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### Post-Traumatic Stress Disorder

As claims become common,  
parties and courts explore  
juncture of law and psychiatry.



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**P**ost-Traumatic Stress Disorder (PTSD), originally a wartime trauma-based psychiatric condition referred to as “shell shock” and “battle fatigue,” is increasingly at issue in employment litigation. Misunderstood and misapplied, PTSD claims by employees are likely to become even more commonplace now that the U.S. Equal Employment

Opportunity Commission’s (EEOC) proposed regulations under the ADA Amendments Act of 2008 (ADAAA) state that a PTSD diagnosis “will consistently result in a finding of [an employee’s] disability.”<sup>1</sup>

Employees who believe they were subjected to workplace offenses and injustices have joined wartime veterans and survivors of natural disasters, physical assaults, or other traumatic events in claiming that PTSD has seriously disrupted their lives. Some do so in the course of requesting workplace accommodations, others in the context of discrimination and harassment lawsuits. The statistics are significant. According to an August 2009 U.S. Department of Veterans Affairs study, approximately 8-12 percent of the population in the United States will meet the criteria for

PTSD at some point in their lives.<sup>2</sup>

In employment litigation, PTSD claims often are based on allegations of unlawful workplace conduct such as sexual or racial harassment and sexual or physical assault. Mental health professionals, whether supporting or discrediting a PTSD diagnosis, play an increasingly important role in these disputes even though many have no forensic training or expertise. Further complicating matters, there is little legal authority addressing the subtleties of the psychiatric diagnosis and the evidentiary showing necessary for its application to a claim for damages in employment litigation. Nor is there much on-point authority regarding the statute of limitations in cases of recently discovered and previously latent PTSD.

PTSD claims are of potentially greater value

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to plaintiffs than garden variety emotional distress claims. Trauma is commonly defined as “[a]n emotional shock that creates substantial and lasting damage to the psychological development of the individual,” and juries respond in kind.<sup>3</sup> Courts have upheld substantial six-figure jury awards for PTSD arising from discrimination and harassment.

PTSD claims are inherently appealing to employee-litigants for yet another reason. Employees who establish that they suffer from PTSD will assert that the trauma, and only the trauma, caused their distress and damages. The trauma-based diagnosis, they will argue, rules out pre-existing conditions or alternative stressors as the cause of their damages. Claims of workplace-induced depression or generalized anxiety are, in contrast, more susceptible to an employer’s arguments regarding pre-existing disorders and concurrent stressors unrelated to workplace conduct. The stakes are high, and the challenges significant, for plaintiffs and defendants alike.

### The Essence of PTSD

The diagnostic prerequisites for PTSD apply with equal force to a battlefield veteran and an employee who claims emotional distress arising from unlawful workplace conduct. There is, in short, no double standard. Litigants and courts, however, have displayed some reluctance or difficulty in applying rigorously the requisite elements of a PTSD diagnosis, and trial court judges typically defer to the jury’s credibility determination regarding dueling experts. See, e.g., *Pasternak v. Baines*, 2008 WL 2019812, at \*6 (WDNY May 8, 2008) (six-figure jury award for PTSD-related compensatory damages unaltered by defendant’s post-trial motions even though plaintiff’s emotional distress claim was not grounded on an essential element of the diagnosis—exposure to a traumatic event involving actual or threatened death or serious injury); *Katt v. City of New York*, 151 F.Supp.2d 313, 351 (2001) (defendant’s post-trial motions denied and jury’s \$400,000 compensatory damages award to sex harassment plaintiff claiming PTSD undisturbed despite judge’s observation that had the case been tried to the court he might well have accepted the defense psychiatrist’s opinion that the plaintiff’s psychiatric problems were caused by a violent assault at the hands of her boyfriend rather than any workplace harassment; “Whatever the competing views of the mental health practitioners, it is solely for the jury to weigh and assess the credibility of dueling experts.”) *aff’d sub nom. Krohn v. New York City Police Dep’t*, 372 F.3d 83 (2004).

As with many emotional disorders, problems of proof and rebuttal often stem from the fundamentally subjective nature of PTSD and its symptoms. What is traumatic to one person may be a disturbing but transient experience to another; internal resources and coping skills differ from person to person. Some individuals may also misperceive events as threatening and

therefore find them traumatic. They may regard an incident as life-threatening even though no reasonable person would agree.

A thorough assessment by a clinician trained in the application of the objectively informed criteria for PTSD, including an in-depth interview and exploration of the individual’s psychiatric and medical history, is thus crucial to an accurate diagnosis. Although there is no single-factor objective diagnostic test, the American Psychiatric Association (APA) identifies the essential criteria for the disorder in its Diagnostic and Statistical Manual (DSM), the official set of diagnostic criteria for mental disorders in the United States. The DSM utilizes a differential diagnosis methodology to rule out possible diagnoses during a clinical evaluation, requiring practitioners to assess the probability of a variety of psychiatric conditions.

PTSD is an anxiety disorder that first was recognized by the APA in the DSM in 1980. While there are a variety of criteria identified by the APA, some in the alternative, exposure

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to a traumatic event that involves actual or threatened death or serious injury to oneself or others is a requisite element of the diagnosis. So, too, are feelings of intense fear, helplessness or horror. Persons with PTSD persistently re-experience the traumatic event in one or more of a variety of ways such as intrusive thoughts, flashbacks, or recurrent nightmares. They avoid stimuli associated with the trauma and are often numb to themselves and others. While they may be hypervigilant or have difficulty sleeping or concentrating, they also may suffer from other symptoms associated with the disorder and identified in the most recent edition of the DSM (“DSM-IV”).<sup>4</sup> PTSD does not necessarily surface shortly after an individual’s exposure to trauma. The APA recognizes a delayed onset diagnosis in which the symptoms of PTSD can take six months or even years to appear.

### PTSD in the Workplace

Employees are likely to raise workplace PTSD issues in two ways that are neither mutually exclusive nor similar. First, under the ADA and state-law equivalents such as the New York Human Rights Law (NYHRL) and California Fair Employment and Housing Act (FEHA), qualified employees with protected mental impairments may seek reasonable accommodations such as modified

work schedules to attend psychotherapy appointments, leaves of absences, or more frequent rest breaks, and employers generally are responsible for providing reasonable, effective accommodations that do not cause them undue hardship. Whether an employee’s impairment satisfies the prerequisites of a protected disability has been a frequent focus of workplace disability litigation.

The ADAAA made clear that Congress intended to relax the standard for employees seeking to establish most impairments as protected disabilities. The EEOC’s proposed regulations include PTSD within a category of impairments that almost always qualify for protection under the ADA.<sup>5</sup> According to the commission, the focus should no longer be on whether an employee with PTSD qualifies for protection, but rather on whether a reasonable accommodation is necessary. Litigation under the ADA and analogous state laws that employ similar or more lenient standards for protected disabilities (e.g., the NYHRL and FEHA), is now likely to move more quickly past the question of whether a plaintiff with PTSD suffers from a protected disability. The focus, instead, will be on at least two other fundamental issues: the presence or absence of discriminatory animus, and whether a reasonable accommodation request denied by an employer was reasonable and/or would have caused the employer undue hardship.

Aside from disability-related PTSD claims, employees are most likely to raise the disorder in the context of a lawsuit alleging discrimination and/or harassment. Courts have found a PTSD diagnosis relevant to the subjective component of a hostile environment sexual harassment claim, allegations that race harassment was severe or pervasive and altered an employee’s terms of employment from an objective standpoint, and the “extreme and outrageous conduct” elements of an intentional infliction of emotional distress claim.<sup>6</sup>

The most robust battles over evidentiary issues, expert testimony and damages, however, are likely to occur in the context of discrimination and harassment claims. Unlike ADA-related claims, which rise or fall in the context of a statutory and regulatory framework interpreted and applied through numerous decisions addressing the meaning of “disability” and “reasonable accommodation,” PTSD claims grounded on alleged harassment and discrimination are tethered to case law regarding compensatory damages in general and to rules of evidence that afford significant discretion to “gatekeeper” trial judges. While the admissibility of expert testimony regarding PTSD is governed by the multiple factors set forth in *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993), its progeny,<sup>7</sup> and Federal Rule of Evidence 702 (federal and some state courts), or *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (New York state and some state courts), evidentiary rulings are necessarily highly case- and fact-specific.

## Critical Evidentiary Issues

Trauma, not turmoil or perceived injustice, is the touchstone of a PTSD diagnosis. When a mental health professional proffers testimony and evidence about PTSD that disregard the essential diagnostic criteria in DSM-IV, or fail to employ the differential diagnosis methodology, a *Daubert* motion and/or motion in limine is in order. From the defense standpoint, it is essential to focus the trial court on the prerequisites and methodology supporting a PTSD diagnosis at an early stage in the case.

Expert psychiatric testimony must be based on reliable principles and methods that derive from sound scientific methodology. In *Collier v. Bradley Univ.*, 113 F.Supp.2d 1235, 1244-48 (C.D. Ill. 2000), the court barred plaintiff's expert, a social psychologist, from testifying that the plaintiff suffered from PTSD stemming from racial discrimination and harassment in the workplace. The expert relied upon her interview with the plaintiff, a review of documents and "library research," but did not explain how the plaintiff's symptoms matched the requisite DSM-IV elements for PTSD. Nor did she engage in a differential diagnosis.

The court noted that the critical issue was whether the expert had employed a proper methodology, which she had not. In *Garcia v. Los Banos Unified Sch. Dist.*, 2007 WL 715526, at \*9 (E.D. Cal. March 8, 2007), the court found that the reliable scientific method for a PTSD diagnosis is a differential diagnosis. The court held that the expert's testimony was reliable because, among other reasons, she arrived at the PTSD diagnosis through a dozen clinical consultations with the plaintiff and a process of differential diagnosis that considered mood disorders, chronic depression, other anxiety disorders, obsessive-compulsive disorder, and malingering.

A PTSD diagnosis that fails to objectively evaluate an employee's self-report and take into account the possibility that the data is distorted is unreliable. Consider an employee who alleges that he was subjected to discriminatory ridicule coupled with his supervisor's adverse employment action. On one occasion, he alleges, his supervisor momentarily touched his arm and told him to "watch out." Consider another employee who alleges she was subjected to incessant sexual comments and propositions by a co-worker who leered at her to the extent that she could no longer tolerate being in the same room with him. Both claim PTSD caused by their exposure to a discriminatory and harassing work environment.

The psychiatric testimony regarding each employee must address whether certain conduct at issue—momentary touching and a possible threat, in one case, and offensive comments and leering with no touching, in the other—constitutes a traumatic event that involves actual or threatened death or serious

injury. Each employee's subjective perception of and emotional reaction to the events are critical but non-exclusive elements of the diagnosis.

Psychiatric testimony that simply relies on the employee's self-report and fails to pursue a differential diagnosis for PTSD under the DSM-IV criteria effectively abrogates the diagnostic determination to the patient-litigant. That type of testimony by a clinician amounts to junk science, whether the court's focus is on the methodology or conclusions, and should be excluded under *Daubert*, Federal Rule of Evidence 703 or *Frye*, depending on the jurisdiction. See POSTTRAUMATIC STRESS DISORDER IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT 42, 73 (Robert I. Simon ed., American Psychiatric, 2nd ed. 2002) ("Georgetown Guidelines").<sup>8</sup>

## Delayed Onset Claims

PTSD might not be diagnosed for years after the triggering event. It is not uncommon for an employee-litigant to assert that because avoidance mechanisms such as amnesia are characteristic features of PTSD, he or she repressed memories of the trauma until after the statute of limitations has run. Some states have a discovery rule under common law that tolls the statute until the plaintiff subjectively knows or reasonably should have known that he has been harmed by the defendant's conduct.

Employees also may attempt to rely on the doctrine of equitable tolling. In *Tsai v. Rockefeller Univ.*, 137 F.Supp.2d 276 (SDNY 2001), the plaintiff failed to timely file her EEOC discrimination charge and argued that workplace-induced PTSD prevented her from doing so. Allowing the plaintiff's discrimination claims to survive a motion to dismiss, the court explained that tolling, guided by state law, is limited to exceptional circumstances and decided by principles of equity. The court noted that in New York the toll "for insanity" is narrowly interpreted and extends only "to those individuals who are unable to protect their legal rights because of an overall inability to function in society." *Id.* at 282 (internal quotation marks and citation omitted).

When employees claim delayed-onset PTSD, evidentiary hearings are appropriate to determine the extent, if any, to which their condition inhibited their understanding or otherwise impaired their ability to timely file a claim. Here, too, testimony by qualified mental health professionals will be crucial as will adherence to sound diagnostic methodology. The standard for equitable tolling based on mental incapacity is far from lax. In *Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 80-81 (2d Cir. 2003), an employment sex discrimination case, the court declined to extend equitable tolling on the basis of mental impairment to save the plaintiff's untimely charge with the EEOC and her civil claim,

explaining that tolling applies only where the plaintiff acted with reasonable diligence during the time period to be tolled and proves that the circumstances are truly extraordinary.

## Sound, Not Specious, Claims

PTSD claims in the workplace raise a host of significant evidentiary issues. Contrary to the belief of some attorneys, testimony by mental health professionals is neither indecipherable nor sacrosanct. As PTSD claims become even more commonplace in employment litigation, litigants and courts should navigate their way through the juncture of law and psychiatry with assiduous attention to the elements of the DSM-IV diagnosis and the integrity of the proof associated with each diagnostic component. The results, not the least of which will be the fact-finder's consideration of clinically sound rather than specious PTSD claims, will be well worth the effort.

1. 29 CFR §§1630.2(j)(5).

2. MINN. VETERANS AFFAIRS MED. CTR., THE ASSESSMENT AND TREATMENT OF INDIVIDUALS WITH HISTORY OF TRAUMATIC BRAIN INJURY AND POST-TRAUMATIC STRESS DISORDER: A SYSTEMATIC REVIEW OF THE EVIDENCE, at p. 5 (2009), <http://www.hsr.d.research.va.gov/publications/esp/TBI-PTSD-2009.pdf>.

3. WEBSTER'S II NEW COLLEGE DICTIONARY 1173 (1995 ed.).

4. See AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISION §309.81 (American Psychiatric Association, 4th ed. 2000) (1994).

5. 29 CFR §§1630.2(j)(5).

6. See *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008); *Williams v. Asplundh Tree Expert Co.*, 2006 WL 2131299, at \*10 (M.D. Fla. July 28, 2006); *Bourbeau v. City of Chicopee*, 445 F.Supp.2d 106, 118 (D. Mass. 2006) (internal quotation marks and citation omitted).

7. See *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

8. See also *Gastineau v. UMLIC VP LLC*, 2008 WL 2498102, at \*4 (S.D. Ind. June 17, 2008) (medical testimony that plaintiff suffered PTSD because of defendant's debt collection tactics inadmissible where psychiatric diagnosis was based on plaintiff's own self-report and doctor failed to follow DSM-IV and the Georgetown Guidelines; such speculation does not meet the reliability or relevance guidelines of *Daubert* or Rule 702). Accord *Donlin v. Philips Lighting N. Am. Corp.*, 564 F.3d 207, 215-17 (3d Cir. 2009), *op. vacated and superseded on reh'g*, 581 F.3d 73 (3d Cir. 2009) (plaintiff-employee improperly was allowed to testify as to damages requiring expert testimony; Third Circuit held such issues required technical or specialized knowledge, and ordered a new trial on damages; "A trial judge must rigorously examine the reliability of a layperson's opinion by ensuring that the witness possesses sufficient specialized knowledge or experience which is germane to the opinion offered").