part of the office to accommodate limitations on the employee's ability to concentrate.

8. Shift Changes as an Accommodation

As a general matter, an employer is not required to grant a mentally disabled employee a shift change as a reasonable accommodation where the particular shift—or the time that the functions are to be performed—is an integral part of the job in question. Where this is not the case, however, a shift change may be reasonable. Significantly, if a vacant position exists on another shift, reassignment to that position may be considered as a potential accommodation.

9. Adjustment to Supervisory Methods

According to the EEOC Guidelines, in some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual. Supervisors may provide or arrange additional training or modified training materials.

10. Modified Workplace Policies

It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship. However, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action

because of a disability. Therefore, the employer may apply the policy to the employee if his/her need for modification of that policy is unrelated to his/her disability, and an employer may continue to apply the policy to all other employees.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship. Employers also may not refuse to modify a workplace policy for an employee with a disability if it does so for a nondisabled employee. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a mental disability.

Some workplace conduct policies need not be modified as an accommodation. For example, if an employer has a policy against threats of violence or violence in the workplace, the employer may enforce that policy against an employee with a disability—even if the disability caused the violation of the policy.

D. Summary of Accommodation Process

1. Supervisors should recognize possible need for accommodation and alert human resources.

   - Requests for accommodation may alert you to the need for accommodation.

   - Indications that the employee has difficulty performing his/her job due to mental condition may alert you to the need for accommodation.

2. Human resources will typically request medical information regarding whether the person has a disability and what that person's job-related limitations are, unless the employee has provided such information already.

3. Human resources will evaluate whether the employee has a disability under the ADA and/or the WLAD.

4. Human resources will communicate with the employee regarding whether the employee is disabled and whether the accommodation process will proceed.

   - If the employee is not disabled, human resources and the employee's supervisor should consider whether the employer should provide an "accommodation" anyway, such as where it is easy and inexpensive to provide and will not have repercussions other employees.

   - If the employee is disabled, human resources, the employee's supervisor, and the employee should identify potential reasonable accommodations.

5. Human resources and the employee's supervisor should evaluate the potential accommodations.

   - Attempt to accommodate employee in current job first.

   - If it is not possible to accommodate the employee in his/her current job, investigate accommodating with an offer of a different position.

   - If that is not possible, consider a leave of absence under the ADA, state law, the FMLA (if applicable), and/or the employer's leave policies.

   - Also evaluate whether the accommodation would be an undue hardship to the employer. Consult with legal counsel before denying an accommodation on this basis.

   - Evaluate whether the accommodation would result in a direct threat to the safety of others. Consult with legal counsel before denying an accommodation on this basis.

6. Communicate with the employee.

   - Make a written offer of accommodation.

   - Consult with legal counsel if you believe accommodation is not possible. Advise the employee that an accommodation that allows the employee to continue working is not possible. Offer leave if required (e.g., under the FMLA) or otherwise appropriate.

7. If the initial accommodation is not working, you should engage in the interactive process with the employee again to find an alternate effective accommodation.

8. Document all steps.

    - Keep confidential medical information in a confidential medical file that is separate from the employee's personnel file.

9. When in doubt, consult legal counsel.