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Mental Illness – USA

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UNITED STATES OF AMERICA

What laws protect someone with a psychiatric disability?

(This information has been provided to us by Kim MacDonald-Wilson, M.S., Research Associate at the Center for Psychiatric Rehabilitation, Boston University)

Several different laws apply to people with disabilities and require that employers and educators provide reasonable accommodations. The website for Reasonable Accommodation Information for employers and educators, can be reached at: www.bu.edu/sarpsych/reasaccom.html and the website for consumers, called Handling Your Mental Illness at Work and School can be reached at: www.bu.edu/sarpsych/jobschool/ . All employers with 15 or more employees, including for-profit and non-profit businesses, state and local governments, religious entities and the United States Congress, must comply with the ADA.

Federal agencies of the Executive branch, Federal government contractors and those who receive Federal financial assistance must comply with the Rehabilitation Act of 1973.

Although not specifically requiring accommodations, the Family Medical Leave Act provides for 12 weeks of unpaid employee leave in the event of illness, which may be used by you as an accommodation.

Click on the following for summaries of basic information about these laws. For detailed information on each of these laws, follow the links to the resources in each section.

- The Americans with Disabilities Act (ADA)
- Definition of ADA Terms
- Summary of the new EEOC Enforcement Guidance on the ADA and People with Psychiatric Disability
- Article: The EEOC and the ADA's Reasonable Accommodations Mandate
- The Rehabilitation Act of 1973 - Sections 501, 503 and 504
- The Family and Medical Leave Act (FMLA)

The Americans with Disabilities Act (ADA)

What is the ADA?

The Americans with Disabilities Act (ADA) (P.L. 101-336) is the most comprehensive civil rights legislation adopted to prohibit discrimination against people with disabilities. Public and private businesses, state and local government agencies, private entities offering public accommodations and services, transportation and utilities are required to comply with the law. The

ADA was signed into law by President George Bush on July 26, 1990, extending civil rights protections to individuals with physical or mental disabilities in the following areas:

- Employment (Title I)
- Public transportation and state and local government services (Title II)
- Public accommodations (Title III)
- Telecommunications (Title IV
- Miscellaneous (Title V)

Title I - Employment

Title I of the Americans with Disabilities Act requires employers of 15 or more employees to provide an equal opportunity to qualified individuals. It prohibits discrimination in various aspects of employment. Title I restricts employers from asking applicants about health conditions before a job offer. The actual law reads

> *No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*

ADA, Public Law 101-336, Section 102 (a)

Title I of the ADA further discusses discrimination and requires employers to make reasonable accommodations:

> *... the term " " includes making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose undue hardship on the operation of the business.*

ADA, Public Law 101-336, Section 102 (b)(5)(A)

Employers are obligated to provide accommodations to the known physical or mental limitations of applicants or employees that are due to the disability. This means that in order to receive accommodations you must tell the employer about the disability and how it limits your functioning.

In addition, employers are not required to provide accommodations to employees who are not qualified, that is, unable to perform the *essential functions* of the job with or without reasonable accommodations. What this means is that employers are not obligated to hire you or keep you if you cannot perform the skills needed to do the main parts of the job.

Title II - State and Local Government Activities

Title II prohibits discrimination by state and local government agencies. This Title covers all public agencies regardless of whether they receive federal assistance. This Title guarantees access to all programs, services and activities provided by a public agency, including public education, employment, recreation, health care, social services, courts, voting and town meetings. State and local government funded colleges and universities and other post-secondary educational programs must not discriminate under Title II.

Architectural standards must be followed for new construction. Alteration of existing buildings or relocation of services are required, as well as reasonable modifications to policies and procedures to provide access to programs and services, except as those that would result in undue financial and administrative burdens. This Title also covers public transportation systems which are required to be made accessible to all people with disabilities.

Title III - Public Accommodations

Title III prohibits discrimination by private entities and nonprofit service providers operating public accommodations. This includes privately operated entities that offer licenses and exams, private schools and colleges, banks, restaurants, theaters, hotels, private transportation, supermarkets, shopping malls, museums, health clubs and other recreational facilities, sports arenas, doctor, lawyer and insurance offices, and other commercial facilities. Private clubs and religious organizations are exempt.

Public accommodations must not exclude, segregate or treat people with disabilities unequally. This includes compliance with architectural standards providing physical access as well as reasonable modifications to policies, practices and procedures, effective communication with people with disabilities and other access requirements. Courses and examinations related to professional, educational or trade-related applications, licensing, certifications or credentialing must be provided in a place and manner accessible to people with disabilities, or alternative accessible arrangements must be offered.

Title IV-Telecommunications

Title IV addresses telephone and television access for people with hearing and speech disabilities. It requires telephone carriers to establish interstate and intrastate telecommunications relay services (TRS) 24 hours a day, 7 days a week. TRS enable callers with hearing and speech disabilities who use text telephones (TTYs or TDD), and callers who use voice telephones to communicate with each other through third party assistance. Title IV also requires closed captioning of Federally funded public service announcements.

Title V- Miscellaneous

This title addresses the relationship of the ADA to other laws, development of technical assistance materials, coverage of congressional agencies and prohibits state immunity from remedies. This title specifies certain mental disorders which are not covered by the ADA, including transvestism or other sexual behavior disorders, compulsive gambling, kleptomania or pyromania, or substance use disorders resulting from current illegal use of drugs.

This ADA Information was adapted from: U.S. Department of Justice (1996) A Guide to Disability Laws. U.S. Government Printing Office: 1997 417-737/64278.

For more information on the ADA, contact the ADA Disability and Business Technical Assistance Centers at (800) 949-4232, This call connects the caller with one of the 10 regional centers that serves the caller's region. These centers provide low cost materials, training and technical assistance.

For examples of case law on the ADA and people with psychiatric disabilities, go to the Bazelon Center for Mental Health Law.

Definitions of ADA Terms

The following are definitions of the legal terms used in the ADA which are underlined in the above text.

Covered entity - Currently, Title I of the ADA applies to all private employers with at least 15 employees and all public employers except the U.S. government. The ADA also covers employment agencies, labor organizations and joint labor-management committees. None of these organizations are allowed to discriminate against people with disabilities. Religious organizations are also covered although they may give preference in employment to members of their religion. The only employers not covered are Indian tribes, the U.S. government and tax exempt private membership clubs.

Disability - The ADA defines disability broadly covering people in three categories:

- people who currently have a disability,
- people who have a history of disability, and
- people who are perceived as disabled by others whether or not they actually have a disability.

A disability is impairment, either mental or physical, that "limits one or more major life activities." Major life activities include the ability to care for yourself, learn, work, walk, see, hear, speak, breathe, or maintain social relationships, among others. In the *EEOC Enforcement Guidance on the ADA and People with*

Psychiatric Disabilities, examples of the definition of psychiatric disabilities, also known as mental illnesses, are described. Go to the Summary of this Guidance on this page, or link directly to the Equal Employment Opportunity Commission (EEOC) to get a full copy of the text.

The ADA also covers past history of alcoholism and drug abuse if the person is no longer currently using illegal substances. Alcoholism is covered as a disability if a person is still abusing alcohol, although it does not prohibit an employer from taking disciplinary action for unsatisfactory performance or failure to comply with company policy.

The third category of disability covered by the ADA protects people who are believed to have a disability whether or not they actually have one. Some examples of people covered in this category include a person who may have been hospitalized for depression as a teenager' or a person receiving therapy or medication to control some condition that is not disabling.

The ADA specifies conditions that are not covered, including kleptomania, pyromania, compulsive gambling, all sexual behavior disorders and current illegal use of drugs. Homosexuality is also not covered by tile ADA unless the employer refuses to hire such a person under the assumption they will bring AIDS into the workplace.

Essential functions -The minimum required duties and abilities necessary to perform the tasks of the job. Essential functions of a job can often be determined by writing accurate job descriptions to determine which tasks are a major part of the job and which are not. Factors to consider include the percentage of time spent performing those duties, the qualifications required to do these tasks, and whether the job exists in order to have these duties performed.

Qualified individual with a disability - Any individual with a disability who has the ability, skills and education to perform the essential functions of a job either with or without reasonable accommodations.

Physical or mental limitations - Difficulties in functioning or performing tasks that are due to the disability or medical condition. For example, someone with schizophrenia may hear voices (a symptom of the medical condition) which may interfere with concentrating on a task for long periods of time.

Reasonable accommodations - Changes or adjustments in a work or school site, program, or job that makes it possible for an otherwise qualified employee or student with a disability to perform the duties or tasks required.

Undue hardship - Excessive financial burden or interference with the nature or operation of the business. Factors considered in determining undue hardship include the overall financial resources of the organization, the nature and cost of

the accommodation, and the impact of providing the accommodation on the particular site or operation of the business.

Summary of the new EEOC Enforcement Guidance on the ADA

and Psychiatric Disability

March 28, 1997 - The Equal Employment Opportunity Commission (EEOC) has released a policy guidance concerning application of the Americans with Disabilities Act to individuals with psychiatric disabilities. The comprehensive document answers some of the most common questions about psychiatric disabilities and the ADA.

The new guidance should be helpful to consumers, advocates and employers alike. It discusses how to determine whether a condition is covered under ADA, disclosure of a disability, requesting reasonable accommodations, examples of reasonable accommodations, when an employer can discipline a worker for misconduct resulting from a disability, direct threat and professional licensing.

A guidance is an addition to the EEOC compliance manual and is used by the agency's investigators in determining whether a complainant's ADA rights have been violated. Although guidance issued by the EEOC are not regulations, they can inform courts about the official position of the agency responsible for ADA enforcement in the employment area.

Several of the EEOC positions in the new guidance are especially important to consumers and advocates:

- The guidance expands the list of major life activities to include those relevant to psychiatric disability. An employee wishing to establish that he or she has a covered disability must show substantial limitation of a major life activity. The guidance includes such activities as ", thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity..." This expansion should enable people with psychiatric disabilities to get past the first hurdle under the ADA: whether the employee has a covered disability.

The EEOC reiterates its position that the corrective effects of medication should not be considered when deciding whether an impairment substantially limits a major life activity. Several courts have disagreed with this position, but the EEOC has held fin-n. This is very important to consumers taking medications that alleviate their symptoms, but does not affect their need for an accommodation.

- The agency affirms that ", 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." The

guidance mentions bipolar disorder, major depression and schizophrenia as examples of disabilities that may be episodic over the course of months or years. Accordingly, even if a disability is not currently active, an employee who needs an accommodation to continue controlling symptoms can be covered by the ADA.

The guidance again notes that an employer cannot ask a job applicant whether he or she has a disability or needs a reasonable accommodation. This is a particularly useful protection for people with disabilities that are not visible.

- The Commission clarifies that an employer requesting information from an employee seeking an accommodation may only ask for information that is necessary to verify the existence of a disability and the need for accommodation. This provision means an employee or applicant may refuse broad employer requests such as for all of a consumer's therapy notes. However, employees should be aware that the guidance allows the employer to insist that the employee see a professional of the employer's choice if the initial information given the employer is insufficient to prove that the employee has a disability and needs an accommodation.

The EEOC also takes the position that an employee can use plain English to request an accommodation and need not use the specific terms "accommodation" and "." This should make it easier for employees who are not familiar with the legal terms.

- The guidance gives several examples of potential accommodations, including modifications to work schedules or policies, physical changes to the workplace, adjusting supervisory methods, providing a job coach, and reassignment to a different position. The guidance also makes clear that medication monitoring is not a reasonable accommodation, so employees cannot be forced to take medication under the employer's directive.

Importantly, the guidance provides that an employer can only discipline an employee with a disability for misconduct related to the disability if the workplace standard is job-related to the employee's position and consistent with business necessity. If the misconduct has no relation to the person's ability to do the job in question, the employee cannot be disciplined.

The full text of the guidance is available on the EEOC's web site at www.eeoc.gov or from the Commission's publication distribution center (1-800-669-3362). Contact The Bazelon Center for Mental Health Law at www.bazelon.org/bazelon/ada.html for recent case examples of the ADA and psychiatric disability and other information.

This Summary of the EEOC Guidance on the ADA and People with Psychiatric Disabilities was prepared by The Bazelon Center for Mental Health Law.

http://www.bazelon.org/bazelon/eeocguid.html

Reasonable Accommodations: An On-line Resource for Employers and Educators

The EEOC and the ADA's Reasonable Accommodation Mandate

By Mary Giliberti, JD., Staff Attorney, Bazelon Center for Mental Health Law, Washington, DC

Although the Americans with Disabilities Act (ADA) sets forth a specific requirement for workplace accommodations, every statute is subject to interpretation. Such interpretation can come from two sources: the agency charged with enforcing the Act and the courts.

At this early stage of the ADA's development, there does not appear to be a clear trend in court decisions, which tend to be conflicting and fact-specific. On the other hand, the Equal Employment Opportunity Commission (EEOC), the enforcing agency for the employment provisions of the ADA, has brought several cases and has issued a new guidance which should be very useful in clarifying the ADA's accommodation provisions with respect to workers with psychiatric disabilities.

The EEOC's litigation choices have recognized that individuals with psychiatric disabilities have a fight to reasonable accommodations. The agency has prevailed and obtained consent decrees with monetary damage awards for the employees in two important cases.

First, in EEOC v. Bentley Tools, the agency contended that the company failed to accommodate the employee's anxiety and depression by denying her request for a 90-day medical leave of absence. A second case, EEOC v. Union Carbide, was brought when an employee with bipolar disorder was denied the accommodation of non-rotating shifts, which he needed because of the effects of the medication. A third case, however, on behalf of an employee with depression and bulimia, was unsuccessful. In EEOC v. Amego, the appellate court ruled that the employer did not have to accommodate an employee who attempted suicide by overdosing on medication. Her job entailed administering medication. She sought the accommodation of reassignment to a behavior therapist which would have been necessary to ensure safety for clients who may need medication. This was considered an undue burden for a small non-profit. Each of these cases involved an accommodation that is frequently needed by employees with psychiatric disabilities.

In addition to these three cases, the agency recently released the EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities.

Approximately one third of the guidance addresses reasonable accommodation issues, from requesting an accommodation to selected types of accommodation. The guidance takes into account practical realities for employees with psychiatric disabilities who seek accommodations. It states that an individual may use "English" and need not mention the ADA or use the phrase " accommodation." The agency gives the example of an employee who asks for time off because he is depressed and stressed.

In addition, the EEOC takes the position that a family member, friend, health professional, or other representative may ask for the reasonable accommodation on behalf of an individual with a disability. The EEOC notes that its interpretation directly conflicts with a court case, Miller v. National Cas. Co., 61 F. 3d 627 (8th Cir. 1995), in which the court held that an employer was not notified of the need to accommodate an employee with bipolar disorder when her sister phoned the employer to say that the employee could not come to work because she was " falling apart" and may need hospitalization. Unlike the court, the agency recognized that the employee who is in crisis may not be able to ask for the accommodation in a timely manner due to her disability: accordingly, an employer should consider a request from a third party as a starting point for discussions about the employee's disability and possible accommodations.

Importantly, the EEOC limits what information an employer can seek in response to a request for accommodation. It notes that an employer is entitled to "" documentation that a person has a disability and that the functional limitations necessitate the accommodation requested. The employer cannot, however, ask for all records and therapy notes. This is very helpful to employees who would not ask for needed accommodations because they feared a wholesale invasion of their privacy.

Finally, the guidance contains many examples of reasonable accommodations that are particularly useful to employees with psychiatric disabilities. Despite some negative caselaw, the guidance makes clear that reassignment to a vacant position and adjustment of supervisory methods are forms of reasonable accommodation.

The agency also states that an employer may be required to provide a temporary job coach to assist in training, as long as it is not an undue hardship. Also, an employer "be required to allow ajob coach paid by a public or private social service agency to accompany the employee to the job site as a reasonable accommodation." (Guidance, pp. 27).

In 1990, Congress mandated an end to discrimination against people with mental and physical impairments. Thus far, the vast majority of enforcement and compliance efforts have focused on physical disabilities. By issuing this guidance and engaging in litigation, the EEOC has formally acknowledged that psychiatric

disabilities are equally covered under the ADA and equally entitled to accommodations. This recognition is an important first step that is long overdue.

To obtain a copy of the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 3/25/97 No. 915.002 contact the Equal Employment Opportunity Commission, 1801 L. Street, N.W., Washington, D.C. 20507 or call 1/800/669-EEOC. Web address is: http://www.eeoc.gov

The Rehabilitation Act of 1973

While the Americans with Disabilities Act (ADA) is the most modern legislation, the Rehabilitation Act of 1973 is very explicit with respect to the reasonable accommodations which may be provided. For instance, several of its provisions have been utilized as legal mechanisms for achieving effective supported education. (Ref: Jeanne M. Kincaid, esq.: Reasonable Accommodations: An on-line resource for employers and educators. In *Community Support News*, Fall, 1994, 10(2).

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) went into effect on August 5, 1993. FMLA provides employees with up to 12 weeks of unpaid leave within a 12-month period during which their jobs are protected. Job restoration is guaranteed unless the employee is unable to perform the essential functions of the job.

Who is covered by FMLA?

To be eligible, an employee must have been employed a minimum of 12 months (not necessarily consecutive). During the 12 months preceding the leave, the employee must have worked at least 1,250 hours. Leave due to the serious health condition of a spouse, child, parent or of oneself is clearly defined in the law, primarily an injury, impairment or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider. These conditions also include mental illnesses resulting from stress; substance abuse is covered only if the leave is to seek treatment from a health care provider.

Source for material on FMLA: Washington Business Group on Health, ADA Information Brief, Vol. 1, No. l, The Americans with Disabilities Act and Other Employment Laws: Implications for Employees with Psychiatric Disabilities.

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