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Does the Americans with Disabilities Act accommodate depressed workers?
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Recent court rulings have extended the provisions of the Americans with Disabilities Act (ADA) to mental illness and depression. Although they are common and well understood, depressive disorders are associated with unique cognitive and behavioral characteristics that will make successful application of the ADA more complicated than accommodation of physical illness. However, the social and workplace costs of depression provide major impetus to help depressed employees overcome their disability. These workers frequently experience income losses because of absence from work and reduced earning capacity that accompanies interrupted educational opportunity and a poor work history. The burden of depression in the workplace appears to be greater than that of low-back pain, heart disease, high blood pressure, and diabetes mellitus.

The intent of the ADA is to provide for competitive employment for the disabled. It prohibits employment discrimination on the basis of disability and charges employers with the affirmative duty to make “reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability.” The provisions related to depressive disorders apply more often to workers who become depressed while employed than to those who seek employment while disabled. In this paper we concentrate on issues related to those already employed who become depressed and ask whether the ADA adequately accommodates their unique needs.

Employers And Treatment
Consider now an employee who has been diagnosed with a depressive disorder and whose symptoms include poor concentration, impaired cognitive ability, irritability, and loss of interest in work. Many employers now believe that they should encourage this worker to seek treatment and to discuss his or her medical situation with a supervisor or employee assistance professional. In doing so, however, the employer becomes obligated to meet certain requirements under the ADA. Although some issues have been resolved, interpretation of the law remains complex and may create obstacles for persons with psychiatric disability who seek its protections.

Awareness, recognition, and notification. Although there is still some uncertainty regarding an employer’s duty if the employer suspects a disability but has not been notified by the employee, to date, a depressed person who requires accommodations must request them. The ADA has not, however, provided the incentives or protections necessary for depressed workers to notify their employers.
The requirement for notification may itself be an impediment to application of the ADA because it may depend on an unreasonable expectation of skilled communication and cognitive functioning, both of which are affected by depressive disorders.

From the employee’s perspective, the ADA may not provide sufficient benefit to overcome potentially negative consequences because its protections are limited to a subset of the depressed population. To invoke the ADA, courts have required case-specific demonstration of a disability, defined as substantial limitation of a major life activity. In contrast to some physical illnesses such as diabetes, a diagnosis of depression alone is insufficient evidence of disability. At the other extreme, the ADA also is not applicable when the disability so limits the worker’s job performance that no reasonable accommodation could enable the worker to perform the job adequately. When adequate performance is impossible with accommodation, the worker is deemed “not otherwise qualified” to perform the essential functions of the job. Employees thus may feel that notification puts future possibilities of promotion or employment at risk, with little opportunity for benefit.

From the employer’s perspective, the ADA requires respect for the privacy of the depressed employee and the need to carefully consider corporate culture. For example, in Disanto v. McGraw Hill, Inc. the court ruled that a depressed person could sue the employer for hostile work environment discrimination under the ADA. As in recent sexual harassment cases, employers may be held responsible for exercising reasonable care in preventing or correcting hostile behavior and will have the burden of proving that they have done so.

If the ADA is to successfully remove barriers to employment, its application must outweigh the perceived risks of notification. Employers have successfully implemented training programs for many important corporate initiatives, such as diversity and workplace safety, and many have employee assistance programs (EAPs). Incentives and requirements for training programs on depression as it affects workers and the availability of EAPs to workers who seek accommodation may be critical in limiting employers’ liability and assuring workers that future job opportunities have not been compromised.

**Treatment.** The argument in favor of an active employer role in treating a worker’s depression is that treatment does not cost much, and speeding recovery results in improved productivity and in reduced hospitalization, absence, and turnover. Recent rulings suggest that the ADA facilitates this activist employer strategy because notification appears to allow the employer to require treatment as the first accommodation. In Roberts v. County of Fairfax, Virginia an employer granted leave and suggested counseling to a depressed employee who had discussed his personal problems with the employer. For more than a year the employee did not seek treatment, which was available through his EAP and county emergency services, in spite of the employer’s suggestions. The employee’s doctor believed that with treatment the worker’s depression would no longer affect his work performance. The court held that the employee was not a qualified individual because he had refused to accept his employer’s efforts to accommodate him. If it appears that only treatment will enable a depressed employee to perform the essential functions of the job, courts could find it reasonable for an employer to require treatment as a condition of employment.

There also is precedent to suggest that no further duty to accommodate exists when an employee is noncompliant with treatment. An employee terminated because of failure to control a controllable disability may not invoke ADA protection. In Keoghan v. Delta Airlines, Inc. an employee with bipolar disorder, whose performance, dependability, and attendance were unacceptable to an employer, was deemed not otherwise qualified because she had failed to take her medication regularly; regular medication would have controlled and stabilized her condition. This case is consis-
tent with the notion of a so-called voluntary disability.

It is unclear whether access to treatment, such as through EAPs or employer-provided health insurance, would influence whether requiring treatment is reasonable. Further, if access to treatment is considered a reasonable accommodation, then issues of mental health insurance parity may play a more pronounced role in future ADA litigation.

**Episodic, Controlled Depression**

For many persons depression is a chronic, unremitting illness, often complicated by coexisting psychiatric conditions, while for others it is characterized by periods of relapse and recurrence. Episodic, controlled depression is a chronic, unremitting illness, often complicated by coexisting psychiatric conditions, while for others it is characterized by periods of relapse and recurrence. There are periods during which symptoms have resolved—in some cases completely—but many depressed employees may continue to experience reduced functional capacity, whether from incomplete resolution of the underlying illness or from side effects of medication. In addition, many are at high risk for relapse of the current depressive episode in the short term or recurrence of depression in the longer term.

Medically, the need for continued vigilance is clear, but this need has not been consistently reflected in application of the ADA. Even though the statute and Equal Employment Opportunity Commission (EEOC) guidelines appear to include persons with a history of disability and thus should cover controlled depression, recent court rulings have not been consistent with this interpretation. In *Sutton and Hinton vs. UAL* the U.S. Supreme Court ruled that twin sisters with correctable vision were not disabled. Extending this ruling to depressive disorders, once symptoms have resolved, a person may no longer be considered disabled or eligible for protection under the ADA. Clinically, depressive disorders are much more complex than nearsightedness. Other chronic illnesses, such as diabetes, may offer a better example of how to deal with depressed workers. For example, in *Arnold v. United States Parcel Service* diabetes controlled with treatment was still considered a disability under the ADA.

Three areas of workplace functioning—absence, substandard performance, and disruptive behavior—are particularly relevant to any discussion of application of the ADA to depressed employees. Absenteeism has been a difficult issue for employers and the courts. Leave, self-paced workload, and flexible scheduling are the most frequently cited forms of accommodation, but courts have consistently held that regular and predictable attendance is an essential work function. Employees who must be absent have not been considered qualified and therefore not entitled to this form of accommodation. These issues may be particularly troublesome during periods of symptom remission when continued time off for treatment may be essential to returning or maintaining normal functioning and to preventing a relapse.

ADA protections for symptoms that result in poor work performance, whether from unresolved depression or side effects of medication, also appear limited. It is clear that employers need not tolerate substandard performance. Many of the accommodations suggested by the President’s Committee on Employment of People with Psychiatric Disabilities would result in improved productivity if provided but might be considered undue hardship by employers. Accommodations such as modification of job responsibilities, the ability to change jobs or supervisors to find a “better fit,” allowing exchange of work duties, providing written job instructions, providing high levels of structure and access to supervision, and certain physical modifications to the workplace could be expensive and considered unfair by those who do not receive such special treatment.

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**“The ADA is clear that employers must protect the privacy of disabled workers, but this may impede employers from implementing treatment.”**
Difficult interpersonal relationships may be the hardest work-related functional limitation for depressed employees to overcome. Court rulings make it clear that employers need not tolerate misconduct and that disabled employees must be able to get along with coworkers and supervisors. As symptoms resolve and employees begin to return to normal functioning, these issues may become prominent. The president’s committee has suggested several examples of reasonable accommodations, including tolerance of “different behaviors,” providing an advocate to advise and support the disabled employee, and providing mechanisms for conflict resolution, that may help employers and employees alike.

Although it is clear that employers need not tolerate substandard performance, excessive absence, and disruptive behavior, assessment of these factors and implementation of accommodation or corrective action can be complicated. The ADA is clear that employers must protect the privacy of disabled workers, but this may impede employers from implementing or suggesting accommodations or treatment. Behavioral and social norms or requirements often are not clear, and the interpretation of unacceptable behavior on the part of supervisors or coworkers may be complicated by stigma and misunderstanding. Finally, coworkers may be sensitive to special treatment of a disabled person, especially when, because of privacy requirements, they do not understand the need and requirement for such accommodation. Consistent interpretative guidance on the part of courts and the EEOC may help both employers and employees to understand their mutual obligations. Policies should take the chronic, episodic course of depression into account and recognize that improved functional capacity may lag behind the resolution of symptoms.

Costs Of Accommodation

There has been concern from the ADA’s inception that the law would impose high costs on employers without providing offsetting benefits. Employers and policymakers are already concerned with spending for mental health treatment, which has grown by 7.3 percent per year, and spending for prescription drugs for mental health, which has grown by 9.6 percent per year, over the past decade. Even though the cost of effective depression treatment has declined over the same time period, employers have been limiting access to mental health treatment in an effort to contain health care–related costs.

Rigorous estimates of the costs of accommodation are not available, but our rough calculations suggest that employers’ fears may be justified. An employer’s cost of accommodating depressive disorders may be one-time capital costs such as a special workplace setting, or ongoing costs such as those related to unsynchronized work because of altered work schedules. Suppose that half of all depressed workers must be accommodated with new schedules that result in a 5 percent reduction in each of these workers’ effective work time. Based on recent estimates of lost profit related to reductions in hours worked and the prevalence of workplace depression, we estimate that a firm’s added cost of schedule accommodation would be about 0.25 percent of its current labor costs, making the U.S. burden related to schedule accommodation alone about $13 billion annually. Assuming that the typical depressed worker is similar in other ways to the general U.S. workforce, accommodating altered work schedules may cost an employer as much as $500 per worker year, more than enough to pay for a complete course of treatment with even the most expensive antidepressants.
As it is now applied, the ADA only partially accommodates the needs of depressed workers. On the positive side, it allows employers to actively encourage necessary treatment. Unfortunately, this only helps those who are willing to come forward in what appears to be a “don’t ask, don’t tell” environment. Furthermore, by failing to recognize the clinical course of depressive disorders, current interpretations may impede full return to normal functioning and effective relapse-prevention strategies. Future legislative and regulatory policies should encourage aggressive outreach that provides needed treatment while limiting the risk of subsequent discrimination through training supervisors to recognize a depressed worker and behave appropriately, and education and awareness programs that focus on stigma and the clinical course of depression and its treatment.

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NOTES

4. R.H. Powers, “Depression in the Workplace: Economic and Legal Issues” (Unpublished dissertation, Department of Economics, Indiana University, Bloomington, Indiana, 1998). This paper contains much of the background, including case references, on the ADA. It is available on request from the authors at Health Outcomes Evaluation Group, Eli Lilly and Company, Lilly Corporate Center, Indianapolis, Indiana 46285.