



# **Walking the Tightrope: Recognizing, Addressing and Accommodating Mental Illnesses & Disabilities**

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# Agenda

- What is the prevalence of mental illness and substance abuse in the legal profession?
- What is a mental disability?
- How to address mental disabilities in the workplace?
- What are the employer's duties to accommodate mental disabilities?

# Prevalence of Mental Illness in the Legal Profession

- Lawyers are more likely to suffer from alcohol and substance abuse than the general population
- Lawyers experience mental illness at higher rates than the general population
- There is a known correlation between mental illness and substance abuse

# Prevalence of Mental Illness in the Legal Profession (Cont.)

- ABA/Betty Ford Foundation Report (2016)
  - 20.6% percent of attorneys surveyed had scores consistent with problematic drinking
  - 36.4% of attorneys had scores consistent with hazardous drinking or alcohol abuse
  - Drinking was more of a problem for younger attorneys than older attorneys

# Prevalence of Mental Illness in the Legal Profession (Cont.)

- ABA/Betty Ford Foundation Report (2016)
  - 28% of attorneys surveyed experienced mild or high levels of depression
  - 19% of attorneys surveyed reported experiencing anxiety
  - 23% of attorneys surveyed reported experiencing significant stress
- Lawyers experience depression at higher rates than other occupations

# The Law

- The Americans with Disabilities Act (Title 1)
- California Fair Employment and Housing Act (FEHA)
  - Prohibit discrimination, retaliation, and harassment on the basis of disability
  - Affirmatively require employers to provide reasonable accommodations, engage in a timely, good faith interactive process, and prevent discrimination/harassment/retaliation

# What is a Mental Disability?

California Government Code defines it as:

(j) “Mental disability” includes, but is not limited to, all of the following:

1. Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity
2. Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services

Govt. Code 12926 (j)

# What are Some of the Myths About Mental Disabilities?

1. People with mental illness are violent, weird, and disruptive
2. They are not curable
3. They do not exist / are not real
4. They are contagious

# Is Alcoholism a Disability?

- Alcoholism may be a FEHA disability if it limits a major life activity
- Cannot fire someone just because you know they are an alcoholic, though being an alcoholic is not an excuse for performance problems

# Case Study

## Sandy the Attorney

- Sandy is applying for a litigation position at City. Sandy has an anxiety disorder.
  - Should Sandy disclose this on the application?
  - If she does, what are the City's obligations?

# Case Study

Sandy discloses that she has a disability and needs reasonable accommodation during the application process

- What documentation, if any, can the City request from Sandy?

# Case Study

- During an interactive process meeting, Sandy indicates to City that she needs accommodation during the first stage interview, which involves answering questions from a hiring committee
- She tells City that it is hard for her to stand up and answer questions in front of a group but can communicate through handwriting and email

# Discussion Questions

- The City is concerned that this will alter the hiring process and make it unfair for the others
- Can the City require medical certification?
- Is Sandy's request to alter the first stage interview reasonable or can the City deny her request?
- What kind of reasonable accommodations, if any, can the City provide to Sandy?

# Case Study (Cont.)

## The City hires Sandy.

- Two months later, Sandy began to exhibit certain behaviors
  - She stopped talking to the City Attorney except as necessary for work
  - She became paranoid and accused her secretary of trying to sabotage her briefs without any basis
  - She began having combative discussions with the City Attorney and flying off the handle at any constructive comments about the style or content of her briefs
  - She began missing internal deadlines and forgetting to communicate with clients about important matters
  - Sandy also begins to appear disheveled and unkept

## Case Study (Cont.)

- She had not exhibited any of these behaviors during her interview process or her first two months of employment (though she had disclosed a mental disability)
- Sandy's colleagues were surprised by her behaviors
- They decided to meet with their HR representative to determine how to handle the situation after some of Sandy's colleagues complained about how she treated them

# **What are the City's Duties Given the Information About Sandy's Recent Behavior?**

# What Triggers the Interactive Process?

- Employee directly asking for an accommodation (either orally or in writing)
- Employee representative asking on the employee's behalf (such as the attorney's doctor, spouse or union rep.)
- Employee states he or she is having difficulty getting to work on time because of the medical treatment of his/her health condition
- Employee's spouse calls and tells employer that employee has had a medical emergency and needs to take time off
- Employee's doctor sends a letter with restrictions
- Employer recognizing (by observation or otherwise) an employee is having difficulty performing his/her job duties

# What Does Not Trigger the Interactive Process?

- Employee mentions disability but does not inform employer of any specific limitation (and none is readily apparent to employer)
- Employee mentions inability to perform specific task, but does not request an accommodation or mention that inability is tied to a disability
- Employee makes threats of violence against a supervisor or co-worker

# Possible Accommodations for Attorneys With Mental Illness

- Job restructuring or re-allocation of duties (e.g. being assigned less stressful work.)
- Short term leaves of absence
- Adjustment of work hours
- Modify workplace policies and procedures
- Adjust supervisory methods (e.g., written feedback as opposed to face to face)

# Tasks That May Be Essential Functions For Attorneys

- While the analysis is position specific, duties that may be essential include:
  - Legal research,
  - Writing motions and briefs,
  - Counseling clients,
  - Drafting regulations and opinion letters,
  - Presenting an argument before a state or appellate court,
  - Conducting depositions and trials

# Outcomes from the Interactive Process

- After having a discussion with HR, Sandy decides to go out on a leave of absence to seek treatment
- She requests a six-week leave of absence from work
- City provides Sandy with a form to give to her doctor

# Discussion Questions

- Can City designate Sandy's leave as FMLA?
- What if Sandy does not want the time to be designated as FMLA?
- Can City require her to use her accrued leave balances while she is on leave?

# Outcomes from the Interactive Process

- What if at the interactive process meeting, Sandy states she does not want to take a leave but wants to keep working. She states that her doctor has put her on medication that will control her symptoms
- What should the City do?
- The HR manager wants to contact Sandy's doctor to verify this -- OK?
- The HR manager is concerned about potential liability/risk if Sandy does not take her medication. Can City require proof that she is taking her medication?
- Can the City require Sandy go out on leave versus returning to work?

## Case Study (Cont.)

City allows Sandy to continue working

- The City attorney notices that she appears tired and caught her sleeping on duty
- She is also late to work four times in six weeks
  - Can the City Attorney counsel Sandy for falling asleep on duty and for being tardy to work?
  - If not, what recourse does the City have?

## Case Study (Cont.)

During a follow up interactive process meeting, Sandy presents medical documentation that her recent behavior is the result of new medication. Sandy indicates the doctor has adjusted her medication so that she takes it in the evenings instead of in the mornings to avoid drowsiness at work. Sandy's doctor has released her to return to work with the only restriction that she be able to work in a quiet area.

- Does the City have to allow Sandy to return to work?

## Case Study (Cont.)

City decides to accept Sandy's medical documentation and provides her a quiet work space. Concerned she is going to get "in trouble" again, Sandy stops taking her medication. As a result, she starts to exhibit erratic behavior that scares her co-workers. Sandy does not seem able to focus, has uncontrollable outbursts and started to yell at one of her colleagues for no apparent reason. On another occasion, Sandy started sobbing uncontrollably. Sandy's co-workers do not want to talk to her and start avoiding her. Sandy is also making mistakes on some of her briefs. Sandy tells the City Attorney that she has stopped taking her medication and is sorry for her behavior. The City Attorney alerts the HR manager.

## Case Study (Cont.)

- What should the HR manager do?
- Can the City discipline Sandy for her behavior?
- And if so, what level of discipline is appropriate?

## Case Study (Cont.)

City issues a written reprimand to Sandy. Sandy becomes upset and states that she is stressed and needs to go out on leave. City provides her with the following leave request form for her doctor to complete.

# City's Request Form

Please have your health care practitioner complete the following questions in connection with your request for a leave of absence. You may return the form to your supervisor once it is complete.

Name:

Health Care Provider's Name & Contact Info:

Diagnosis:

Requested Accommodation:

# What is Wrong With This Form?

# What Should City Consider...

- After six weeks of leave, Sandy tells City she is ready to return to work....
- Employer – Before Sandy Returns:
  - Ensure Sandy is ready to return
  - No 100% healed policy permitted
- Medical authorization
- Return to work letter?
- Fitness for duty exam?
- Any accommodation request and any conditions

## Case Study (Cont.)

- Upon her return to work, Sandy requests a new supervisor. She has filed a stress claim during her leave claiming that the City Attorney is creating a hostile work environment for her and states she cannot continue to work for her.

# Discussion Questions

- What documentation can City require from Sandy before her return to work?
- And what if the medical documentation states that Sandy can return to work but must work for a different supervisor?
- Is Sandy's request for a new supervisor reasonable?
- How should City respond?

# Adjust Supervisory Methods

People with mental health disabilities may have difficulty working effectively with supervisors

- City may want to consider:
  - Establishing written long term and short term goals
  - Maintaining open channels of communication
  - Providing regular information meetings to discuss workplace issues and productions levels

## Case Study (Cont.)

- Sandy also requests an emotional support animal (ESA) to assist her in her return to work. She wants to bring her cat to work
- City has a policy against animals in the workplace

# Discussion Questions

- Is Sandy's request reasonable?
- How should City respond given it has a policy against animals in the workplace?

# Unreasonable Accommodations

- Creating a new position
- Promoting an employee solely because he/she has a disability
- Indefinite medical leave
- Violating another employee's rights
- Reassigning the employee with a disability to a position that is neither funded, nor vacant
- Eliminating essential functions
- Would cause an undue hardship

## Case Study (Cont.)

- City allows Sandy to bring an ESA to work with her
- The ESA accompanies Sandy to work for two weeks but Sandy does not keep the cat in a carrier. The cat makes its way around the office and ends up biting one of Sandy's colleagues who tries to pet the cat
- In addition another employee complains that he is allergic and objects to having the cat at work

# Discussion Questions

- How should the City handle the request for an ESA given its policy against animals in the workplace?
- Some employees are afraid of animals or may have allergies. Now what?
- What should the City's response be if other employees who do not have disabilities begin asking to bring their own pets to work?
- What if instead of a cat, Sandy wants to bring her Rottweiler to work? Or her pet hamster?

# Performance Evaluation Time

- After a year of employment, the City Attorney must complete Sandy's performance evaluation
  - Can the City Attorney give Sandy a below standards evaluation for Sandy's tardiness and absences?
  - Can the City Attorney give Sandy a below standards rating for teamwork based on her difficulty to get along with her co-worker?
  - Can the City Attorney give Sandy a below standards rating for her sub-standard work product?

# Post-Evaluation Conduct

- After her performance evaluation, Sandy continues to exhibit performance deficiencies although she is getting along better with her co-workers. However, her briefs still contain errors and her supervisor has to constantly check and redo her work. The City Attorney is frustrated and approaches the HR Manager. He feels that if he does anything to address her performance, Sandy will file a stress claim again.
- What should the HR Manager do?

# Post-Evaluation Conduct

- Send Sandy to a fitness for duty examination/seek medical certification from Sandy's doctor
- Engage in the interactive process meeting
- If poor performance is not the result of disability, start/continue progressive discipline

## Case Study (Cont.)

- City sends Sandy to a fitness for duty which reveals that her brief errors are not the result of her disability. City gives Sandy a one day suspension. Sandy goes out on FMLA leave.

## Case Study (Cont.)

- Sandy exhausts her 12 weeks of FMLA and presents a doctor's note stating she needs another 4 weeks of leave to provide care for her father who was just diagnosed with cancer.
- The HR Manager wants to deny the request since she has exhausted her protected leave and does not have any accrued leave available. There are two other attorneys in the department who have been picking up the slack for Sandy and are not happy about the extra work. Can City deny Sandy's request?

## Case Study (Cont.)

- City grants Sandy an additional 4 weeks of leave. After that, Sandy presents another doctor's note putting her on leave for another 4 weeks for her own serious health condition. This continues for the next 6 months with Sandy presenting doctor notes taking her off work one month at a time.
- The City Attorney is frustrated and wants to separate Sandy and hire a new litigation attorney. Can City take this action?

# Status During Process

- City must file a disability retirement application if it believes Sandy to be disabled
- Cannot “separate” employee until application is acted upon
- What if the application is denied?
  - PERS: depends on reason underlying denial

# Best Practices

- Review policies and procedures
- Hire the best person regardless of disability or perceived disability but be aware of implicit bias
- Engage in the interactive process
- Consider all reasonable accommodation options

# Best Practices

- Train HR or appropriate personnel on disability accommodations
- Make sure trained individuals document the process
  - Provides evidence of a genuine interactive process and accommodations considered and implemented
  - Helps facilitate clear communication between the employer and employee

# Leave Review

- Does your City have employees on extended leaves of absence?
- Advice and strategies for accommodations
- Separation and disability retirement when necessary

# Ethical Considerations

- Rule 5.1 of the Cal. Rules of Prof. Conduct
  - (a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act.
  - (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

# Ethical Considerations (Cont.)

- (c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act if:
  - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

# Questions?

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