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PROTECTING YOUR EMPLOYEES FROM HARM WHILE ACCOMMODATING MENTAL ILLNESS – ARE EMPLOYERS IN A BIND?

Presented by:

Sheree Wright
Senior Associate General Counsel
Vanderbilt University
Office of the General Counsel
2100 West End Avenue, Suite 750
Nashville, TN 37203

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MENTAL HEALTH, SAFETY, AND WORKPLACE ACCOMMODATIONS:
WORKPLACE VIOLENCE AND THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION – THE DILEMMA (WHY ARE WE HERE?)

Employer’s Dilemma:

“Employers face a dilemma when dealing with employees whom they believe to be a direct threat. If the employer acts adversely where the employee is not a threat, then the employer may be liable under discrimination law. If the employee is a direct threat, and the employer does not act, the employer may face liability to others harmed by the employee.”

Employee’s Dilemma:

By the same token, employees face a similar dilemma – should they disclose the mental illness or impairment and request accommodations, or simply hope that these accommodations will not be needed in order to avoid the stigma and stereotypes which sometimes exist?

The Answer:

There is no good answer. In fact, as shown in this paper, as well as in the articles and cases referenced herein, the best decisions are individualized and based on a careful review of all of the specific facts and circumstances. Furthermore, the answer should not be based on stereotypes and presumptions. These are not easy situations to evaluate; however, a checklist is included at the end of this paper to facilitate the analysis.

BACKGROUND – THE ISSUES FROM BOTH SIDES

Employer Concerns:

Mental health issues negatively impact an organization’s productivity and profitability. They affect “employee performance, rates of illness, absenteeism, accidents and staff turnover.”

According to the National Institute of Mental Health, “an estimated 26.7 percent of Americans ages 18 and older – about one in four adults – suffer from a diagnosable mental disorder in a given year.” Many of these individuals do not seek treatment or avoid reporting their illness to

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3 Id.
their employer, fearing the stigma that is often associated with mental illness. Indeed, studies have confirmed that employers have "strong negative perceptions of persons known or thought to have a mental illness," resulting in less interest in hiring applicants who appear mentally unstable. Employers may fear that they may be held liable for violence that occurs in the workplace through negligent hiring or retention of employees who have a mental illness.

Employee Concerns:

Mental illness or impairment should be afforded the same protection as any physical medical condition. Federal discrimination law requires employers not to discriminate against employees who have a disability and to make reasonable accommodations for qualified employees with a disability. Congress enacted the Rehabilitation Act in 1973, and then later the Americans with Disabilities Act (ADA) in 1990 (and the ADA Amendments Act in 2008, ADAAA), to ensure that disabled individuals are "not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."

Unfortunately, "people with mental disabilities fare[] significantly worse in employment discrimination lawsuits than their counterparts with non-psychiatric disabilities." Almost half of those with non-psychiatric disabilities received a settlement from the defendant or a favorable court ruling, compared to only 37% of the individuals with psychiatric disabilities. There are several possible reasons for this discrepancy. First, studies have repeatedly demonstrated that people with psychiatric disabilities are "among the most stigmatized groups in society and that they are harmed in their daily life activities by myths, stereotypes, and stigmas associated with their impairments." Second, actors involved in ADA enforcement might hold stereotypes about the mentally disabled and unconsciously act on them, producing "different and second-class treatment." Finally, legal actors have greater difficulty in assessing cases that involve mental illness and treat them differently.

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7 Id. at 685-86.
8 Id.
9 Rothstein, supra note 1, at 935.
11 Jeffrey Swanson et al., Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly? 66 Md. L. Rev. 94, 65 (2006). This study controlled for "health status, plaintiff's education, reasons for lawsuit, and assistance by a lawyer." Id.
12 Id. at 108.
13 Id. at 133-36.
14 Id. at 133-34.
15 Id. at 134-35 ("Plaintiffs' attorneys may believe that people with depression will make poorer witnesses, and settle for a lower amount; or defendants and their attorneys may believe that manic-depressive illness is less controllable than other conditions, and be less willing to accept a settlement involving reinstatement; or judges may believe that mental illness is harder to diagnose than other conditions and doubt that a plaintiff actually has an impairment covered by the law.")
Is the Concern Real?

The correlation between mental disorder and violence is, at best, quite small:

- “[M]ore than 95% of violent acts are committed by the non-mentally ill.”\textsuperscript{17}
- “7% of workplace homicides are committed by current or former employees.”\textsuperscript{18}
- “90% of those diagnosed as mentally ill are not violent.”\textsuperscript{19}

While mental illness could serve as one factor to help predict violent behavior, it is only one of many other factors, including “age, gender, marital history, economic status, and education.”\textsuperscript{20}

**Workplace Violence, Loss of Life, Injuries in the Workplace, and the Media Attention which these Incidents Receive Only Heighten the Concerns of Managers and Employees in the Workplace:**

Employers continue to struggle to find ways to address mental health and its relationship to workplace violence. According to a report published by the Department of Justice, nearly two million workers are victims of workplace violence each year.\textsuperscript{21} There are reports of individuals with a history of mental illness who act violently in the workplace. The media attention surrounding these situations helps to perpetuate the idea that people with mental illness may be unpredictable and dangerous. Accordingly, fear of workplace violence and resultant employer liability place employers in a difficult dilemma when trying to determine whether an employee with a mental illness poses a direct threat.

**OUR GOAL**

This paper will highlight some of the issues involved in addressing mental illness under the ADA. Given the focus of this session, this article assumes a working knowledge of the ADA; several helpful sources are cited for further study. Part I will provide a brief overview of the elements of Title I of the ADA. Part II will discuss the relationship between conduct and the duty of employers to provide workplace accommodations. Finally, Part III includes a sample of representative cases that highlight some of the challenges in cases that involve misconduct and behavior suggestive of future risk. There are no easy answers here – our goal is to provide you with the framework to evaluate situations as they arise.

\textsuperscript{16} Id. at 135-36.
\textsuperscript{17} Jane Byeff Korn, *Crazy (Mental Illness under the ADA)*, 36 U. MICH. J.L. REFORM 585, 586 (2003).
\textsuperscript{18} Id. at 611.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 612.
I. ELEMENTS OF THE ADA TO CONSIDER

Proving Disability:

Under the ADA, a disability is defined as: (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) "a record of such an impairment;" or (3) "being regarded as having such an impairment." The Equal Employment Opportunity Commission (EEOC) has defined mental impairment as "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities." Under the ADAAA and the EEOC's amended regulations, the definition of disability was expanded, where disabilities are now to be considered in their unmitigated state. And disability "shall be construed in favor of broad coverage . . . to the maximum extent allowed by the terms of [the ADA]." These cases must be individually assessed, where the "primary object of attention" should be whether "covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability." As a result, many courts have held that "depression, anxiety, post-traumatic stress syndrome, and panic attacks" constitute mental impairments under the ADA.

While the impairment must "substantially limit" a major life activity to qualify as a disability under the ADA, the term "substantially limit" is not a "demanding standard," and should be construed broadly. The ADAAA broadened the list of "major life activities" to include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Although this list does not include some issues central to the cases involving a mental illness or impairment, such as interpersonal skills, it does provide some additional guidance. The EEOC clarified that while "traits or behaviors are not, in themselves, mental impairments," they may be "linked to mental impairment.

Qualified Individuals, Reasonable Accommodations and Defenses:

A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." These individuals must be able to perform "fundamental job duties." Employers can deny a request for a reasonable accommodation by demonstrating undue

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23 29 C.F.R. § 1630.2(h)(2) (2009). See also Rumel, supra note 8, at 520.
26 29 C.F.R. § 1630.1(c)(4) (2013).
27 Rumel, supra note 10, at 520, quoting 29 C.F.R. § 1630.2(h)(2).
29 29 C.F.R. § 1630.2(j)(1)(i).
33 29 C.F.R. § 1630.2(n).
hardship, defined as any action requiring “significant difficulty or expense.”34 The ADA does not require employers to give special treatment to applicants or employees who fail to carry out essential responsibilities, or pose a direct threat to others or to themselves.35 This “direct threat” analysis is central to workplace violence cases.

Employers are permitted to hold employees with disabilities to the same standard as other employees.36 However, they are still obligated to provide reasonable accommodations to a known disability,37 which generally include a transfer, a reassignment to a vacant position, or an unpaid absence that would still allow the employee to return to work.38 In the case of an employee with a mental impairment, other types of accommodations may be helpful. The checklist at the end of these materials includes a list of possible accommodations compiled from the cases and articles examined here.

II. Workplace Conduct and the Duty to Accommodate – Where Do You Draw the Line?

Mental illness differs from physical impairment; it is often manifested through behavior that others perceive as voluntary and employers label as “misconduct.”39 These illnesses often remain hidden until inappropriate conduct occurs.40 The condition may require behavioral accommodations that employers are reluctant to grant.41 In some cases, the employees/plaintiffs are unsuccessful in their claims because they were found by the court to not be disabled or “otherwise qualified” under the statute.42 Thus, the conduct-based nature of mental illness may have the effect of creating a higher bar for plaintiffs when bringing forth a discrimination claim under the ADA.43

Duty to Accommodate a Known Disability:

Federal discrimination law requires employers to provide reasonable accommodations to qualified individuals with a disability. However, an employee may not disclose (and an employer may not know of) a mental disability until after an inappropriate conduct occurs for several reasons. First, unlike some physical disabilities, the employee may not exhibit any outward manifestation of his or her mental illness.44 Second, the employee may be reluctant to report the condition/disability and request accommodations, especially if, through implementing these

34 Danforth, supra note 6, at 671.
35 Rothstein, supra note 1, at 938.
36 Runel, supra note 10, at 526.
37 Id.
38 See id.
39 Danforth, supra note 6, at 677-79.
40 Id. at 683.
41 See id. at 677-79.
42 Id. at 676.
43 Id.
44 Id. at 678.
accommodations, the employee’s privacy may be compromised. Finally, the employee may not be aware or be in denial that he or she has a mental illness and/or impairment.

Federal courts have been inconsistent in deciding whether an employer has an obligation to accommodate or excuse inappropriate behavior or conduct when the employer did not know of the disability. In some rulings, courts have found that employers are under no obligation to excuse misconduct stemming from a mental illness if the employer only found about the illness after the misconduct. These courts determined that an employer may hold a disabled individual to the same standard that it holds other employees. Inappropriate conduct, then, can justify dismissal or disciplinary action.

Other federal circuits, however, hold that employers are required to provide accommodations to employees following the misconduct, unless they can show undue hardship. Employers may be obligated to make reasonable accommodations to allow an “otherwise qualified” employee to meet the conduct standard in the future. As in other types of disabilities, some courts have found that the employer and employee are obligated to engage in an interactive process to try to reach an appropriate accommodation. The Second Circuit has specifically stated that misconduct stemming from a disability may be protected.

**Direct Threat:**

This issue is usually central to workplace violence cases. The ADA regulations define “direct threat” as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodations.” Employers may take adverse action against an individual who poses a direct threat. The ADA offers specific factors for an employer to consider when determining whether an individual poses a direct threat. These factors include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.”

The EEOC also provides some guidance: “the determination . . . must be based on an individualized assessment of the individual’s present ability to safely perform the functions of the job, considering a reasonable medical judgment . . . and/or the best available objective evidence.” Deciding which individual poses a direct threat is complex and difficult. For example, even psychiatrists acknowledge the difficulty in predicting violence. In 2012, the

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45 Id.
46 Id.
47 See id. See also Calandra v. Tenn. Processing Cir. LLC., No. 3:08-1099, 2009 WL 5170193, at *8 (M.D. Tenn, 2009).
48 Danforth, supra note 6, at 679.
49 See id. at 679-83.
50 See, e.g., Humphrey v. Memorial Hospitals Ass’n, 239 F. 3d 1128, 1139-40 (9th Cir. 2001).
51 Danforth, supra note 6, at 643.
52 See, e.g., Battemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996).
53 Danforth, supra note 6, at 642.
54 29 C.F.R. § 1630.2(r).
55 Rothstein, supra note 1, at 950.
56 See id. See also 29 C.F.R. § 1630.2(r).
57 Rothstein, supra note 1, at 950.
59 See AMERICAN PSYCHIATRIC ASSOCIATION, POSITION STATEMENT ON ASSESSING THE RISK FOR VIOLENCE (2012).
American Psychiatric Association approved the following “Position Statement on Assessing the Risk for Violence”:

During their careers most psychiatrists will assess the risk of violence to others. While psychiatrists can often identify circumstances associated with an increased likelihood of violent behavior, they cannot predict dangerousness with definitive accuracy. Over any given period some individuals assessed to be at low risk will act violently while others assessed to be at high risk will not. When deciding whether a patient is in need of intervention to prevent harm to others, psychiatrists should consider both the presence of recognized risk factors and the most likely precipitants of violence in a particular case.60

Future Risk: Managing Unusual Behavior:

Many disability discrimination cases involve behavior that suggests future risk.61 Courts acknowledge that requiring an employer to accommodate a threatening employee “place[s] the employer on a razor’s edge—in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone.”62 Several courts have held that adverse employment action taken out of fear of potential violence is legitimate and non-discriminatory.63 Once the employer articulates a valid reason for the action, the burden shifts to the disabled employee to prove that the employer’s reason either: (1) has no factual basis; (2) did not motivate the action; or (3) was insufficient to support the adverse action.64

III. Threat of Future Risk: Real Cases

The delicate relationship between conduct and mental illness may leave employers susceptible to liability under the ADA.65 Employers, in response to discrimination claims, will often use the “direct threat” provision of the ADA to argue that the employee failed to meet the “otherwise qualified” element under the statute.66 As the cases below illustrate, courts may be reluctant to rule in favor of the plaintiff after the employer’s direct threat assertion. The cases below illustrate the issues and problems faced for both employers and employees. They are grouped by the prevailing party.

60 Id.
61 Rothstein, supra note 1, at 951.
62 Danforth, supra note 6, at 684, quoting Palmer v. Circuit Court, 117 F.3d 351, 352 (7th Cir. 1998).
63 See Calandriello, at *8.
64 Id.
65 Danforth, supra note 6, at 686.
66 Id.
Verdicts for Employers:

Carrozzi v. Howard County, Maryland (1995):
Beverly Carrozzi was a clerk typist with bipolar disorder. Although she was given several opportunities to improve her computer skills, her supervisor found her computer work to be "severely deficient" when compared to a reasonably proficient level, which negatively impacted the division's productivity. Moreover, Carrozzi displayed erratic and insubordinate behavior, including dumping a bag of trash on a conference table while her supervisor was conducting a meeting, conveying to other employees that she was crazy, and using profanity towards the same supervisor.

The court found that Carrozzi failed to meet the ADA's "qualified" element. While her problems may have stemmed from her disorder, the court held that it did not excuse her failure to perform the "essential functions of her job." Moreover, the employer had made numerous efforts to accommodate her disability, including providing her with additional training, job counseling and medical leave and offering to work with her psychiatrist. Her requests to restructure her job duties in a way that would allow her to be exempted from normal performance were unreasonable, and, the court concluded, would "change the very essence of the clerk typist position."

Palmer v. Circuit Court of Cook County, Illinois (1997):
Marquita Palmer worked as a social service caseworker for the Circuit Court. In May 1992, she received a written warning from her supervisor for making "abusive personal and profane statements to a fellow employee." Despite the warning, the plaintiff got into a physical altercation with a different coworker, and was suspended for ten days. She continued to make inappropriate comments to her supervisor and coworkers upon returning to work. In March 1993, Palmer took a medical leave of absence to attend an out-patient program for mental illness and was subsequently diagnosed with paranoid delusions and major depression. After the plaintiff was prescribed treatment, her therapist requested a meeting with her supervisor to discuss possible accommodations for the plaintiff. The supervisor refused to meet, which prompted more inappropriate remarks by the plaintiff. She telephoned her supervisor several times to express that she "could just kill her." Based on this behavior, Palmer was involuntarily committed to an

68 Id. at *1.
69 Id.
70 Id. at *2-3.
71 Id.
72 Id.
73 Id. at *3.
74 Palmer v. Circuit Court of Cook County, Ill. 905 F. Supp. 499 (ND Ill. 1995).
75 Id. at 501.
76 Id.
77 Id. at 501-2.
78 Id. at 502.
79 Id.
80 Id.
81 Id.
inpatient facility. On the day of her release, she received a letter from her employer notifying her that she had been terminated.

Palmer brought suit under the ADA. The district court granted summary judgment for the employer, holding that (1) the plaintiff only had a "personality conflict" with her employer and provided no evidence that she was substantially limited by her depression in order for her illness to qualify as a disability under the ADA; (2) her abusive and threatening behavior demonstrated that she was not an otherwise qualified individual; (3) her employer could not have accommodated her without undue hardship; and (4) the plaintiff failed to establish that she was discharged because of her disability, and not her conduct. The Seventh Circuit affirmed the lower court's decision. Chief Judge Posner concluded:

[W]e cannot believe that this duty [to provide reasonable accommodations] runs in favor of employees who commit or threaten to commit violent acts ... It would be unreasonable to demand of the employer either that it forces its employees to put up with this or that it station guards to prevent the mentally disturbed employee from getting out of hand.

A staff chemist with an anxiety disorder was terminated when he refused to submit to a fitness for duty evaluation. Before starting work at Merck in 1996, he had taken a pre-placement physical examination, and was found to be able to perform "any job without restriction." Beginning in February 2003, he began exhibiting strange behavior, including behaving erratically to his lab members, being quick to anger, and appearing "deliberately slow, almost catatonic." Due to his behavior and poor work performance, Merck requested that Ward undergo another evaluation, which he failed to do, and was subsequently dismissed from the company.

The district court granted summary judgment for the employer, and the Court of Appeals affirmed. For an employer to justify a fitness-for-duty evaluation, the court stated that the employer must show that the test is a "business necessity," a term that includes ensuring a safe workplace. The court held:

The record is undisputed that Merck's supervisory employees had a concern about the safety of their other employees, given the unusual

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82 Id.
83 Id. at 502-3.
84 Id.
85 Id. at 503-11.
86 Palmer v. Circuit Court of Cook County, Ill. 117 F.3d 351 (7th Cir. 1997).
87 Id. at 353.
89 Id. at 132.
90 Id. at 132-33.
91 Id. at 133.
92 Id. at 141.
93 Id. at 134-35.
behavior of Ward, and this perceived safety concern was, standing alone, sufficient to establish the "business necessity" element of the ADA's standard for post-employment medical examinations.94

*Calandriello v. Tennessee Processing Center, LLC.* (2009):

Robert Calandriello, who suffers from bipolar disorder, worked as a technician at TPC and had put a poster of Charles Manson with the printed text "Impact is Inspiration" in his cubic e.95 He had also used his computer at work to frequent websites that featured "violent images, images of assault weaponry, and serial killers."96 When TPC investigated the plaintiff's internet usage, they found "10,515 hits classified as shopping, 284 hits classified as military, 35 hits classified as adult material, 21 hits classified as weapons, 12 hits classified as games, and 1 hit each in the militancy extremist and racism/hate categories" over a three-week period.97 He was terminated for creating a security risk and for management's "loss of confidence" in him.98

As a result of his termination, Calandriello filed suit in state court alleging discrimination under state disability law, including the Tennessee Disability Act (TDA), which is similar to the ADA. The court granted summary judgment to the Defendant, holding that the Plaintiff failed to provide evidence of pretext that would invalidate the Defendant's alleged non-discriminatory reason.99 Citing *Palmer*, the court held that "the [ADA] does not require an employer to retain a potentially violent employee."100

*Verdicts for Employees: Lack of "Direct Threat" Element:*

*Bullemeyer v. Fort Wayne Community Schools* (1996):

Robert Bullemeyer worked as a custodian for the Fort Wayne Community Schools (FWCS) for approximately fifteen years.101 During that period, he developed serious mental illnesses, including bipolar disorder, anxiety attacks and paranoid schizophrenia, and went on several medical leaves.102 The last leave extended from May 1993 to April 1994.103 In May of 1994, his supervisor contacted him to see if he was ready to return to work at FWCS, and informed Bullemeyer that he would need to take a physical before starting.104 He was also told that he would receive no special accommodations at his newly assigned school site.105 When he visited the school site, he was informed by the custodial foreman that if he moved as slowly as he did, then he would not get his work

94 *Id.* at 139.
96 *Id.* at *2-3.
97 *Id.*
98 *Id.* at *3-4.
99 *Id.* at *8-9.
100 *Id.*
101 Bullemeyer, 100 F.3d at 1231-82.
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
done. Concerned that he would lose his job if he worked there, he spoke with his psychiatrist, who wrote a letter to FWCS stating that "due to Bob's illness . . . it would be in his best interest to return to a school that might be less stressful than Northrop High School."  

Bultemeyer received no response from his supervisor, and was subsequently terminated.

Bultemeyer filed suit under the ADA. The Seventh Circuit reversed the lower court's grant of summary judgment to the employer, holding that an employer has a heightened duty to help an employee "determine what specific accommodations are necessary." This duty involves engaging in an interactive process to find a reasonable solution. FWCS failed to give Bultemeyer a chance to demonstrate that he was "otherwise qualified," especially since they had previously placed him successfully in an environment with special accommodations. Moreover, with knowledge of his mental illness, they failed to ask Bultemeyer what he needed to successfully return to work. Thus, the court concluded that FWCS acted in bad faith.

**Humphrey v. Memorial Hospitals Association (1999):**

Carolyn Humphrey worked as a medical transcriptionist for Memorial Hospitals Association (MHA) from 1986 until her termination in 1995. During the duration of her time at MHA, her performance consistently exceeded MHA's standard for speed, efficiency, and productivity. Beginning in 1989, she began experiencing problems with tardiness and absenteeism. She engaged in a series of obsessive rituals that made it difficult for her to get to work on time. For example, she would feel compelled to rinse her hair until it "felt right," which sometimes took up to three hours. She would also pull strands of hair from her head to examine them, convinced that something was crawling on her scalp. Humphrey received several disciplinary warnings in 1994 and 1995 for her lateness and absences. In 1995, she was diagnosed with obsessive compulsive disorder. Her doctor sent a letter to her employer explaining that her conduct was a direct result of her OCD. Humphrey's supervisor rejected her request to work from home, offering her instead a "flexible" start time arrangement where she could begin work any time within a 24 hour period on the days that she was scheduled to

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106 Id.
107 Id.
108 Id.
109 Id. at 1284-85.
110 Id.
111 Id.
112 Id. at 1286.
113 Id. at 1287.
114 Humphrey, 239 F.3d at 1130.
115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id. at 1131.
122 Id.
CONCLUSION

The precise relationship between workplace violence and mental health remains unclear.\textsuperscript{126} It is important to remember, however, that the vast majority of individuals with mental illness are not violent,\textsuperscript{127} and are far more likely to be victims than perpetrators of crime.\textsuperscript{128} The fear associated with mental illness and violence is over-exaggerated and highly prejudicial. In fact, the best predictors of possible violent behavior are not associated with "stereotypical" images of mental illness. Instead, they are: "(1) excessive alcohol intake, (2) a history of violent acts with arrests or criminal activity, and (3) a history of childhood abuse."\textsuperscript{129} Nonetheless, employers face the difficult challenge of trying to predict violent behavior. Employees that pose a direct threat to the workplace often require quick and decisive action. For less extreme situations, employers should take reasonable steps to manage "unusual" behavior through an interactive process.

\textsuperscript{121} Id. at 1131-32.
\textsuperscript{122} Id. at 1133.
\textsuperscript{123} Id. at 1137.
\textsuperscript{124} Danforth, supra note 6, at 684.
\textsuperscript{125} Korn, supra note 18, at 586.
\textsuperscript{127} Danforth, supra note 6, at 685.
WORKPLACE VIOLENCE RISK?

FACTORS TO CONSIDER

✓ What happened to give rise to the concern?

  o Was it in the workplace?
    ▪ If not in the workplace, should it still be considered?
    ▪ Be able to articulate why/why not.

  o What happened?
    ▪ Who reported the concern?
    ▪ What did others see?
    ▪ What did others hear?
    ▪ Is there a recording (video, audio, photo)? Is it preserved?

  o Behavior changes:
    ▪ Aggression
    ▪ Alcohol/substance use
    ▪ Violent images > web! (computer use)

  o Is the behavior just unusual or is it threatening?

  o Are there factors which would influence the reporter and/or witnesses?
    ▪ Personal feelings/conflict
    ▪ Personal history
    ▪ Time
    ▪ Credibility
    ▪ Stereotyping

  o What is the employee’s position with the employer?
    ▪ Safety-sensitive
    ▪ Deals with public
    ▪ Deals with money/finances
    ▪ Deals with sensitive personal information

  o Are there any prior issues/concerns regarding this employee?
    ▪ What were they?
    ▪ When did they happen?

  o Is the behavior covered under a current request for an accommodation?

  o Does the behavior give rise to a request for a fitness for duty evaluation?
✓ Factors to consider when determining whether an individual poses a direct threat:

  o Duration of risk
  o Nature and severity of the potential harm
  o Likelihood that the potential harm will occur
  o Imminence of the potential harm

✓ What do you do with the vague “I am afraid of them” situations?

  o Ask the employee(s) to be very specific
  o What does the person do, say, report, etc. that makes them feel that way?
  o Consult with your experts (Security, EAP program, etc.)
  o Don’t take the comment at face value BUT
  o Don’t ignore it either — “unpack” that feeling to find the root of the issue
  o Consider education and reinforcement of inclusive environment
  o Don’t give in to the “fear factor” without analyzing it carefully!
  o Engage with employee: Is this employee just venting?
  o Type of behavior?
  o Encourage an "open door" policy for supervisors: Are people stopping by to chat?

✓ What types of accommodations should you consider? (Examples – be creative)

  o Modifying work space
    ▪ Allow transfer to a different site or department
    ▪ Reassignment to a vacant position
    ▪ Allow employee to work from home
    ▪ Reduce distraction: Allow employee to use headphones to protect them from loud noises, or use a tape recorder to record instructions from meetings/supervisors

  o Flexible scheduling
    ▪ Allowing leave during periods of hospitalization or incapacity
    ▪ Modified hours

  o Job restructuring
    ▪ Divide larger tasks into smaller assignments
    ▪ Assign minor tasks to other employees
    ▪ Provide written checklists

  o Job counseling
    ▪ Assign an understanding supervisor/job coach who will serve as a source of support: in the workplace
    ▪ Regular performance feedback
- Skills training opportunities
  - Individualized training courses
  - Allow extra time to learn tasks

- Stress Management
  - Encourage employee to use stress management techniques
  - Flexible breaks
  - Allow presence of support animal