

October 2018

Mental Health Conditions: Where Do Employers and Physicians Find Common Ground?

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Agenda

- Mental Health Condition Meets Performance Standards
- Trending: Requests for Emotional Support Animals
- Creating a More Inclusive Workplace Regarding Mental Health

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The Basic Data – Behavioral Health

59% reported high levels of stress, with extreme fatigue/feeling out of control

36% cite stress and personal relationship issues as their most common reason for absences

18% of Americans have an anxiety disorder (Anxiety and Depression Association of America)

9.5% of Americans experience depression (Centers for Disease Control and Prevention)

Source: ComPsych

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Mental Health Condition Affecting Performance

Betty, Assistant to the COO

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- Betty, Executive Assistant to the COO, average performer
- New boss, Phillip
- Fails to set appointments, sends Phillip to wrong meeting
- Meet with Betty:
 - Cries
 - "Making me do things I've never done before . . . Have to coordinate my boss and several members of his team"
 - At end of meeting, reports that she has long suffered from anxiety and depression
- Next day: Anxiety, can't come to work

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Betty's performance issues continue

Misunderstands Tasks; Failed to set up meeting with key stakeholders, COO

Continues to take leave

COO has had enough

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Continued Performance Issues

- Response
 - Supportive and empathetic, but not a counselor
 - Responsibility?
 - **Recognize situations** in which an employee's behavior is creating difficulties or concerns in the workplace
 - Engage in the **interactive process** to identify assistance that will help employee perform job
 - **Consistently** apply discipline

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Two-Part Conversation with Betty

- First, treat this as a conversation about *performance*:
 - Reference previous conversation: “As you will recall, we met on [DATE] and discussed our concerns about . . .”
 - Discuss what you have observed most recently
 - Express concern about how her work does not meet your expectations; What *are* your expectations?
 - Issue the discipline

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Two-Part Conversation with Betty

- Second, transition to the *interactive process*:
 - Is there anything we can do to help you improve in these areas? Invite the conversation
 - Be prepared for an emotional reaction, whether it is surprise, anger, denial or defensiveness
 - Give the employee time to talk, be empathetic when necessary, and remain focused on performance and how we can provide assistance

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Two-Part Conversation with Betty

- Keys to discussion:
 - Be open to discussing modifications to the job that will help the employee succeed
 - Gather information about accommodation requests
 - Give feedback on particular accommodation requests (if confident)
 - If you don't have answers, tell the employee you need time

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Two-Part Conversation with Betty

- *Follow-up with documentation*
 - Recap discussion regarding performance, expectations in the future
 - During our conversation, I asked how we could help you
 - You said . . .
 - We will make every reasonable effort to help you succeed
 - Here are the modifications we will provide . . . (www.askjan.org)
 - Implementation and how you will follow-up

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Think about How You Phrase Communication

What to Avoid	Instead . . .
“How's your health?”	“How can we help you?”
“You seem depressed.”	“You're not your usual self lately.”
“Snap out of it.”	“Do you want to talk about it?”
“Think positive.”	“It's always OK to ask for help.”
“I know exactly what you're going through.”	“It's hard for me to know what you are going through, but I can see it's distressing you.”

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Inconsistent Statements from Physician

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- Betty exhausts FMLA leave
- August 17 letter from physician:
 - No work for Betty at this time
 - October 1: work from home
 - November 1: anticipated return to work

To Whom It May Concern:

██████████ (DOB 10/18/70) is currently under my medical care and I am recommending that she not return to work at this time. Due to increasing severity of her symptoms, I am recommending that she return to work 10/1/18 on restricted duty of working from home, and anticipate that she will return to full duty 11/1/18 without restrictions. If any further information is needed, Wynetta will need to sign a release.

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Inconsistent Statements from Physician

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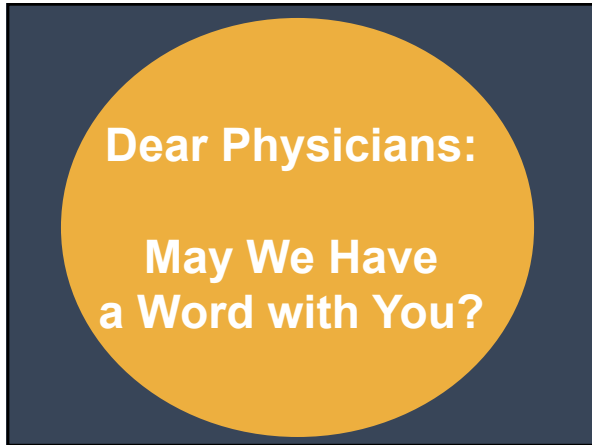
- Employer: cannot accommodate leave, must fill position
- August 17 letter from physician: Can return in 2 days!

To Whom It May Concern,

██████████ (DOB 10/18/70) is currently under my medical care and I previously recommended that she not return to work until 10/1/18 due to increasing severity of her symptoms. ██████████ requested to return to work 8/29/18 in the presence of her difficulties due to concerns about maintaining her position at ██████████

In order to return to work, I am recommending that she be allowed to work from home at least one day or half day per week in order to continue treatment and build effective coping with her symptoms. ██████████ also should be allowed to take short breaks throughout the day as needed in order to prevent worsening of symptoms throughout the work day, as long as this does not interfere with performing essential job duties. I recommend that these accommodations remain in place for at least one month to allow her the opportunity to build a healthy routine in the workplace.

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Can You Force Betty to Obtain a Medical Exam?

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Yes, as long as:

- It's job-related and consistent with business necessity, and
- She seems unable to perform the essential functions of her job, and/or she's a direct threat

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under The Americans With Disabilities Act (ADA) (June 27, 2000)

Does this exist here?

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Can You Force Betty to Obtain a Medical Exam?

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- Can you send her to your own doctor? Yes, but:
 - Documentation must be "insufficient"
 - Must explain insufficiencies, and allow opportunity to cure
 - "Should consider" contacting the employee's doctor first
- Can Betty argue that "unnecessary mental-health examinations" violate the ADA?
 - No, as long as the exam is "job related and consistent with business necessity"

Painter v. Ill. Dept. of Transportation (7th Cir. December 6, 2017)

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Interactive Process Imperative

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- Employer should still continue to engage with Betty
 - When there is a "communication breakdown," courts will ask *why* it happened
 - Communication "even more difficult in a case involving an employee with a mental disability, ... necessary accommodation is often nonobvious to the employer."

Ekstrand v. School Dist. of Somerset (7th Cir 2009)

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You Make the Call . . .

1 Legally blind employee requests service dog to assist her with travel to/from work and maneuvering around office.

You Make the Call . . .

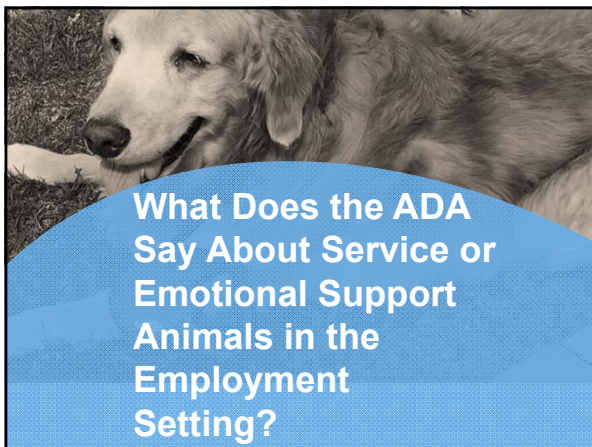
2 Employee with PTSD wants to bring emotional support dog to work:

- Reminds her to take medication
- Can sense when she is stressed or overwhelmed

You Make the Call . . .

3 Employee with diagnosed anxiety and depression requests emotional support dog:

- Acts as “barrier” between her and co-workers
- Helps keep her calm



Ummmmm . . .

Definition of Service Animal

Regulations covering service animals are found within Title II and III of the ADA

- Title II: State and Local Governments
- Title III: Business and Industry

Definition of Service Animal

A service animal is a dog that is individually trained to do work or perform tasks for a person with a disability


Emotional Support Animals

Emotional support animals not covered by ADA

Alleviate symptoms related to disability, but do not perform a “task” as required by the ADA

Emotional Support Animals

A request from an employee to bring a service animal to work should be handled like any other request for reasonable accommodation



Instead of saying NO, Could We Take a Practical Approach?

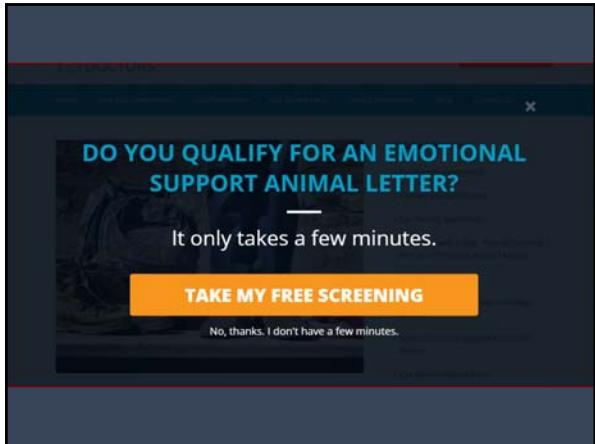
Handling Requests for Use of Emotional Support Animal

1.
 - Asking to bring an emotional support animal into the workplace as an accommodation = request for modifying a workplace policy
 - Do you have a NO animals policy?
 - What is needed and what services will animal perform?

Handling Requests for Use of Emotional Support Animal

2

- Employer may ask for medical documentation if the disability and need for accommodation are not obvious or already verified
- Physicians: What are you looking for when making this recommendation?



Handling Requests for Use of Emotional Support Animal

3

Discuss with employee:

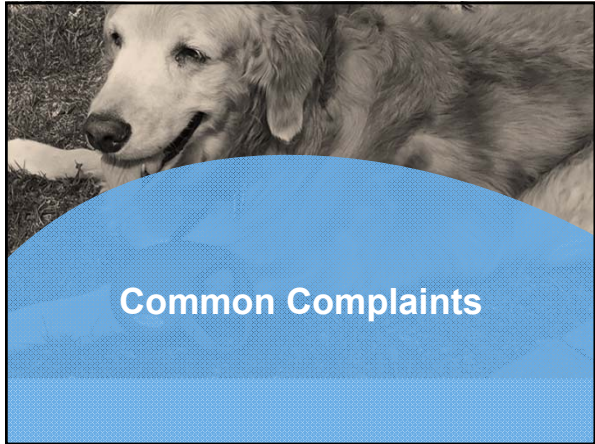
- Parameters of physician note
- Whether animal is:
 - Trained
 - Under employee's control at all times
 - Bathroom, grooming habits

Handling Requests for Use of Emotional Support Animal

4

Come to an agreement:

- Understanding that it will be a trial period
- How long trial period last?
- What factors might end the trial period early (e.g., signs of aggression, lack of control)
- How long ESA is necessary



Allergies

Eliminate in-person contact:

- Work in different areas of the building
- Establish different paths of travel
- Arrange for alternatives to in-person communication, such as e-mail, telephone, teleconferencing, and videoconferencing
- Allow flexible scheduling
- Allow one of the employees to work at home or to move to another location

Examples provided by Job Accommodation Network (www.askjan.org)

Allergies

Minimize exposure if in-person contact cannot be eliminated:

- Private/enclosed workspace, portable air purifier
- Plan between the employees to avoid using common areas (break room and restroom) at same time
- Dander care products used on the animal regularly
- Temporarily use of other accommodations
- Work area cleaned, dusted, vacuumed regularly
- Allow employee to take periodic rest breaks to go outside, take medication, or to go to the doctor

Barking?
Playing Fetch?

Use Common Sense!



How Do We Create a More Inclusive Workplace Regarding Mental Health?

A More Inclusive Workplace

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- Helping People Become Happier, Confident and More Productive (John)
- Breaking the Stigma of Mental Illness (Susan)
- Decreasing Social Isolation and Making People Feel More Included: *What are Your Examples?*
- Isn't This Just Something We Need to Do?

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FMLA Insights

Guidance & Solutions for Employers

Can an Employer Require That an Employee Submit FMLA Certification from a Specialist to Support the Need for FMLA Leave?

By Franczek Radetke, P.A.

When it comes to FMLA medical certification, my clients have many questions.

One had, in particular, to get medical information that results in a certification completed by the employer's primary care physician. This is particularly true when the employer's mental health is at issue. Employees frequently contend that their doctor needs information from a specialist who is the more knowledgeable about the employer's specific medical condition. As a result, my client asks me whether they can require that the employee obtain a specialist certification in those circumstances from a specialist.

I have been a bit reluctant to give the green light. Until now.

Facts

Take the case of Bina, a community outreach worker for the City of Miami. Bina had a track record of absence after she was diagnosed or treated about her performance. Colleagues, in fact, do not recall her absence. Bina requested a certificate from her doctor to "serve papers." In support of her leave, Bina submitted a certification from her primary care doctor, who indicated that Bina was "under the care of a specialist and hospitalized."

Opinion

Given the particular nature of the questions that led to Bina's leave of absence, the City's Director requested that Bina submit a "new" certification from her "treating physician." Even more, she told Bina that she also would be required to provide Bina her date certification from the more pertinent to confirm that she is able to perform the duties of her job at the conclusion of her leave.

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