

How To Cope With ADA Stress Claims

Law360, New York (December 17, 2013, 11:24 PM ET) -- It doesn't take much these days for an employee to prove that a condition qualifies as a covered disability under the American Disabilities Act. Essentially any chronic condition which significantly limits a bodily function is going to qualify, and cognitive thinking and concentration are bodily functions. In most cases, chronic stress and anxiety disorders are covered by the ADA. What's an employer to do when an employee requests an accommodation due to chronic stress, particularly if the stress is from their work?

Psychiatric conditions are very difficult to deal with:

- They are hard — if not impossible — to verify and;
- Employers often are reluctant to meet their ADA obligations because — consciously or unconsciously — they doubt the employee's disability is real.

Blindness, deafness, bad backs, bad knees — employers can see and verify those conditions. Even hypertension and diabetes, while those conditions can't be seen, they can be verified — or at least reliably tested for by doctors.

Psychiatric disorders have none of that. While psychiatrists and psychologists will claim they can verify mental disorders, without X-rays or other physical test results, there may be doubts, particularly when the request for an accommodation comes from a poor job performer, as is often the case. Employers are understandably reluctant to make a poor job performer's job easier just because they say the job is stressful.

So how bad can it get? Take a look at the American Psychiatric Association DSM-5, the diagnostic bible for psychiatric conditions, which just came out this year. Diagnoses include unspecified intellectual disability (essentially low IQ), unspecified depressive disorder, social anxiety disorder, generalized anxiety disorder, obsessive compulsive disorder, post-traumatic stress disorder, binge-eating disorder, antisocial personality disorder and general personality disorder, just to name a few. Looking at the diagnostic criteria, it becomes clear that much of it, if not all, is based on subjective complaints. There is little to verify the diagnosis and they are so broad, they can cover a significant part of the population.

Then, think about the kind of accommodations an employee might request, particularly for a stress disorder: come in late to work to avoid the stress of the commute, leave work early to avoid the stress of the commute, work at home where there is less stress and no commute and work less hours to reduce stress. The possibilities are endless — and the possibilities for abuse are exponentially endless.

The United States District Court for South Dakota, on Sept. 26, 2013, issued a decision reflecting how bad the situation can become. *Huiner v. Arlington School District*, No. 11-4172-KES (D.S.D. Sept. 26, 2013). The court was faced with a school teacher who was performing poorly and had objected to teaching a particular class. The teacher went to a physician's assistant, who diagnosed her with anxiety and depression over her concern about being fired. The physician assistant then recommended accommodations in the form of:

- Limiting the observations of her work to one class period a week, and include a second impartial reviewer;

- Allowing phone calls during work hours to medical clinicians for support;
- Requiring the employer provide in writing how the teacher's performance can be improved;
- Allowing 10-minute breaks to go to a relaxation area;
- Allowing her to play soothing music; and
- Requiring the employer to provide coverage if she becomes overwhelmed with stress.

The court refused to grant the employer's motion for summary judgment, finding the failure to accommodate claim needed to be decided by a jury.

Of course, not all courts will reach this same result. In fact, numerous courts in numerous jurisdictions have held that it is not a reasonable accommodation to eliminate stress from the job, because stress is inherent in most jobs. But, the Huiner decision is a textbook example of the difficulties in dealing with a psychiatric claim.

What should employers do?

When faced with a psychiatric disability, particularly a stress claim, the employer often would be well advised to obtain an independent medical examination ("IME") by a doctor the employer selects. The IME serves three purposes:

- If the diagnosis is confirmed, it will give the employer confidence that the employee has a true condition and is not faking. If the diagnosis is disputed by the IME, it can be a defense, although remember ... it will ultimately be for the jury to decide which doctor to believe.
- The IME doctor can often give ideas for alternative accommodations, which allow the employee to perform his job, but are hopefully more reasonable than the accommodations the employee's psychiatrist suggested. For example, a treating doctor might allege a worker must work at home because they need to rest when they get cognitively tired. An IME might, however, propose that alternatively the worker could rest at work by putting their head down on their desk and closing their eyes for 10 minutes.
- If the employee refuses to attend the IME, which often happens because the employee has a chip on their shoulder (or — gasp — might be faking!), the refusal to attend an IME may be a complete defense to an ADA claim.

The employer can also use the IME report to challenge the treating psychiatrist's or psychologist's opinion. Candidly, some doctors might say whatever their patient wants them to say. However, when asked to justify their opinion, particularly when faced with a well-reasoned report from a credentialed psychiatrist, the treating doctor may back away from her initial opinion, or not respond at all, in which case the employer will be well justified in following the IME's opinion.

Likewise, employers need to be patient. Instead of dismissing accommodations out of hand, the employer, using human resources, needs to meet with the employee to go through the ADA interactive process; hear the employee out, usually with an in-person meeting with the

employee and then follow up in writing to document what was discussed and the employer's justifications for its actions. Hopefully, the interactive process works and the employee and employer can work out a reasonable accommodation. Sometimes, employees will doom their own request, saying they can't perform duties which are clearly essential functions of the job. While the ADA requires much from employers, at the end of the day, employees still must be able to perform the essential duties of the job.

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