

Outside Counsel

Expert Analysis

Mental Stability At Work: an Assessment

Mental stability is a term that defies simple definition. That should come as no surprise, given that the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders identifies approximately 300 different psychiatric diagnoses. Nor is the presence of mental stability, or mental illness, susceptible to a single objective test. Rather, mental health professionals apply their clinical expertise and a wide variety of objective measures to assess and diagnose individuals.

Against this backdrop and the recent news of a suicidal co-pilot accused by authorities of deliberately crashing a commercial aircraft with 150 passengers and crew on board, employers and employees alike must address day-to-day questions about the mental stability of their workplace colleagues. They must consider the range of inquiries and interventions that employers lawfully may make when an employee's mental state is in question.

Finding the Proper Balance

For guidance, they should turn to the statutory and regulatory framework under the Americans with Disabilities Act (ADA) and analogous state laws, guidance published by the Equal Employment Opportunity Commission (EEOC), and case law interpreting the statutory framework. They may also turn to mental health pro-



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professionals as consultants, forensic examiners or, if they have rendered treatment, fact witnesses.

There is reason to feel some reassurance. Under certain conditions, employers are allowed to make inquiries, to require mental examinations (and pay all costs), and even to exclude workers from the workplace who are a direct threat to them-

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selves, their colleagues or the public. At the same time, employees are protected from inquiries or exams that are neither job-related nor consistent with business necessity. Information about an employee's mental health is especially sensitive, and courts and the EEOC are typically attentive to employee privacy interests. The challenge for all involved is to find the proper balance between employer and employee interests, and protection and privacy, in the context of the statutory and regulatory scheme.

Ensuring that myths, fears and stereotypes about mental illness do not influence employment decisions involving individuals who are or appear to be mentally disabled is at the heart of the ADA. An employer's decision to ask an employee questions about his or her mental condition, to require a mental examination, or to exclude the individual from the workplace should be based on objective evidence. Fear that an employee with mental illness is likely to engage in violent behavior, in the absence of any indication the employee is having difficulty performing his or her job duties or poses a risk in the workplace, is unlikely to stand up to scrutiny by the EEOC or a court.

Indeed, studies by mental health professionals show that the correlation between a diagnosis of a mental impairment and an increased risk of violent behavior, absent certain additional factors, is uncertain. When additional factors are present, e.g., substance abuse, a history of violence, paranoid delusions and hallucinations, personality disorders or personal crisis such as divorce or becoming a victim of crime, the risks increase.¹ Some of these factors may be known to employers, and employees concerned about a particular individual and those factors, rather than myths and stereotypes, should be considered as part of the risk assessment.

Exams and Inquiries

The key legal standard for employer inquiries or exams regarding mental disabilities, and their nature and severity, is embodied in 42 U.S.C. §12112(d)(4)(A).

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According to the EEOC, the “job-related” and “consistent with business necessity” standard is met when an employer has a reasonable belief, based on objective evidence, that an employee’s ability to perform essential job functions is impaired by a medical condition, or an employee will pose a direct threat due to a medical condition.

The EEOC identifies at least three potential sources of such information. An employer may observe performance problems and reasonably attribute them to a medical condition, receive reliable information from a credible third party that an employee has a medical condition, or observe symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or pose a direct threat.²

In the U.S. Court of Appeals for the Second Circuit, the leading decision regarding the “business necessity” standard is *Conroy v. New York Dep’t of Corr. Servs.*, 333 F.3d 88 (2d Cir. 2003). In *Conroy*, the Court of Appeals held that an employer cannot justify an inquiry about a disability by simply showing it is convenient or beneficial to its business. “Business necessity” means something vital to the business. That said, the court recognized that an employer’s quest to ensure a “safe and secure” workplace is a business necessity. So, too, are examinations or inquiries necessary to determine whether an employee can perform job-related duties (“fitness-for-duty” exams), so long as the employer can identify legitimate, non-discriminatory reasons to doubt the employee’s capacity to do so.

Although *Conroy* affords employers substantial latitude to seek information about an employee’s mental health issues and treatment as a business necessity, it does not throw caution to the wind. *Conroy* requires an employer to show that its request for information, or the mental exam itself, is “no broader or more intrusive than necessary.” This limitation is not as stringent, however, as the EEOC’s position that the scope of an employer’s inquiry or mental exam should not exceed the specific mental condition at issue (e.g., depression)

and its effect on the employee’s ability to perform essential job functions or to work without posing a direct threat.³

The EEOC’s position readily conflicts with the scope of inquiry that many mental health professionals find necessary to clinically evaluate an individual’s mental status and to formulate sound diagnoses. A mental health professional, well aware that mind and body are not separate, may need to ask questions about an individual’s general level of symptoms and functioning, both mental and physical, past and current. In similar fashion, most doctors considering a patient’s report of localized

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pain would inquire in due course about the patient’s overall medical history and general health.

Unduly restricting the focus of the doctor’s physical exam and inquiries may render her or his medical assessment superficial and invalid. Mental health professionals as well should not be barred from requesting information necessary to formulate their clinical evaluations and diagnoses. Given *Conroy*’s business necessity standard and the EEOC’s more restrictive position on inquiries and exams, however, employers may want to confer with knowledgeable counsel about the scope of a mental examination or inquiry before proceeding.

Treatment

It is important to distinguish between exams and inquiries, on the one hand, and mandated psychiatric treatment, on the other. Mandated treatment or medication is likely to trigger heightened scrutiny by a court or the EEOC. In *Borgus v. Smith-Kline*, No. 02-CV-6472, 2004 WL 2095534, at *5 (W.D.N.Y. Sept. 20, 2004), the district court applied *Conroy*’s business necessity

standard to an ADA disability discrimination claim arising from the employer’s mandate that an employee attend regular psychotherapy sessions with medication management, following her fitness-for-duty exam, until her providers deemed treatment unnecessary. The employee had, at various times, been diagnosed with paranoia, bipolar disorder, and possibly psychotic depression.

The employer argued that, considering the employee’s diagnoses, a treatment agreement was necessary for her to adequately do her job, just as similar agreements are allowed to deal with substance abusers. Although the court did not fault the employer for mandating a fitness-for-duty exam, it denied summary judgment, explaining that while “[e]nsuring the safety of employees is a reasonable basis for a company to make a legitimate medical inquiry of an employee,” it was “unable to find as a matter of law that the treatment agreement in the instant case was no more intrusive than necessary under the circumstances.”

Borgus and other decisions addressing mental inquiries and exams under the ADA illustrate that the business necessity standard does not lend itself to rote determinations. Inquiries deemed necessary in one circumstance may be unnecessary in another. The nature of the workplace and position at issue often play key roles in the analysis. Certain workplaces, such as the state correctional facility at issue in *Conroy*, present “special circumstances.”

Numerous courts, within and outside the Second Circuit, have allowed inquiries and exams of employees who hold safety-sensitive positions and whose mental stability is in question. In *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit affirmed summary judgment for the employer, holding that the city did not violate the ADA by requiring a police officer to take a fitness-for-duty exam after he exhibited “emotionally volatile behavior,” including swearing at a supervisor, engaging in a loud argument with a coworker, and becoming extremely angry when the incident was investigated, all within one month. The

court explained that its consideration of the exam's legitimacy was "heavily colored" by the nature of the officer's employment.

Brownfield is significant because the court rejected the plaintiff's argument that the business necessity standard requires a showing that an employee's job performance has suffered because of health problems. Noting similar holdings in the Seventh, Eighth and Eleventh Circuits, the Ninth Circuit held that "prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work."

Workplace Safety

Even when non-safety-sensitive positions are involved, courts often allow mental exams and inquiries intended to ensure that workplaces are safe and secure. In *Shannon v. Verizon*, No. 1:05-CV-0555 (LEK/DRH), 2009 WL 1514478, at *1 (N.D.N.Y. May 29, 2009), the employer required an employee to take a leave until he submitted to a mental fitness for duty examination because he told his coworker and supervisor that, if someone was bothering him, he would "go postal and that would solve the problem and [he] would laugh from [his] jail cell." The court granted summary judgment for the employer on the employee's ADA and New York Human Rights Law claims.

In *Rivera v. Smith*, No. 07 Civ. 3246(BSJ) (AJP), 2009 WL 124968, at *4 (S.D.N.Y. Jan. 20, 2009) aff'd, 375 F. App'x 117 (2d Cir. 2010), the Southern District of New York held that the employer's requirement that an employee submit to a psychiatric examination before being allowed to return to work after a coworker complained that she felt threatened and unsafe by his behavior was "for an appropriate business necessity — ensuring a safe work environment for all of its employees."

Situations involving an employee's suicidal thoughts or attempted suicide are particularly delicate. Each must be considered on an individual basis. An employee's contemporaneous suicidal thoughts or

action will typically support an employer's request for a mental examination and, in some circumstances, exclusion from the workplace pending the results of the exam. A more difficult situation arises when employees are concerned about a colleague who is known to have experienced suicidal ideation in the past, or to have attempted suicide. While every situation is different, concerns may focus on a colleague who wants to return from a medical leave of absence, or may be actively employed but exhibits troubling behavior.

The EEOC observes that in most circumstances, an individual who has attempted suicide will not pose a direct threat when she or he seeks to return to work.⁴ While the EEOC's guidance makes clear that employers and employees should not presume an individual poses a risk, it does not bar an employer's inquiry as to whether, in fact, risk is present. Indeed, the EEOC stresses that in these situations an employer must base its determination on an individualized assessment of the employee's current ability to perform his or her job functions safely.

In *Walton v. Spherion Staffing*, No. 13-6896, 2015 WL 171805, at *1 (E.D. Pa. Jan. 13, 2015), the district court in the Eastern District of Pennsylvania addressed a situation in which an employer did not engage in an individualized assessment of a formerly suicidal employee, and described the lawsuit as one that "tests the outer bounds of the Americans with Disabilities Act in the context of workplace violence." The employee had suicidal and homicidal thoughts and wrote a plea of help to his supervisor, which led the police to take him willingly to the police station. He later called his employer to report his diagnosis (depression), and ask about insurance coverage. The employer promptly terminated his employment. In response to his ADA discrimination lawsuit, the employer argued that the employee's threats disqualified him from protection under the ADA.

Denying the employer's motion to dismiss, the court explained that "[p]redictable, and in some instances understandable, fear of the mentally-ill can skew an

objective evaluation of risk." The court noted that there was no indication that the employee had a history of any violent conduct, and that his individual instinct in the moment of crisis was to seek help, and to be protective of others.

Conclusion

Objective information is the touchstone of an employer's assessment when dealing with an employee who has been or is suicidal. Employers should not be reticent to request and consider information about performance problems or symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or will pose a direct threat.

Reliable information from credible third parties, including coworkers, should be considered. Often, the opinion of a mental health professional retained to clinically assess the employee will provide valuable objective information. Employers and employees can rest assured that the statutory and regulatory scheme under the ADA affords ample opportunities for inquiries and exams that respect the dignity of employees while promoting safety in the workplace.



1. Eric B. Elbogen, PhD, Sally C. Johnson, MD, "The Intricate Link Between Violence and Mental Disorder," *JAMA Psychiatry*, Feb. 1, 2009, Vol. 66, No. 2, <http://archpsyc.jamanetwork.com/article.aspx?articleid=210191>.

2. See EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examination of Employees Under the Americans With Disabilities Act (ADA), pp. 6-7 (2005), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

3. See EEOC, Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities, Question No. 14, Examples C and D (1997), <http://www.eeoc.gov/policy/docs/psych.html>.

4. See EEOC, Enforcement Guidance: The Americans With Disabilities Act And Psychiatric Disabilities, Question No. 35 (1997), <http://www.eeoc.gov/policy/docs/psych.html>.