

Podcast

Mental Health Accommodations in the Workplace

By Cepideh Roufougar & Joanne Braddock Lambert

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Transcript

INTRO

Accommodation requests for mental health issues are on the rise. Even though these types of disabilities might not be outwardly apparent, employers must address requests for mental health accommodations in the same way they would evaluate—and potentially accommodate—any disability as legally required.

On this episode of We get work[®], we explore how employers can effectively engage in the interactive process to ensure employees struggling with mental health concerns can remain productive members of the workforce.

Our hosts today are Cepideh Roufougar, co-leader of the California Advice and Counsel resource group, and Joanne Lambert, principals, respectively, in the San Francisco and Orlando offices of Jackson Lewis.

Cep and Joanne, the question on everyone's mind today is: What steps can employers take right now to remain ADA-compliant when addressing employees' requests for mental health accommodations, and how does that impact my business?

CONTENT

Cepideh Roufougar

Principal, San Francisco

I am Cepideh Roufougar, and I'm joined today by my colleague, Joanne Lambert. Hi, Joanne.

Joanne Lambert

Principal, Orlando

Hello, Cep.

Roufougar

Thanks for joining me today, Joanne, to talk about accommodating individuals with mental health disabilities. This is an area of the law that I know both you and I have done quite a bit of work in, and it's an area that we're both pretty passionate about.

I want to kick off today by starting with a short story about how I got into this space in the first place. For me, I started working in the mental health disability space about 20 years ago when I had a client who had an employee who was struggling with schizophrenia. We did not know that this individual had schizophrenia when he was hired about a year and a half before the employee started to experience symptoms at work. Through the interactive process, which I can't stress enough employers really should utilize, we learned about the employee's diagnosis. Unfortunately, in this particular situation, we weren't able to come up with some accommodations that would really enable this person to remain employed with the employer. But we were able to, through leave, a lot of patience and a lot of work with his representative, who was his brother, get to a place where everybody- the employer, the employee and his family- felt like the employer had done their part in at least trying to assist this person the best that we could.

It was really one of those things that highlighted for me this really human aspect of what our human resources departments do for employers. While it wasn't the outcome that everybody would have wanted, it was still a positive process because everybody felt good at the end. That is such an important part of the interactive process. When you're dealing with disability related accommodations, employers sometimes struggle with how to make sure that we get through this process with everybody still feeling good and that people were heard. It's particularly difficult in the mental health space because it's not like a physical disability where you're seeing it.

Joanne, what about you? How did you fall into this space, and what are some of the struggles that you see that employers have?

Lambert

Well, Cep, just along the way somewhere after doing this for 30+ years, scary to say it out loud, that we just started to get more and more employers calling and needing help with these kinds of accommodations. One of my children is neurodivergent. My son taught me that word, by the way, because I am simply a lawyer. I'm not a doctor, but these are new things for all of us to learn. If you do have someone in your life who has some of these issues, you might have some small insight, but a lot of people don't, especially in the workplace. So, I think that there was just an increase and a rise in situations like, we've got this employee who says they have a learning disability or this employee who has OCD or ADHD. We get that, but we still need them to do their job. Do we have to accommodate these things? So, Cep, the answer to that is I got into it because they started to increase their requests. I became more passionate about it, if you will, and more attuned to it because I have someone that I love who has some of these issues, which helps me see the other side.

It's part of our job as employment attorneys who specialize in this space to help employers get their heads around this. You said it, Cep, because these conditions are not usually visible. Some of the symptoms can be, but you can't really touch them. It is not a weightlifting restriction, not a standing and sitting issue or someone saying I can't drive to work. These are amorphous concepts for a lot of people, and it's harder for employers to really get their heads around it. Then questions come up like, is this real? Do we have to take their word for it? The answer is no. Just like any accommodation, you're entitled to some healthcare provider documentation. What do we do for accommodations? In your case, as creative as you guys tried to be, you couldn't really come up with anything that could keep that person in the job.

One of the first ones I remember was a gentleman who worked in a cubicle farm with a lot of coworkers in a big room. He had OCD, and his routine every morning was to sharpen all of his pencils and unwrap these throat lozenges that he would suck on during the day. He had to get them all unwrapped and laid out before the workday started, and it was very disruptive because it took half an hour and was very noisy. The employer was beside themselves. I was like, let's take a step back. What can we do here? It was a really easy fix. Can we let him come half an hour early, do his routine before anyone else gets there and let him leave half an hour early? It was like, yeah, no further problems. So, with that, Cep, I'm sure you've had some very interesting accommodations.

What are you seeing trending right now in the mental health space for employee accommodation requests?

Roufougar

Well, Joanne, I'm seeing a lot of requests for leave. Naturally, people are taking time off to get treatment, to help address their issues or because they need time to adjust to medication changes. That was one of the things in my original case that I was talking about. We were giving the employee a lot of leave as he was adjusting to medications to see if they would help alleviate the symptoms of his schizophrenia so that he could come back to work. I'm also seeing folks wanting differences in how they receive pieces of information, whether it's that they need a lot more detailed instructions or the manner in which instructions are provided.

Joanne, I want to go back to something you said because you said something really important there. You mentioned this idea of people not being believed or employers asking do we have to believe them? One of the areas where employers struggle in this space is because oftentimes the questions or requests for accommodations come up after someone gets a negative performance evaluation, and the person is struggling with making deadlines or following directions and instructions. They've gotten the performance management documentation. Now, for the first time, they're saying to the employer, but I have ADHD, I have anxiety or I have some other condition like PTSD or depression.

Employers really need to take a step back when these requests are coming up in that context, instead of asking initially, is this real, or is this just someone trying

to come up with an excuse for why they're performing poorly? Because we don't do that when it's a physical disability, that's not where we go to when it's a physical disability. Employers should really take that step back and say, okay, is there something that I could do differently for this person that could help them overcome the particular struggle that they've identified that is impacting their performance? That's where I always try to ask folks like, well, we obviously will adjust how we communicate with someone who's hearing impaired. Why wouldn't we make that a communication adjustment for someone who has ADHD and maybe provide more written direction instead of verbal direction all the time?

I talked a lot about accommodations that I've seen, but Joanne, I know that one of your specialty areas is dealing with service animals. I know they can be really important and helpful in the mental health space. So, would you tell us a little bit more about your experiences with service animals in the mental health space?

Lambert

Service animals are amazing. I learn, probably once a month, a new thing that an animal can be trained to help someone with. There are obvious ones like site support functions that service animals can do, which we call assistance animals since there are service animals, emotional support animals, comfort animals, therapy animals and all sorts of animals. The things that animals can be trained to help people with are really super impressive, especially in the mental health space.

This concept of emotional support animals has been ramping up. First, with service animals, with the physical assistance you see. Then, I would say probably in 2010, maybe a couple of years later, you started to see this emotional support animal concept coming up. You started seeing people fly on airplanes with their emotional support animals, and the Fair Housing Act provides for you to allow people in a pet-free housing place to have their emotional support animal. So, that started to bleed into Title I of the ADA, which is what we're talking about today- employment accommodations.

People get really confused and say, well, if it has something to do with mental health, it's an emotional support animal. No, that's not necessarily true because there are so many tasks that an animal can be trained to help a person who has a mental health disability do, which is a service animal. For example, if you have an employee who has post-traumatic stress disorder, PTSD, a dog can be trained to go in and clear the room like when you watch a cop or procedural show on television or a streaming service when they go in with their weapons drawn, look in all the closets, open all the doors and they say clear. The animal actually performs that function for this person with PTSD and comes back to the person and gives a signal that the room is clear and that it is safe for them to enter this space. It's amazing that an animal can do that.

Another thing that assistance animals can do to help people with mental health disabilities is recognize an oncoming panic attack or anxiety attack. They can divert their handler's process, help them back down, and not actually have the

attack. They can remind their handler to take medication for their mental health disability. They can soothe their anxiety by actually signals or touching that they might do. This is much more than an emotional support animal.

I know, Cep, that you like that because animals are so interesting. Are you seeing a lot of support animal requests in the workplace? Because I know that I am from this.

Roufougar

I am, and I will say that this is one of those areas where I do think that employers should really be utilizing their interactive process to figure out what the person's functional limitations are and how the animal in the workplace helps them. I know a lot of employers use standardized forms for the interactive process, and that that can sometimes be difficult and a hindrance to getting the information that you really need in the mental health space. I find that some of those standardized forms aren't really getting at the questions that we need answered when it's a mental health disability versus a physical health disability.

Joanne, what about you? Are you seeing that with the forms as well?

Lambert

Absolutely. Even when it's a physical health disability, I've never been a big fan of having a form that you don't customize. I get that we need forms, and I know employers need the forms. You need somewhere to start with, but that's what it has to be. When you're talking about engaging in the interactive process with an employee who has advised you that they have some sort of mental health issues that they need accommodations for, some of the standard questions on your form are not going to make any sense or have any correlation to finding out what's going on with them, what it is they can and cannot do without an accommodation and what accommodations might work for them. That's the number one thing.

Thing number two with forms, especially in the mental health space, is if you don't customize your interactive form to tell the healthcare provider the relevant parts of the job and the work environment as it relates to this employee, the issues they are having and the accommodations they've put out there, then the healthcare provider is not going to be able to give you good information back. If you don't provide that, it's bigger than attaching a job description. It's so much bigger, especially with a mental health condition where someone like the doctor needs to understand their work environment. Because what happens when we go to the doctor? You tell your doctor the information, they believe you and they rely on it. They don't sit there and cross-examine you to get all the other information. That's the employer's job. If you want to get good information to make a good decision, and let's face it, later on defend that decision in litigation if you end up there, it's super, super important that you're not using a cookie cutter, one size fits all form, especially when it comes to mental health.

I'll throw in here too on service animals; that's a whole different world of interactive documents and requests, completely different. I've got some

templates I put together for that, and every time somebody asks me for it, I open it up and revise it. I swear I must revise it at least once or twice a month because I think of a better way to express something, or I encounter an accommodation situation that I should add. So, I'm not a huge fan of forms.

How about you, Cep?

Roufougar

I also am not a huge fan of just sticking to the forms. I agree with you. They do have a place and are important. I like to use them as a starting point and get them tailored for each individual situation.

This brings us to how I'd like to close our discussion today. I want to share with folks a quote out of a U.S. Supreme Court decision, *U.S. Airways, INC. v. Barnett*, that I think really stresses what the whole purpose behind the Americans with Disabilities Act is and is very important in the mental health disability accommodation space. In this decision, now-retired Justice Breyer says,

“The statute referring to the ADA seeks to diminish or eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the nation's life, including the workplace. These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike. They will sometimes require affirmative conduct to promote entry of disabled people into the workforce. They do not, however, demand action beyond the realm of the reasonable.”

That opening part of it, this idea of trying to diminish or eliminate stereotypical thought processes and thoughtless actions and hostile reactions, is incredibly important when you're dealing with mental health disabilities. We're always striving to remove some of the stigma that is attached to mental health disabilities and helping to encourage employees to more openly talk about it since it will enable employers to come up with better and creative solutions to keep people productive members of the workforce. That's what I think the whole purpose of the ADA is about- what we as employers can do that's within the realm of reasonableness to help an individual with a disability become or remain a productive member of the workforce.

Lambert

Absolutely. I love that quote, and it really does encapsulate everything that we're talking about here today. With that, we'd like to thank you both on behalf of Cep and me for joining us today. Glad you could hop on, and please be sure to tune into and follow Jackson Lewis' We get work® podcast. We have all sorts of exciting new content coming up in the future for you to listen to. Thanks.

OUTRO

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