

# From Stigma to Strategy: Navigating Mental Health and Employment Law

Presented by:

Elizabeth T. Johnston  
Ejohnston@verrill-law.com

Erik Peters  
Epeters@verrill-law.com

## Conversations About Mental Health

- 21% of U.S. adults are experiencing a mental illness
  - 2023 State of Mental Health In America, Mental Health America
- Adults aged 35-44:
  - 31% reported mental illness in 2019
  - 45% reported mental illness in 2023
  - Stress in America 2023 study conducted by The Harris Poll on behalf of the American Psychological Association

## Conversations About Mental Health

- 47.2% of U.S. adults with mental illness received treatment in 2021
- 65.4% of U.S. adults with serious mental illness received treatment in 2021
  - *Mental Health by the Numbers*, National Alliance on Mental Illness

## Conversations About Mental Health

- In 2010 worldwide, an estimated US \$2.5–8.5 trillion in lost output was attributed to mental, neurological and substance use disorders, depending on the method of assessment used.
- This is expected to nearly double by 2030 if a concerted response to the public health and economic burdens of these disorders is not mounted.
  - *Scaling-Up Treatment of Depression and Anxiety: A Global Return on Investment Analysis*, The Lancet, May 2016

## Prince Harry, Duke of Sussex

Founded the Heads Together Initiative to tackle stigma and change the conversation on mental health, in part due to challenges he faced in overcoming the death of his mother, Princess Diana



## Caeleb Dressel

Won five gold medals at the 2020 Tokyo Olympics, then pulled out halfway through the 2022 world championships and didn't swim for eight months while dealing with mental health issues



## U.S. Olympic and Paralympic Committee

Founded its mental health department in 2020. Mental health services offered by USA Gymnastics includes the presence of therapy dogs to offer athletes support at competitions



## Representative Yadira Caraveo – D-CO

Announced in August 2024 that she  
received treatment for depression



Like many Americans, I struggle with depression. As a doctor, I always urge my patients to take care of their health first and receive the support that they need. In recent months, my depression became more severe, so I decided to take my own advice and seek treatment at Walter Reed Medical Center. I am grateful for the time and attention their team has provided me with – the type of care every American deserves – while continuing the work for Colorado’s 8th district. I’m sharing this today because I believe we need to de-stigmatize mental illness – in Colorado and across our country. It is my hope that the millions of people who struggle with depression, post-traumatic stress, anxiety or any other mental health issues seek help. I will continue to fight for access to counseling and mental health services so that any American that ever needs it, has access to it.



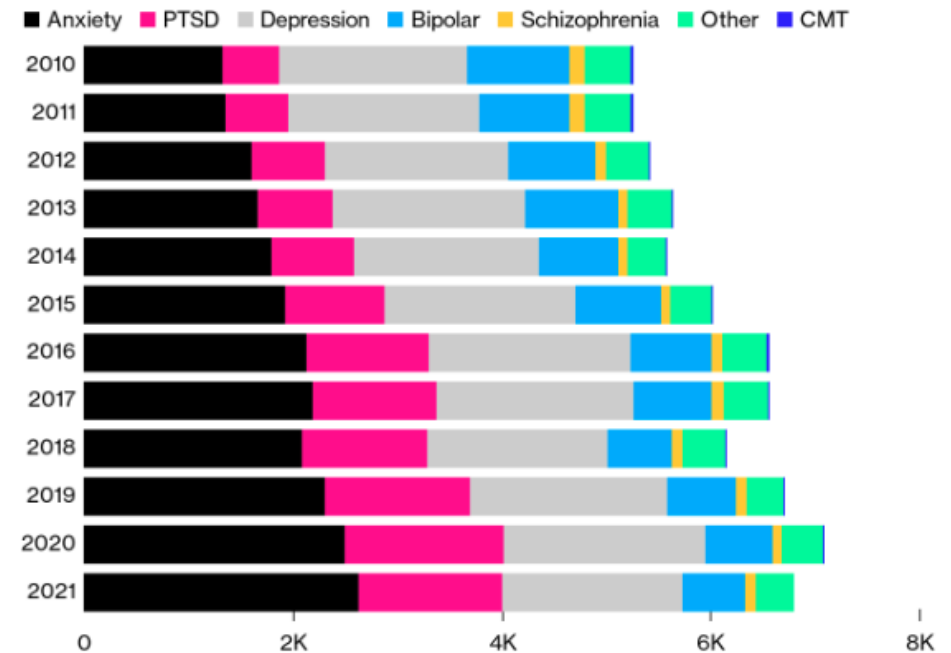
## Increase in Workplace Discrimination Claims

- 30% of ADA-related charges in 2021 were related to mental health discrimination – *up from 20% in 2010*
  - Anxiety and PTSD most prevalent

<https://news.bloomberglaw.com/daily-labor-report/anxiety-ptsd-drive-rise-in-mental-health-employment-bias-claims>)

### Mental Health Discrimination Charges

EEOC charges alleging bias against workers with anxiety, PTSD on the rise



Source: U.S. Equal Employment Opportunity Commission

Bloomberg Law

## Mental Health Discrimination - Enforcement Priority for EEOC

### EEOC Strategic Enforcement Plan Fiscal Years 2024 – 2028

- **Expands the vulnerable and underserved worker priority to include** additional categories of workers who may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections—such as **workers facing mental health related disabilities**
- The EEOC will focus on harassment, retaliation, job segregation, labor trafficking, discriminatory pay, disparate working conditions, and other policies and practices that impact particularly vulnerable workers and persons from underserved communities. **With respect to employment discrimination, the Commission views the category of vulnerable workers as including: workers with mental health related disabilities**

# Employer Responsibilities

## ADA & MHRA Protections/Prohibitions

Americans with Disabilities Act (ADA) & Maine Human Rights Act (MHRA) protect individuals with “disabilities”

### **ADA/MHRA offer:**

- Protections from harassment and discrimination against employees and applicants on the basis of disability
- Requirement that employers “reasonably accommodate” disabilities
- Protection against retaliation against disabled employee or applicant for requesting a reasonable accommodation

## What is a disability?

1. A physical or mental impairment that substantially limits one or more of the individual's major life activities
2. A record of this impairment
3. Being regarded as having an impairment that is not both transitory and minor

*In addition: Association with someone with a disability*

## Mental Impairments as Disabilities

- A mental impairment is any mental or psychological disorder, such as:
  - An intellectual disability
  - An organic brain syndrome
  - Emotional or mental illness
  - Specific learning disabilities

## Mental Impairments as Disabilities

- All impairments must substantially limit one or more major life activities to qualify as a “disability”
- To qualify for legal protection, employee must be substantially limited in performing a major life activity as compared to most people in the general population

## Mental Impairments as Disabilities

Examples of major life activities that a mental impairment may substantially limit – the abilities to:

- Concentrate
- Interact with others
- Communicate
- Eat
- Sleep
- Care for one's self
- Regulate thoughts or emotions



## Mental Impairments as Disabilities

### **\*Potential\* Examples:**

- Major depressive disorder
- PTSD
- Bipolar disorder
- Schizophrenia
- OCD
- Panic disorders
- Personality disorders
- ADHD
- Anxiety disorders
- Social phobias
- Postpartum depression
- Eating disorders

## Mental Impairments as Disabilities

- Again, “just” a diagnosis is not enough; employee must establish that mental impairment substantially limits a major life activity
  - *Tinsley v. Caterpillar Fin. Servs., Corp.*, 766 Fed. Appx. 337, 341 (6th Cir. 2019) (PTSD did not substantially limit ability to work)
  - *Weaving v. City of Hillsboro*, 763 F.3d 1106, 11114 (9th Cir. 2014) (ADHD did not substantially limit ability to work or interact with others)
  - *Russell v. Phillips 66 Co.*, 184 F. Supp.3d 1258, 1270 (N.D. Okla. 2016) (depression not shown to limit ability to perform any major life activity)

## Mental Impairments as Disabilities

- Symptoms and/or recovery may not be “linear”
  - Mental impairment does not need to be permanent to be substantially limiting
  - Impairment that is episodic or in remission is a disability if it substantially limits a major life activity while active
  - I.e., employee’s symptoms may come and go; what matters is how limiting they are while present
    - 42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii); (ix); *Depression, PTSD and Other Mental Health Conditions in the Workplace*, available at [eeoc.gov](http://eeoc.gov)

## Employee's Need for Reasonable Accommodation/Beginning the Interactive Process

- When employee or applicant is a **qualified individual with a disability** that requests an accommodation, parties must engage in the **interactive process** to determine whether there exists a **reasonable accommodation** for the disability that the employer can provide without experiencing an **undue hardship**
- Generally, employees inform the employer of the need for accommodation, unless the employer:
  1. Knows that the employee has a disability.
  2. Knows or has reason to know that the employee is experiencing workplace problems because of the disability.
  3. Knows or has reason to know that the disability prevents the employee from requesting a reasonable accommodation.

## Employee's Need for Reasonable Accommodation/Beginning the Interactive Process

- Not like a broken leg or a bad back – the existence of the disability and the need for accommodation may not be clear
- How might the employer become aware?
  - “[E]mployers can become aware of an employee’s condition indirectly, such as through observation of the employee’s behavior.” *Boadi v. Center for Human Dev., Inc.*, 239 F. Supp.3d 333, 351 (D. Mass. 2017) (internal citation omitted).
  - Relevant information could include, among other things, a diagnosis, a treatment plan, apparent severe symptoms, and physician-imposed work restrictions. See *Yarberry v. Gregg Appliances, Inc.*, 625 Fed. Appx. 729, 737-38 (6th Cir. 2015) (emphasis supplied).
  - *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 934 (7th Cir. 1995) (“it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability”).

## Employee's Need for Reasonable Accommodation/Beginning the Interactive Process

- Has employee provided employer with information sufficient to substantiate that they have a disability and need a reasonable accommodation?
- Is disability or need for accommodation obvious?
- If not: the employer may request/require additional documentation to establish that 1) the individual has a disability, and 2) the disability necessitates a reasonable accommodation
  - If documentation is insufficient, employer may ultimately require an examination by a provider of employer's choice

## Qualified Individual with a Disability?

- A **qualified individual with a disability** has the skills, experience, education, and other requirements of the job the individual holds or desires and can perform the essential functions of the position with or without a reasonable accommodation.

## Determining the Job's Essential Functions

- What is job's purpose?
- Establish essential vs. non-essential functions
- Refer to job description
  - Should include intellectual, social, physical requirements
  - Remote and in-person requirements
- Note: Employers are not required to reallocate or eliminate a job's essential functions as part of reasonable accommodation process



## Interactive Process Generally

- **Determine the job's essential functions.**
- **Establish the individual's limitations.** Consult with the disabled individual to ascertain:
  - The individual's precise job-related limitations; and
  - How those limitations could potentially be overcome with a reasonable accommodation.
- **Explore potential accommodations.** Confer with the individual to be accommodated to:
  - Identify potential accommodations; and
  - Assess their effectiveness in enabling the individual to perform the essential functions of the job.
- **Select the most appropriate accommodation.** Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

## Interactive Process - Exploring Reasonable Accommodations

- **Reasonable accommodation** - Change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job or the application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities
- Both parties must participate in good faith and provide relevant information during the process
- Employer may choose between various *effective* accommodations

## Interactive Process - Exploring Reasonable Accommodations

Potential reasonable accommodations:

- Altered break/work schedules (example: scheduling them around therapy appointments)
- Physical changes to workplace or equipment (examples: room dividers, soundproofing, visual barriers between workspaces, quiet office spaces or devices that create a quiet work environment)
- Changes in supervisory methods (example: written instructions provided where normally, they are not)

## Interactive Process - Exploring Reasonable Accommodations

Additional potential reasonable accommodations:

- Specific shift assignments
- Working from home
- Changes to workplaces policies/procedures
- Allowing use of accrued paid leave or giving additional unpaid leave for treatment/recovery (may require modifying leave or attendance policies)
- Reassignment to vacant position

## Employer's Undue Hardship Defense

- Undue hardship is any action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial or disruptive.
- Factors to consider:
  - Nature and net cost of the accommodation
  - Overall financial resources of the employer
  - Number of employees
  - The number, type, and location of the employer's facilities.
  - The employer's operation
  - For accommodations provided by a specific facility:
    - The financial resources of the facility;
    - The number of employees at the facility; and
    - The effect of the accommodation on expenses and resources of the facility.

## Employer's Undue Hardship Defense

- Employer bears burden of proving
- Not an undue hardship to reallocate some of employee's work duties to others
- Is an undue hardship if proposed reasonable accommodation reallocates disabled employee's duties in a way that makes other employees work longer and harder

## No Retaliation

- **Employers may not retaliate against an individual for requesting a reasonable accommodation**
- What is retaliation? Examples:
  - Adverse employment action taken because of the accommodation request
  - Continuing to ask for more information or another examination if the individual has already provided sufficient documentation supporting request for accommodation

# **Employer Challenges & Strategies**



## Common Issues/Challenges

- Disciplining employees with mental disabilities
- Can employee perform job's essential functions, notwithstanding that their behavior may be eccentric/unusual?
- Stigma/stereotypes associated with mental disabilities

## Common Issues/Challenges

- Does employee's behavior pose a direct threat to safety of themselves or other employees?
- Is there a threat of workplace violence or other misconduct?

## Best Practices

- Ensure appropriate policies are in place:
  - Prohibitions on discrimination and harassment
  - Reasonable accommodation request procedure
  - Anti-retaliation
  - Workplace violence
- Educate employees and managers/supervisors on policies and protections
- For anyone handling reports or requests for accommodation, provide training on the request process and the duty to engage in the interactive process

## Best Practices

- Document steps the interactive process
  - Log attempts to accommodate and employee responses
  - Memorialize conversations (follow-up emails, dated memos to file)
- Implement confidentiality procedures for information regarding employee disabilities
  - Medical records should be kept separate from personnel file with limited access

## Best Practices

- Cultivate a supportive environment
  - Open the dialogue to reduce stigma
  - Consider and respond to employee needs
- Provide resources to employees to assist with mental health issues/concerns
  - Employee Assistance Programs
  - Access to information about counseling services
  - Flexibility for employees to seek mental health services

# QUESTIONS?