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DISABILITY EMPLOYMENT LAW CONFERENCE

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[How to Navigate the Interactive Accommodation Process for an Individual with a Mental Disability]

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Mary Snyder

Mary Snyder is an attorney in the Labor & Employment practice group at the firm's Oklahoma City office.

Snyder has focused her practice on exclusively representing employers and management in employment and traditional labor matters since 1999. In her practice, Snyder routinely represents clients in the courts, in front of administrative tribunals, and in appellate proceedings in regard to litigation brought under the Fair Labor Standards Act, Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, as well as other state and federal employment-related laws.

As part of her advice practice, Snyder regularly advises companies and human resource representatives on best employment policies and practices, including proper drafting of a full range of employee-related policies and procedures. Snyder aids clients in regard to understanding potential discrimination, harassment, retaliation, reasonable accommodation and wage and hour claims. Snyder also advises on I-9 compliance issues and assists companies in obtaining employer-sponsored visas for foreign workers.

Snyder speaks Spanish fluently and is able to investigate cases and conduct employee training in Spanish where the workforce so requires.

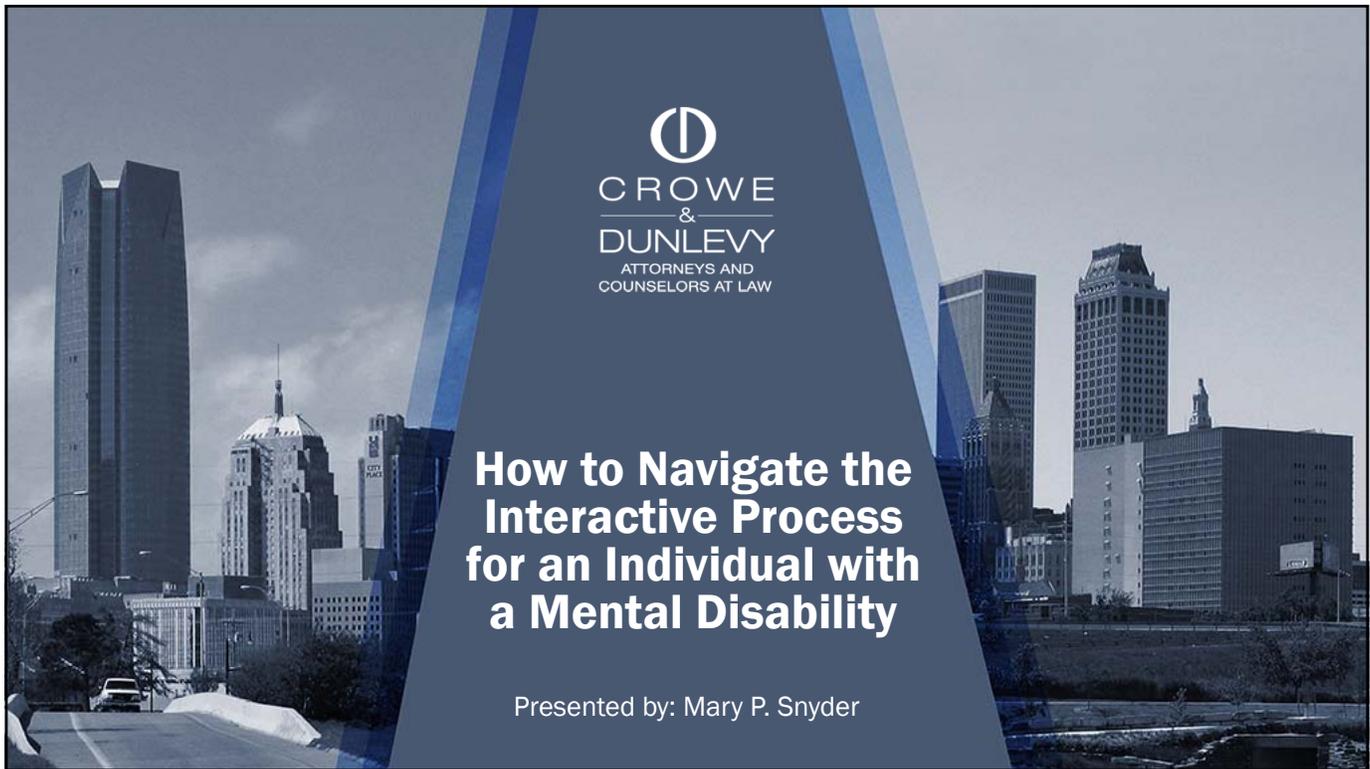
Snyder received her Juris Doctor from Harvard Law School in 1999, where she graduated cum laude. She holds a bachelor's degree in Spanish, with high honors, from Portland State University.

Prior to joining Crowe & Dunlevy, Snyder practiced labor and employment law at Sheppard, Mullin, Richter & Hampton, LLP and at Wilson, Turner, Kosmo, LLP, both located in San Diego, CA.

Snyder is a regular speaker at continuing education courses for human resource professionals and attorneys regarding various aspects of laws affecting the workplace, obligations when conducting a reduction in force, the ADA, the overlap of various leave laws, and best employment practices.

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**How to Navigate the
Interactive Process
for an Individual with
a Mental Disability**

Presented by: Mary P. Snyder

Objectives

- » Learn how and when to engage in the interactive accommodation process with a person with a mental disability
- » This requires an understanding of:
 - What constitutes a mental disability
 - When an employer must be proactive in seeking to accommodate mental disabilities
 - How and when to initiate an interactive dialogue
 - What types of accommodations are considered reasonable in the mental disability context



What Constitutes a Mental Disability?

- » Any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities
- » Must substantially limit a major life activity



Substantially Limited Standard

- » An impairment need not prevent/severely or significantly limit a major life activity to be considered substantially limiting
- » Requires an individualized assessment
- » An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be disabled



Substantially Limited Standard

- » Mitigating measures cannot be considered in determining whether someone with a mental impairment is substantially limited in regard to a major life activity
 - This includes psychotherapy, behavioral therapy and medications



Major Life Activities

- » Eating
- » Sleeping
- » Standing
- » Lifting
- » Bending
- » Reading
- » Concentrating
- » Thinking
- » Communicating
- » Major bodily functions
- » Sitting
- » Reaching
- » Interacting with others



Mental Impairments

These mental impairments almost always constitute a disability

- » Intellectual disability
- » Major depressive disorder
- » Bipolar disorder
- » Post-traumatic stress disorder
- » Obsessive-compulsive disorder
- » Schizophrenia



Mental Impairments

A broad category

- » Currently there are almost 300 mental disorders contained in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)
- » Now includes hoarding and caffeine withdrawal, but not all of these will be considered disabilities



What about others?

- » Assume a mental impairment could be covered by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) if:
 - It can be diagnosed and
 - It has some adverse impact on the person's life or ability to do their job



How do you Know when to Begin an Interactive Process?

- » Immediately after:
 - An employee discloses a mental impairment and requests an accommodation
 - You come to know, or are given a reason to know, that the employee is disabled and needs an accommodation (even if the employee does not request an accommodation)
 - You have a reasonable belief based on objective evidence, that an employee's inability to perform an essential job function is due to a mental condition



Is this a Request for a Reasonable Accommodation?

- » Telling supervisor, “I need to leave and I need to leave right now”
- » Made by employee whom employer knew to have bipolar disorder and who was in the middle of anxiety attack (which employer did not know)



Is this a Request for a Reasonable Accommodation?

- » Telling supervisor, “I need to leave and I need to leave right now”
- » Made by employee whom employer knew to have bipolar disorder and who was in the middle of anxiety attack (which employer did not know)
 - No, this is not a request for reasonable accommodation
 - Russell v. T.G.Missouri Corp., 340 F.3d 735 (8th Cir. 2003)



Is this a Request for a Reasonable Accommodation?

- » Telling supervisor, “I am stressed and cannot perform my duties in a proper and safe manner right now. I need to leave. I’m under a doctor’s care—it’s on file in HR.”



Is this a Request for a Reasonable Accommodation?

- » Telling supervisor, “I am stressed and cannot perform my duties in a proper and safe manner right now. I need to leave. I’m under a doctor’s care—it’s on file in HR.”
 - Yes, this was a request for reasonable accommodation
 - Huffsmith v. Yellow Transp., Inc., 2006 WL 2371977 (M.D. Pa. 2006)



How do you Know when to Begin an Interactive Process?

- » No magic words are required from the employee
- » This can be extra difficult in the mental impairment area
- » Examples:
 - “I need time off because I am depressed” – probably on notice
 - “I need time off because I am stressed” – maybe on notice
 - “I need time off to decompress after that big project” – probably not on notice



How do you Know when to Begin an Interactive Process?

- » When in doubt open a dialogue
 - Asking an employee if s/he needs an accommodation does not by itself support a claim for “regarded as”
 - However, unless a disability is obvious, it is best to focus on work conduct/performance rather than any perceived disability



The Interactive Process Often Starts with Gathering Information

- » Determine the employee's limitations from:
 - The employee
 - A healthcare provider
- » Ensure the healthcare provider understands essential job functions so s/he can provide relevant information



Documenting Mental Disabilities

- » An employer may obtain reasonable documentation that an employee has a mental disability and needs an accommodation if the need for accommodation is not obvious
- » Employer may require documentation of an impairment come from a healthcare professional
- » Healthcare professionals other than psychiatrists may provide documentation of an impairment



Is There a Duty to Seek Medical Information?

- » An employer can seek medical information if it has reason to believe that conduct or performance problems are being caused by a mental impairment
- » However, the Americans with Disabilities Act (ADA) does not require an employer seek medical information in this context. The employer can instead focus on the conduct or performance issues.
- » See Equal Employment Opportunity Commission (EEOC) → The Americans with Disabilities Act → Applying Performance and Conduct Standards to Employees with Disabilities
 - <http://www.eeoc.gov/facts/performance-conduct.html>



What Should the Documentation Include?

- » The EEOC recommends healthcare providers provide the following:
 - Information about their professional qualifications
 - Nature of the client's condition (if the client does not want the specific diagnosis identified, then provide the general type of disorder or describe how the condition substantially limits brain function or a major life activity)
 - Client's functional limitations in the absence of treatment
 - Need for reasonable accommodation
 - Recommended accommodations
- » See EEOC → The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work
 - http://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm



Questions to Ask an Employee to Begin the Interactive Process

- » What are the employee's limitations?
- » How do those limitations impact the employee's ability to do his or her job?
- » Are there specific parts of the job that the employee cannot perform (either at all or well) because of his or her limitation?
- » Does the employee have any suggestions as to what could be done to help with those items?



The Interactive Process Requires Back and Forth Dialogue

- » Employer and employee need to participate in the interactive process
- » Many accommodations will fall into one of three broad categories:
 - Ability to work scheduled shift
 - Ability to process information or focus
 - Ability to control emotions



The Interactive Process May Require Brainstorming

- » After gathering information from the healthcare provider and from the employee, HR may need to brainstorm and be creative to find a reasonable accommodation
- » If an employee will not accept a proposed accommodation, the employer cannot force the employee to accept it.
 - However, if the employee cannot perform the job and will not accept a reasonable accommodation, the employee may not be qualified



Assessment of Whether a Requested Accommodation is Reasonable

- » Part of the interactive process requires an evaluation as to whether an accommodation requested by an employee or his/her health care provider is reasonable
- » This requires an individualized assessment of the situation



Request to Accommodate

Based on inability to work the scheduled shift

- » The following may be reasonable accommodations:
 - Flexible scheduling -- part-time work hours, job sharing, adjustments in the start or end of work hours, compensation time and/or making up missed time
 - Modified break schedule – longer or more frequent
 - Leave – sick leave for reasons related to mental health, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery, leaves of absence and/or use of occasional leave (a few hours at a time) for therapy and other related appointments
 - Telecommuting
- » However, there are limits . . .



Request to Accommodate

Based on inability to work the scheduled shift

- » It is not a reasonable accommodation to allow an employee to have excessive absenteeism
- » “Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee ‘who does not come to work cannot perform any of his job functions, essential or otherwise.’”
 - Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1239 (9th Cir. 2012)



Request to Accommodate

Based on inability to process information or focus

- » Request to reassign an employee to permanent light duty to address impairment caused by ADD was not reasonable
 - Shin v. University of Maryland Medical System Corp., 369 Fed. Appx 472 (4th Cir. 2010)
- » Request to allow an employee to work without the required professional certification to accommodate depression was not reasonable
 - Johnson v. Board of Trustees of Boundary County School District No. 101, 666 F.3d 561 (9th Cir. 2011)



Request to Accommodate

Based on inability to process information or focus

- » Reasonable accommodations for an intellectual disability:
 - Giving instructions at a slower pace
 - Breaking job tasks into sequential steps
 - Using charts, pictures or colors
 - Providing a tape recorder to record directions
 - Allow a job coach to be present to help the employee learn the job, provide support, help with the working relationship between the employee and the employer, assist in finding reasonable accommodations
 - Allowing a non-employee to be present for job evaluations and disciplinary proceedings to help the employee understand



Request to Accommodate

Based on inability to process information or focus

- » EEOC → Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act → www.eeoc.gov/laws/types/intellectual_disabilities.cfm



Request to Accommodate

Based on difficulty controlling emotions

- » Request for office to be moved away from other employees so employee would not have to interact with others found not a reasonable accommodation
 - McKane v. UBS Financial Services, Inc., 363 F. Appx 679 (11th Cir. 2010)
- » Request by employee with severe depression to have no contact with any coworkers or two supervisors was not reasonable
 - Theilig v. United Tech. Corp., 415 F. Appx 331 (2d Cir. 2011)



Difficulty Controlling Emotions

Conduct standards are still okay

- » The EEOC makes clear that employers can develop and enforce conduct standards as long as they are job-related and consistent with business necessity
- » See EEOC → Informal Discussion Letter → “ADA: Definition of ‘Disability’; Reasonable Accommodation; Employee Misconduct” (March 27, 2008)
- » Examples – prohibitions on:
 - Violence
 - Threats of violence
 - Destruction of property
 - Insubordination
 - Yelling, shoving or cursing
 - Making obscene gestures



Difficulty Controlling Emotions

What if the employee violates conduct rules?

- » Employer can impose discipline on an employee for misconduct if it would do so for any other employee
- » Employer does not need to:
 - Lower production or performance standards
 - Excuse violations of conduct rules that are job-related and consistent with business necessity
- » However, reasonable accommodation may include lessening the amount of formal or written reprimands
 - Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999)



Difficulty Controlling Emotions

What if the employee appears to be violent or at risk for violence?

- » Employer can only exclude employee for safety reason if employer can show a direct threat
 - Direct threat – significant risk of substantial harm to the health or safety of the individual or others
- » Must do an individualized assessment of the individual and be able to identify the specific behavior that causes the threat
- » Must be able to articulate specific legitimate safety concerns – cannot base on stereotypes



Request to Accommodate Based on Other Types of Needs

- » Request by an employee with bipolar disorder to leave early to accommodate his daughter's school schedule was not a request for a reasonable accommodation even though the denial of the accommodation made the employee's anxiety worse
 - Boutin v. Home Depot U.S.A., Inc., 490 F.Supp.2d 98 (D. Mass. 2007)
- » Request to be transferred to a different supervisor due to allegation that the supervisor caused the employee stress, depression or anxiety is not a request for a reasonable accommodation
 - Larson v. Commonwealth of Va., Dept. of Transp., 2011 WL 1296510 (W.D. Va. 2011)



Request to Accommodate

Based on other types of needs

- » Request that supervisor modify employee's normal procedures or manner of handling employees may be a reasonable accommodation
 - EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA (Oct. 17, 2002)



Documentation of the Process

- » It is helpful to document the interactive process:
 - Conversations with employee
 - Suggestions made by the company and the employee
 - Efforts to implement agreed-upon accommodations
 - Result of the accommodations



Re-Opening the Interactive Process

- » The interactive process may need to be re-opened if follow-up reveals that an accommodation is not working or worked but is no longer effective
- » Re-open to explore if there are other reasonable accommodations that will enable the employee to perform the essential functions of his or her job



Confidentiality During the Interactive Process

- » Medical information should be kept separate from the employee's personnel file
- » Managers and supervisors should only be told if necessary to provide reasonable accommodations or meet work restrictions
- » The employer should not tell coworkers that an employee is receiving a reasonable accommodation, even if they ask
 - The EEOC declares this constitutes disclosure that the individual has a disability



What to do About Those with Bad Judgment?

- » Historically, the following personality qualities are generally not an appropriate subject of accommodation:
 - Poor judgment
 - Chronic lateness
 - Irritability
 - Inability to get along with supervisors or co-workers
- » However, such personality traits may be included if the employee's relations with others are characterized by severe problems on a long-term basis
 - EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997)
 - www.eeoc.gov/policy/docs/psych.html



Examples of Reasonable Accommodations

- » Breaks
 - Breaks according to individual needs rather than a fixed schedule
 - More frequent breaks and/or greater flexibility in scheduling breaks
 - Provision of backup coverage during breaks
 - Telephone breaks during work hours to call professionals and others needed for support
- » Modification of policies
 - Beverages and/or food permitted at workstations, if necessary, to mitigate the side effects of medications
 - On-site job coaches
- » Reduction and/or removal of distractions in the work areas



Examples of Reasonable Accommodations

- » Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions
- » Private offices or private space enclosures.
- » Office/work space location away from noisy machinery.
- » Reduction of workplace noise that can be adjusted (such as telephone volume)
- » Increased natural lighting or full spectrum lighting
- » Music (with headset) to block out distractions
- » White noise or environmental sound machines



Examples of Reasonable Accommodations

- » Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations
- » Software that minimizes computerized distractions such as pop-up screens
- » Modification of job duties
- » Increasing job duties more slowly
- » Allowing extra time to learn tasks
- » Allowing the person to attend individualized training courses



Examples of Reasonable Accommodations

- » Exchanging minor tasks with other employees
- » Allowing the person to use a lamp instead of fluorescent lights to eliminate a flicker which may be irritating or cause a reaction
- » Providing the employee with a tape recorder to tape instructions from a supervisor, training programs and meetings if they have difficulty with memory
- » Allowing an employee to use headphones to protect them from loud noises
- » Job coach assistance in hiring and on the job training and performance



Examples of Unreasonable Accommodations

- » Removing an essential function from a job description
- » Monitoring an employee's use of medication
- » Taking action that would result in undue hardship
 - Such as significant difficulty or expense



Is this a Request for a Reasonable Accommodation?

- » A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers
- » After receiving a suspension as the second step in uniform and progressive discipline, she discloses her disability, states that it causes her behavior and requests a leave of absence for treatment



Is this a Request for a Reasonable Accommodation?

- » The employer may discipline her because she violated a conduct standard (a rule prohibiting disruptive behavior towards patrons and coworkers) that is job-related for the position in question and consistent with business necessity
- » The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future



Is this a Request for a Reasonable Accommodation?

- » An employee with major depression is often late for work because the side effects of his medication makes him extremely groggy in the morning
- » His scheduled hours are 9 a.m. to 5:30 p.m., but he arrives at 9 a.m., 9:30 a.m., 10 a.m. or even 10:30 a.m. on any given day
- » His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders
- » The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment
- » The individual then explains that he was late because of a disability and needs to work a later schedule



Is this a Request for a Reasonable Accommodation?

- » In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity
- » The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future
- » For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10 a.m.



Is this a Request for a Reasonable Accommodation?

- » An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm
- » The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor
- » When he learns that his employment has been terminated, the employee asks the employer to put the termination on hold and to give him a month off for treatment instead.
- » This is the employee's first request for accommodation and also the first time the employer learns about the employee's disability



Is this a Request for a Reasonable Accommodation?

- » The employer is not required to rescind the discharge under these circumstances because the employee violated a conduct standard (a rule prohibiting threats of physical harm against supervisors) that is job-related for the position in question and consistent with business necessity
- » The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability
- » His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity



Questions?



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