



C R O W E
D U N L E V Y
ATTORNEYS AND
COUNSELORS AT LAW

**Declutter Your Mind:
Tips for Managing Leave
and Accommodation Issues
around Employee
Mental Health Issues**


Presented by: Michael W. Bowling



Michael W. Bowling



- Director in the firm's Oklahoma City office
- Labor & Employment Practice Group member
- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Michael W. Bowling, or another licensed attorney.



Agenda



Mental Health Disability Interactive Dialogue Reasonable Accommodation Scenarios



Is My Business Even Covered?

ADA/OADA

- Yes.
 - Americans with Disabilities Act (ADA) generally applies to employers with 15 or more employees.
 - Oklahoma Anti-Discrimination Act (OADA) applies to employers with at least one employee.



FMLA

- Perhaps.
 - Family Medical Leave Act (FMLA) applies to employers with at least 50 employees and where employee seeking leave works within 75-mile radius of at least 49 other employees.



Mental Health
Disability

Mental Disabilities

- Any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness and specific learning disabilities
- That substantially limits a major life activity



Substantially Limited Standard

- An impairment need not prevent or severely or significantly limit a major life activity to be considered “substantially limiting”
- Requires an individualized assessment
- An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be “disabled”
- Mitigating measures such as psychotherapy, behavioral therapy and medications cannot be considered in determining whether someone with a mental impairment is “substantially limited” in regard to a major life activity



Major Life Activities

- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Major bodily functions
- Sitting
- Reaching
- Interacting with others



And Then There's the FMLA

- Serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider
- Broader definition than disability under the ADA/OADA



**FAMILY AND
MEDICAL
LEAVE ACT
(FMLA)**



Mental Impairments = Broad Category

- Almost 300 mental disorders contained in Diagnostic and Statistical Manual of Mental Disorders (DSM-5)
- Assume mental impairment could be covered by ADA/OADA if:
 - It can be diagnosed; and,
 - It has some adverse impact on the person's life or ability to do their job
- Assume that a mental impairment could be covered by FMLA if:
 - It requires a doctor's care; and,
 - It requires absence from work



But . . . Don't Make Assumptions

- ADA/OADA also protect non-disabled individuals from being "regarded as" disabled
- Don't play armchair therapist / psychologist / psychiatrist (even if you are one)
- Don't conflate behavioral issues with mental health issues
- No stereotyping (e.g., combat veterans and PTSD)
- Absent obvious accommodation for obvious disability based upon clear accommodation request, base all decisions (including accommodation decision) on dialogue and objective medical evidence





Beginning the Interactive Process

- **Immediately** after:
 - An employee discloses a mental impairment and requests an accommodation
 - You come to know, or are given a reason to know, that the employee is disabled and needs an accommodation (even if the employee does not request an accommodation)
 - **You have a reasonable belief, based on objective evidence, that an employee's inability to perform an essential job function is due to a mental condition**



Beginning the Interactive Process

- No magic words are required from the employee. This can be extra difficult in the mental impairment area:
 - "I need time off because I am depressed."
(Probably on notice)
 - "I need time off because I am stressed."
(Maybe on notice)
 - "I need time off to decompress after that big project."
(Probably not on notice)
 - "I need time off. This job is driving me crazy."
(Probably not on notice)



Beginning the Interactive Process

- When in doubt – open a dialogue
 - Asking an employee if s/he needs an accommodation does not, by itself, support a claim for "regarded as"
 - However, unless a disability is obvious, it is best to focus on work conduct/performance rather than any perceived disability



Is This a Request?

- "I need to leave and need to leave right now" made by employee whom employer knew to have bipolar disorder and who was in the middle of an anxiety attack (which employer did not know)
- Telling supervisor that employee needed to leave, was stressed and could not perform his duties in a proper and safe manner and that he was under a doctor's care **and** that it was on file



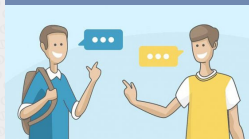
Interactive Process Requires Dialogue

- BOTH employer and employee need to participate in interactive process
- Need to determine what are employee's limitations from:
 - Employee
 - Healthcare provider
- Need healthcare provider to understand essential job functions so s/he can provide relevant information



Interactive Process Requires Dialogue

- Questions to ask:
 - What are the employee's limitations?
 - How do those limitations impact the employee's ability to do his or her job?
 - Are there specific parts of the job that the employee cannot perform (either at all or well) because of his or her limitation?
 - Does the employee have any suggestions as to what could be done to help with those items?



Interactive Process Requires Dialogue

- After gathering information from healthcare provider and employee, HR may need to brainstorm and be creative to find a reasonable accommodation
- If employee won't accept proposed accommodation, employer cannot force the employee to accept it
- Employer not required to provide employee's requested accommodation **if** employer suggests reasonable alternative
- If the employee cannot perform the job and will not accept a reasonable accommodation, employee may not be "qualified"



Documentation

- Documentation of disability must be **sufficient** but also **reasonable**
 - **Sufficient:** Documentation establishes the existence of an impairment and the degree to which the impairment limits major life activities.
 - **Reasonable:** Employer is entitled to no more information than is necessary to determine the employee has a disability and needs accommodation.
- Also important to document interactive process:
 - Conversations with the employee
 - Suggestions made by the employer and the employee
 - Efforts to implement agreed-upon accommodations
 - Result of the accommodations



Confidentiality During the Interactive Process


- Medical information should be kept separate from the employee's personnel file
- Managers and supervisors should only be told if necessary to provide reasonable accommodations or meet work restrictions
- Employer should not tell coworkers employee is receiving "reasonable accommodation," even if they ask; Equal Employment Opportunity Commission (EEOC) takes position that constitutes disclosure that individual has disability






Example Reasonable Accommodations

- Leave
- Modified break schedule
- Telecommuting
- Modification of policies –
 - Beverages and/or food permitted at workstations, if necessary, to mitigate side effects of medications
 - On-site job coaches
- Reduction and/or removal of distractions in the work area



Example Reasonable Accommodations

- Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions
- Private offices or private space enclosures
- Office/work space location away from noisy machinery
- Reduction of workplace noise that can be adjusted (such as telephone volume)
- Increased natural lighting or full spectrum lighting
- Music (with headset) to block out distractions
- White noise or environmental sound machines



Example Reasonable Accommodations

- Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations
- Software that minimizes computerized distractions such as pop-up screens
- Modification of job duties
- Increasing job duties more slowly
- Allowing extra time to learn tasks
- Allowing the person to attend training courses that are individualized



Example Reasonable Accommodations

- Exchanging minor tasks with other employees
- Allowing person to use lamp instead of fluorescent lights to eliminate flicker which may be irritating or cause reaction
- Providing the employee with tape recorder to tape instructions from supervisor, training programs and meetings if they have difficulty with memory
- Allowing employee to use headphones to protect from loud noises
- Job coach assistance in hiring, and on the job training and performance
- Support animal



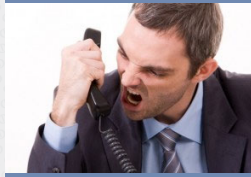
Unreasonable Accommodations

- Removing an essential function from a job description
- Monitoring an employee's use of medication
- Taking action that would result in undue hardship (i.e., significant difficulty or expense)



Unreasonable Accommodations

- Employer may continue to set and enforce reasonable behavioral expectations
 - Violence
 - Threats of violence
 - Destruction of property
 - Insubordination
 - Yelling, shoving, cursing
 - Making obscene gestures
 - Racist, sexist, or other discriminatory conduct



Unreasonable Accommodations

- Request for office to be moved away from other employees so employee would not have to interact with others found not a “reasonable accommodation.” *McKane v. UBS Financial Services, Inc.*, 363 F. App’x 679 (11th Cir. 2010)
- Request by employee with severe depression to have no contact with any coworkers or two supervisors was not reasonable. *Theilig v. United Tech. Corp.*, 415 F. App’x 331 (2d Cir. 2011)



Scenarios

Example #1

Susan, a reference librarian, frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. At the corrective action meeting intended to suspend her (after her second offense), Susan discloses a disability, states that it causes her behavior, and requests a leave of absence for treatment.

What should the employer do?



Example #2

Tim has major depression and is often late for work because of medication side-effects that make him extremely groggy in the morning. Though his scheduled hours are 9:00 a.m to 5:30 p.m., he generally arrives between 9:30 and 10:30 a.m. His job involves telephone contact with traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines Tim for tardiness, stating continued failure to arrive promptly will result in termination. Tim then explains that he has been late because of a disability and needs to work a later schedule.

What are the employer's options?

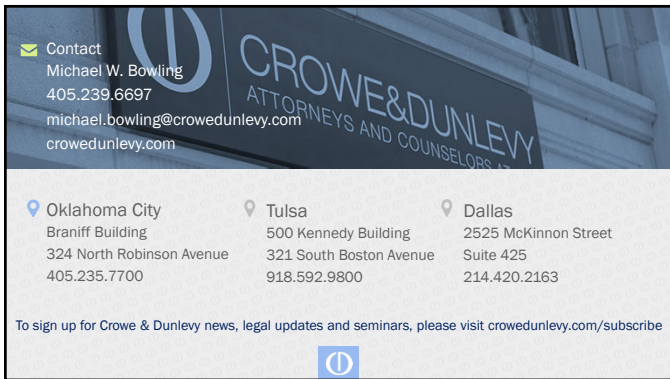


Example #3

Amber has a hostile altercation with Jack, her supervisor, and threatens Jack with physical harm. The employer immediately terminates Amber's employment, consistent with its policy of immediately terminating of anyone who makes threats. When Amber learns she has been terminated, she asks to put the termination on hold and take a month off for treatment instead. This is Amber's first request for accommodation and also the first time the employer learns about her disability.

What should the employer do?





CONTACT
Michael W. Bowling
405.239.6697
michael.bowling@crowedunlevy.com
crowedunlevy.com

Oklahoma City	Tulsa	Dallas
Braniff Building 324 North Robinson Avenue 405.235.7700	500 Kennedy Building 321 South Boston Avenue 918.592.9800	2525 McKinnon Street Suite 425 214.420.2163

To sign up for Crowe & Dunlevy news, legal updates and seminars, please visit crowedunlevy.com/subscribe

