

Minding Your Business: Managing Mental Health in the Workplace

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On April 3, 2018, Cat Greenleaf, creator and host of NBC's popular talk show "Talk Stoop," filed a lawsuit against her employer and supervisor for breach of contract and disability discrimination after she was fired following the death of a close friend. According to Greenleaf, she suffered from depression and obsessive-compulsive disorder, which she spoke openly about with guests on her talk show. She also invited guests who had publicly admitted to having mental health issues to speak about their battles on her show.

After the death of her close friend, Greenleaf relapsed into a severe depression. She sought medical treatment and continued to successfully tape episodes of her hit show. Greenleaf openly shared her relapse with her producers and supervisor. Specifically, Greenleaf texted one of her producers stating "[I'm] in the throes of deep grieving [and] going to see a grief counselor tomorrow . . . I've been crying and throwing up a lot, which is why I think it's time for some pro help here," including that she had already made "an appointment with an MD. . ." Greenleaf claims that within days of discussing her relapse with her employer, her supervisor telephoned her at home and fired her on the spot. Greenleaf argues that her employer's reasons for her termination are a pretext for discrimination due to her mental illness.

This pending lawsuit along with the media coverage surrounding the recent suicides of designer Kate Spade and chef Anthony Bourdain have stirred up considerable dialogue regarding mental illness. Because mental illness can be difficult to diagnose and also seriously impair an employee's ability to function, it can create a legal quagmire of issues for employers. Companies need to be equipped to successfully navigate the multitude of issues presented by actual or perceived mental disability in the workplace to successfully manage their employees, create an inclusive work environment, and avoid potential liability from lawsuits similar to the one filed by Cat Greenleaf.

Mental Health Conditions Are Covered By the ADA

The Americans with Disabilities Act ("ADA") provides certain protections to individuals with a "physical or mental impairment" that "substantially limits" one or more major life activities. As with physical impairments, a mental health condition does not have to be permanent or severe to be protected under the ADA. However, if the condition makes an employee's work-related tasks more difficult, uncomfortable, or time-consuming to perform, it may be considered a "disability" under the ADA. If symptoms come and go, as is the case with certain mental illnesses, the focus will be on how debilitating the symptoms are when present. An employer must be judicious and deliberate in the actions it takes at every stage of the employment process, from hiring to firing, to ensure it does not run afoul of the ADA and other Equal Employment Opportunity ("EEO") laws.

Hiring – Ensure Employment Screening Practices Do Not Constitute a Medical Exam

Although personality and psychological tests are being utilized more frequently by companies to screen large applicant pools, employers who utilize this type of testing should be certain that it would not be deemed a source of potential discrimination. First, employers are not permitted to conduct any test that would be considered a "medical examination" until after a conditional offer of employment is extended to an applicant but prior to when that individual starts work. Under the ADA, a medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health. A test that measures if an individual has anxiety, depression, or any other type of mental illness would likely constitute a medical exam. Even if the exam is given at the appropriate time of the hiring process, it must be administered to all individuals entering the same job category, be job-related and be consistent with business necessity. If an employer subsequently revokes the offer after conducting the medical examination, the employer has the burden of proving that the revocation was job-related and consistent with business necessity.

Even if the personality or psychological test is deemed to be neutral on its face (seemingly impacting all applicants or employees equally), it may violate EEO laws if it has a discriminatory impact on a protected class of individuals. If the test disproportionately impacts one class of persons, the burden is once again on the employer to show that it is job-related and consistent with business necessity. As a result, employers need to be careful not to overuse such tests and should avoid testing when it does not relate to an employee's job function.

What to Do when An Employee Discloses a Mental Health Condition

Employers must walk a precarious tightrope when it comes to inquiring about an applicant or employee's mental health condition. On the one hand, an individual has a right to privacy regarding his or her mental health. However, an employer is responsible for ensuring that an employee is able to successfully and safely perform his or her role. Generally, the only circumstances in which an employer can inquire about a mental disability are the following: 1) if the individual requests a reasonable accommodation, 2) after a conditional job offer is extended but before employment begins (if the other criteria discussed above is met), 3) if the employer is engaging in affirmative action for people with disabilities, and 4) if objective evidence exists that an employee may be unable to do his or her job or poses a safety risk to self or others because of the apparent condition.

If an employee's performance or behavior in the workplace becomes an issue, the employer should privately meet with that individual, layout the performance issues, and give him or her an opportunity to share information. If the employee does not reveal a mental health condition, employers should follow their normal performance management procedures. Employers are cautioned about referring an employee to an Employment Assistance Program ("EAP") prior to having objective information regarding that person's disability. Several courts have held that employers who referred employees to EAPs based upon behavioral issues have wrongfully perceived that employee as having a disability and violated the ADA.

If the employee shares that he or she is struggling with a mental illness, such as depression, the employer should seek medical confirmation and engage in an interactive process to explore reasonable accommodations.

Reasonable Accommodation: Being Creative and Nimble in the Interactive Process

If a reasonable accommodation would help an employee with a mental disability do his or her job, the employer must provide one unless the accommodation involves significant difficulty or expense. If there are multiple effective accommodations, the employer may choose which one to provide. The Equal Employment Opportunity Commission ("EEOC") has provided the following examples as possible accommodations for individuals with a mental health condition: altered break and work schedules; a quiet office space; devices that create a quiet office space such as noise cancelling headphones; changes in supervisory methods such as providing written instructions instead of verbal communications or opting for one-on-one supervision instead of group meetings; specific shift assignments; working from home; and allowing for time off for medical leave. An employer should always document in writing any efforts at providing the employee with a reasonable accommodation.

Under the ADA, an employer must engage in the interactive process once an employee requests an accommodation for a disability. An employer cannot terminate an employee for requesting an accommodation and cannot pass the

expense of the accommodation on to the employee. A detailed policy to guide managers and human resources specialists through the interactive process can help ensure compliance with the law, especially when it comes to requests for accommodations for mental health conditions.

While it is impermissible to terminate an employee on account of the employee's mental illness, an employer is also not required to employ an individual who cannot perform his or her job or poses a direct threat to safety of self or others. The question of whether an employer has sufficiently engaged in the interactive process is fact-specific and varies from situation to situation. As a result, employers are advised to consult with legal counsel prior to terminating an individual with an actual or perceived disability.

Final Thoughts

Employers must consider mental health issues and the impact such conditions may have on their employees. With the increasing attention to mental health issues, it is important that employers provide work environments in which individuals with mental health conditions are able to succeed. In order to provide these types of inclusive environments, while also shielding themselves from potential disability discrimination claims, employers should continuously review their employment applications and policies as well as training procedures to be sure they comply with the law.



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