

Atypical Accommodations for Employees with Psychiatric Disabilities

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People with psychiatric disabilities often need atypical accommodations to participate in today's workforce. Some of these accommodations, including structural and social changes in the workplace, can address biases against people with psychiatric disabilities, while others ameliorate deficits that may affect performance or interaction with others. Many courts have denied requests for such accommodations based on employers' assumptions about performance or the direct threats purportedly posed by people with psychiatric disabilities. By challenging these assumptions, which can be influenced by stigma and stereotypes, and by enforcing an employer's duty to interact regarding potential accommodations, employees with psychiatric disabilities could benefit from structural and social accommodations. Courts should consider social science research in determining which nontraditional accommodations may be reasonable and whether the employer can establish that they impose any undue hardship. Such consideration will expand opportunities for people with psychiatric disabilities in the workplace without unduly interfering with employers' interests.

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INTRODUCTION

Courts must interpret the Americans with Disabilities Act (ADA)¹ in a manner that ensures that employers will consistently and fairly accommodate employees with psychiatric disabilities.² People with psychiatric disabilities, also known as mental illness, face unique barriers to employment and, consequently, have a significantly lower participation rate and a higher unemployment rate in today's workforce, compared to the participation of those without disabilities.³ Even if employed, their status has been described as "at best, precarious."⁴ This lack of stable participation in the workforce can be attributed, at least in part, to the unwillingness of employers to provide nontraditional or unique accommodations for employees with psychiatric disabilities.⁵ As the labor market tightens, employers who may need to "consider workers they once would have

¹42 U.S.C. §§ 12101–12213 (2012).

²The American Psychiatric Association (APA) defines mental illnesses as "health conditions involving changes in thinking, emotion or behavior" (or a combination of these). *What Is Mental Illness?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/what-is-mental-illness> (last visited Mar. 18, 2018). The term "psychiatric disability" is used by mental health professionals and within the context of the ADA when an individual's mental illness interferes with performance of major life activities. *What Is Psychiatric Disability and Mental Illness?*, BOSTON UNIV., <https://cpr.bu.edu/resources/reasonable-accommodations/what-is-psychiatric-disability-and-mental-illness> (last visited Mar. 18, 2018). Both the International Classification of Diseases (ICD-10), a publication of the World Health Organization, and the diagnostic statistical manual, published by the APA, outline three main types of mental illnesses: anxiety disorders (such as panic disorders), mood disorders (such as bipolar disorder), and schizophrenia disorders. *See id.*; WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (2016), <http://www.who.int/classifications/icd/en/>.

³Bureau of Labor Statistics, *Employment Status of the Civilian Noninstitutional Population by Disability Status and Age*, U.S. DEP'T OF LABOR, <https://www.bls.gov/news.release/disabl.a.htm> (last visited Mar. 23, 2018). The unemployment rate for people with psychiatric disabilities is estimated at eighty percent. *Mental Illness: NAMI Report Deplores 80 Percent Unemployment Rate; State Rates and Ranks Listed-Model Legislation Proposed*, NAT'L ALL. ON PSYCHIATRIC DISABILITIES (Jan. 1, 2014), <https://www.nami.org/Press-Media/Press-Releases/2014/Mental-Illness-NAMI-Report-Deplores-80-Percent-Un#sthash.awae8PFd.dpuf>.

⁴Susan Stefan, "You'd Have to Be Crazy to Work Here": *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 801 (1998).

⁵*See infra* text accompanying notes 58–156 for discussion of claims involving denials of accommodations.

turned away”⁶ can and should expand their labor pool by providing atypical accommodations for potentially productive employees with psychiatric disabilities.

Atypical accommodations, including changes to the workplace structure, job design, and/or required social interactions, would enable many people with psychiatric disabilities to function successfully in the workplace without imposing a significant burden on their employers. Thus, the judiciary system should interpret the ADA to require such atypical accommodations to enhance the participation of people with psychiatric disabilities in the labor market, for the benefit of themselves, employers, and society in general. Such a requirement is supported by existing social science research, which demonstrates the effectiveness of such atypical accommodations in creating inclusive and diverse work environments, and reaping the benefits of untapped human capital.⁷

The ADA was enacted by Congress to provide greater inclusion in the U.S. workforce for persons with disabilities.⁸ The ADA requires employers to provide reasonable accommodations for an otherwise qualified individual with a disability, unless the employer can establish that the accommodation would impose an undue hardship.⁹ Part I of this article explains the accommodation process and its importance to employees with disabilities, as well as its potential benefits for employers. In particular, people with psychiatric disabilities benefit from more atypical accommodations that enhance their ability to perform by providing both physical changes in the workplace, such as noise reduction, as well as social changes, such as different methods of communication with a supervisor. Both structural and social accommodations could widen opportunities for people with psychiatric disabilities to participate in the labor force.

Despite the ADA’s accommodation requirement, employers generally have been neither willing nor required to accommodate employees with

⁶Ben Casselman, *As Labor Pool Shrinks, Prison Time Is Less of a Hiring Hurdle*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/business/economy/labor-market-inmates.html>.

⁷Lynn Perfy Wooten, *Breaking Barriers in Organizations for the Purpose of Inclusiveness*, 47 HUM. RESOURCE MGMT. REV. 191, 191–96 (2008).

⁸H.R. REP. NO. 485, pt. 2, at 28–29 (1990); S. REP. NO. 116, at 6 (1989).

⁹42 U.S.C. § 12112(b)(5)(A) (2012).

psychiatric disabilities to the same extent as employees with physical disabilities are accommodated.¹⁰ Part II of this article explains how courts have failed to impose fully the ADA's requirement that employers take reasonable steps to accommodate employees with psychiatric disabilities,¹¹ without reaching the question of whether the accommodation would impose an undue hardship on the "operation of the business" of the employer.¹² In doing so, courts allow employers to rely on a psychiatric diagnosis and general notions about qualities required for their employees to justify the denial of an accommodation that could enable a person with a psychiatric disability to perform the job.

In one case, automaker Ford's rejection of a request by a veteran with posttraumatic stress disorder (PTSD) exemplifies the failure of both employers and the courts to require structural accommodations for employees with psychiatric disabilities.¹³ In that 2017 decision, the court dismissed the veteran's claim seeking permission to bring a service dog to work despite evidence that the dog would help him tolerate the loud noises and interactions that could trigger PTSD.¹⁴ In deferring to Ford's position that the employee had not proven that the dog would enable him to tolerate his workplace, the court refused to require Ford to give the employee an opportunity to utilize the service dog at work to determine whether its presence would in fact reduce his stress.¹⁵ This court's reasoning highlights how an employer can require a subjective qualification, such as handling stress, and then refuse an employee the opportunity to demonstrate the effectiveness of the proposed accommodation so as to allow the employee to demonstrate the reasonableness of the request.

Part III of this article provides an overview of the stigma and stereotypes associated with psychiatric disabilities. Both structural and social

¹⁰Caitlin McDowell & Ellie Fossey, *Workplace Accommodations for People with Mental Illness: A Scoping Review*, 25 J. OCCUPATIONAL REHAB. 197, 200 (2015); see *infra* text accompanying notes 98–158 for discussion of decisions failing to require accommodation.

¹¹42 U.S.C. § 12112(b)(5).

¹²42 U.S.C. § 12111(10) (2012).

¹³*Arndt v. Ford Motor Co.*, 247 F. Supp. 3d 832 (E.D. Mich. 2017), *aff'd*, No. 17-1415, 2017 WL 6375584 (6th Cir. Dec. 13, 2017).

¹⁴*Id.* at 839, 852, 854–55, 861.

¹⁵*Id.*

accommodations could widen opportunities for people with psychiatric disabilities. Moreover, objective criteria in the consideration of a request for accommodation would ensure that atypical accommodations that could support performance will not be denied based on an employer's reliance on the stigma or stereotypes associated with psychiatric disabilities.

Structural and social accommodations should not be rejected as unreasonable on a motion for summary judgment when they can address actual limitations or triggers experienced by employees with psychiatric disabilities in the workplace. The viability of such accommodations is directly supported by the array of social science research establishing that people with psychiatric disabilities can and have been accommodated successfully.¹⁶ Courts should require provision of such atypical accommodations based on its feasibility and benefit, unless employers carry their burden of establishing that such an accommodation would impose an undue hardship on them. Because many atypical accommodations involve little to no cost and minimal impact on employer operations,¹⁷ imposing such a burden should result in employers providing more accommodations, rather than dismissing accommodation requests based on little more than an assumption that the request is unreasonable. The final part of this article argues that courts should interpret the employer's duty to provide reasonable accommodations to include potentially structural and/or social accommodations in the workplace unless such changes impose an undue hardship on the employer.

Reliance on objective evidence, as well as social science research, to define reasonableness and undue hardship would fulfill an employer's obligation to analyze each request for an accommodation on an individual basis.¹⁸ With such a broader, and yet more individualized,

¹⁶See *infra* text accompanying notes 230–48, 280–311, 317–35 (discussing this research).

¹⁷Jonathan Delman et al., *The Promise of Demand Side Employer-Based Strategies to Increase Employment Rates for People Living with Serious Mental Illnesses*, 40 *PSYCHIATRIC REHAB. J.* 179, 180 (2017) (noting low cost of many accommodations).

¹⁸See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397–98 (2002) (describing the conflict with neutral rule does not make accommodation unreasonable); Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §1630 (2011); *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000) (citing *Sch. Bd. v. Arline*, 480 U.S. 273, 287 (1987)).

interpretation of the duty to accommodate, the veteran with PTSD described above might have had the opportunity to show that he could continue to work at Ford.

I. THE ADA'S DUTY TO ACCOMMODATE

A reasonable accommodation is required if it would enable a person with a disability to perform the essential duties of the position without imposing an undue hardship on the employer.¹⁹ An employer must provide at least one such reasonable accommodation unless the accommodation “would impose an undue hardship on the operation” of the employer.²⁰ Accommodations can be used to preserve the employee’s status as a “qualified individual,” but both reasonableness and undue hardship should be assessed based on “the needs and disability of the employee and the resources and expectations of the employer.”²¹

An employee can demonstrate the reasonableness of an accommodation by showing that other employers in the industry provide similar accommodations or “‘some of the more obvious and visible circumstances’ of the employer indicating that the accommodation is ‘facially practicable.’”²² The ADA excludes protection for a person with a disability who poses a direct threat to themselves or others,²³ defined as a risk that “cannot be eliminated by reasonable accommodation.”²⁴ Thus, employers must consider the possibility that an accommodation would ameliorate a perceived direct threat.²⁵

¹⁹42 U.S.C. § 12111(8) (2012); *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014).

²⁰42 U.S.C. § 12111(8),

²¹Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKLEY J. EMP. & LAB. L. 68, 110 (2008).

²²Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 145 (2003).

²³*Id.*

²⁴42 U.S.C. § 12111(3) (2012).

²⁵*Id.*; see *Emerson v. N. States Power Co.*, 256 F.3d 506, 514 (7th Cir. 2001) (considering whether direct threat could be eliminated by accommodation).

Accommodation can be essential to enabling people with disabilities to perform the essential functions of their job.²⁶ Accommodation in the workplace can address the “structural” and/or “dynamic” discrimination that imposes additional employment barriers for people with disabilities.²⁷ Accommodations allow people with disabilities to compete on “level ground with the nondisabled workforce,” which can be seen as a “form of equal opportunity, not a form of advantage.”²⁸ Thus, accommodations are distinctly important for the inclusion of people with psychiatric disabilities in the workplace.

Accommodations are directly related to positive employment outcomes for people with psychiatric disabilities.²⁹ Work provides a means of self-support, and also helps people with psychiatric disabilities avoid relapse, contribute to society, feel normal, and build confidence.³⁰ Accommodation can break the cycle of unemployment, which perpetuates feelings of inadequacy and dependency, thus perpetuating periods of unemployment.³¹ Moreover, accommodations can promote job retention³² through enhanced job satisfaction and well-being.³³ With such accommodations in place, people with psychiatric disabilities have an opportunity for improved performance and promotion, which can help address the negative assumptions about this group.

²⁶42 U.S.C. § 12111(8).

²⁷Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 904–05 (2000).

²⁸*Id.* at 905, 915.

²⁹Sheila H. Akabas & Lauren B. Gates, *A Social Work Role: Promoting Employment Equity for People with Serious and Persistent Mental Illness*, in ADMINISTRATION IN SOCIAL WORK 163, 166, 175 (Michàl E. Mor Barak & David Bargal eds., 2000) (stating employees who were accommodated inadequately experienced more negative employment outcomes).

³⁰Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 481 (2006).

³¹David Dooley, *Unemployment, Underemployment, and Mental Health: Conceptualizing Employment Status as a Continuum*, 32 AM. J. COMMUNITY PSYCHOL. 9, 16 (2003).

³²McDowell & Fossey, *supra* note 10, at 200–01; Clifton M. Chow et al., *The Impact of Job Accommodations on Employment Outcomes Among Individuals with Psychiatric Disabilities*, 65 PSYCHIATRIC SERVS. 1126, 1130–31 (2014).

³³Akabas & Gates, *supra* note 29, at 176.

The provision of accommodations can also benefit employers by helping attract and retain talent, as well as enhancing productivity.³⁴ Thus, accommodation allows employers to take advantage of the “unusual degree of creativity, high level of accuracy, or attention to detail,” which employees with psychiatric disabilities can bring to the workplace.³⁵ Conversely, the failure to accommodate otherwise qualified people with psychiatric disabilities excludes them from the workplace, which has been described as “a significant waste of potential.”³⁶ In addition, providing accommodations for employees with psychiatric disabilities can avoid costly turnover³⁷ and address attendance issues.³⁸ Accommodations also help employers avoid costs and liabilities associated with issues such as workplace violence, which can arise from employees both with and without disabilities.³⁹

Atypical accommodations, which can benefit employees with psychiatric disabilities in particular, lead to more satisfied employees and more productive and safer workplaces for all workers. Because atypical accommodations also can increase the overall economic productivity and an employee’s development,⁴⁰ other benefits might include greater dedication by employees, better identification of qualified candidates for promotion by employers, fewer insurance claims and reduced postinjury rehabilitation costs, and an improved corporate culture.⁴¹ Moreover, overall increased diversity in the workplace often leads to greater

³⁴Jeanette N. Cleveland et al., *Accommodation in the Workplace*, 7 HUM. RESOURCE MGMT. REV. 77, 99 (1997).

³⁵Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1375–76 (2008).

³⁶ILO, *DISABILITY INCLUSION STRATEGY AND ACTION PLAN 2014–17*, 1 (2015), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/genericdocument/wcms_370772.pdf.

³⁷Helen A. Schartz et al., *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 346 (2006).

³⁸Ami C. Janda, Comment, *Keeping a Productive Labor Market: Crafting Recognition and Rights for Mentally Ill Workers*, 30 HAMLINE J. PUB. L. & POL’Y 403, 435 (2008).

³⁹Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill,”* 34 U.C. DAVIS L. REV. 849, 927 (2001).

⁴⁰Waterstone & Stein, *supra* note 35, at 1376.

⁴¹*Id.* at 1377.

creativity, a better learning environment, increased attention to customer needs, and increased quality of service and goods provided.⁴²

In addition to these direct benefits to employers, changes in both the structure of the workplace and social interactions can be important to overcome any implicit biases that may interfere with hiring or retaining people with psychiatric disabilities. Research has shown that increased interaction with people with disabilities helps to reduce reliance on stereotypes and the influence of biases.⁴³ By accommodating people with psychiatric disabilities, both supervisors and coworkers will have increased contact with members of this group, which should alleviate the influence of such biases, resulting in an indirect but overall benefit to the organization. Despite these organizational benefits, the courts have failed to require atypical accommodations from employers. Part II reviews the litigation on this issue.

II. COURTS' FAILURE TO REQUIRE ATYPICAL ACCOMMODATIONS

People with psychiatric disabilities have arguably gained the least from the ADA's protections,⁴⁴ which may explain at least in part their persistent low participation rate in the labor market. Legislators who supported the ADA in 1990 expressed concern about including protections for those persons with psychiatric disabilities.⁴⁵ Even the disability community itself has "failed to defend with equal passion the rights and humanity of people with psychiatric disabilities."⁴⁶ With such lukewarm

⁴²Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 209–10 (2009).

⁴³Emens, *supra* note 30, at 480; Patrick W. Corrigan et al., *Challenging the Public Stigma of Mental Illness: A Meta-Analysis of Outcome Studies*, 63 PSYCHIATRIC SERV. 963–64, 967, 969 (2012).

⁴⁴Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 107–08, 110, 114–15 (2006).

⁴⁵Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 217 (2016).

⁴⁶NAT'L COUNCIL ON DISABILITY, FROM PRIVILEGES TO RIGHTS: PEOPLE LABELED WITH PSYCHIATRIC DISABILITIES SPEAK FOR THEMSELVES 10 (2000), https://ncd.gov/rawmedia_repository/21553992_2d13_4dcb_a1c4_e6c9e9434e8.pdf.

support, it may not be surprising that people with psychiatric disabilities have struggled to obtain atypical accommodations through ADA litigation.⁴⁷

The accommodation requirement of the ADA has not been fully realized for people with psychiatric disabilities, despite its importance in supporting their participation in the workforce. People with psychiatric disabilities have been significantly less likely to be accommodated than employees with physical disabilities.⁴⁸ Employers' failure to provide accommodations is illustrated in the Equal Employment Opportunity Commission's (EEOC) charge statistics. Almost one-fourth of all ADA charges in fiscal year (FY) 2016 involved a mental health condition or psychological disorder,⁴⁹ and half of those ADA charges alleged a failure to provide reasonable accommodation.⁵⁰ In contrast, in FY 2010, twenty-one percent of all charges concerned a person with a psychiatric disability,⁵¹ and one-third of all ADA charges alleged a failure to accommodate.⁵² In ADA claims, a sample of EEOC claimants with psycho-social impairments included twenty-five percent identifying depression as the exclusive impairment; another twenty-five percent of these claims alleged depression in combination with other disorders such as PTSD or anxiety.⁵³ These figures demonstrate the growing importance of the duty to accommodate people with psychiatric disabilities among claims of discrimination.

⁴⁷Amy L. Allbright, *2008 Employment Decisions Under the ADA Title I—Survey Update*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 363, 363, 365 (2009) (indicating the extremely high win rate for defendants in published ADA decisions).

⁴⁸McDowell & Fossey, *supra* note 10, at 200.

⁴⁹Patrick Dorrian, *Worker Mental Health Issues on the Rise: "Could Be Anyone,"* BLOOMBERG BNA (Jan. 26, 2017), <https://www.bna.com/worker-mental-health-n73014450290/>.

⁵⁰*Statutes by Issue (Charges Filed with EEOC) FY 2010–2017*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [hereinafter *Statutes by Issue*], https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Mar. 24, 2018).

⁵¹*ADA Charge Data by Impairment/Bases—Receipts (Charges Filed with EEOC) FY 1997–2017*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm> (last visited Mar. 24, 2018).

⁵²*Statutes by Issue*, *supra* note 50.

⁵³Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 69 (2005).

In December 2016 the EEOC issued guidelines regarding employees with mental health conditions, highlighting the importance of providing accommodations for people with psychiatric disabilities.⁵⁴ These guidelines, however, fail to emphasize the need for individualized accommodations, which do not rely on the stigma and stereotypes associated with psychiatric disabilities, despite the ADA's requirement of individualized assessment already enforced on behalf of employees with physical disabilities.⁵⁵ Perhaps more importantly, the EEOC has failed to recommend that employers consider structural and social changes to the workplace that can be more important for employees with psychiatric disabilities. Without such guidance, courts likely will continue to allow employers to deny structural and social accommodations for employees with psychiatric disabilities.

While some job restructuring has been required as a reasonable accommodation,⁵⁶ people with psychiatric disabilities have had less success in obtaining accommodations affecting the overall structure of the workplace such as performing duties in a different way, environmental changes, and exceptions to work rules. In addition, employers and courts have been reluctant to grant accommodations involving social relationships in the workplace such as interactions with supervisors and freedom from harassment. Courts have been reluctant to interpret the ADA as requiring such atypical accommodations that challenge an employer's managerial control over the workplace. Instead, courts give employers wide latitude to determine which accommodations are reasonable without ever establishing that an accommodation imposes an undue hardship on the employer's operation. Such latitude fosters a climate in which employers may rely on the stigma and stereotypes associated with psychiatric disabilities, rather than thoughtfully considering the merits of an accommodation request.⁵⁷

⁵⁴*Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/mental_health.cfm (last visited Mar. 24, 2018).

⁵⁵29 C.F.R. pt. 1630 (2012); *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000).

⁵⁶29 C.F.R. § 1630.2 (2012).

⁵⁷*See infra* text accompanying notes 167–89 for discussion of stigma and stereotypes.

A. Overall Approach to Requests for Accommodation

The inability of employees with psychiatric disabilities to obtain atypical accommodations highlights several weaknesses in courts' application of the ADA. First, courts have refused to enforce the ADA's requirement that employers individually assess employees to determine their qualifications and their need for accommodation. Second, courts' granting of motions for summary judgment to dispose of ADA claims undercuts the ability of employees with psychiatric disabilities to demonstrate their individual ability to perform the duties of their positions with reasonable accommodation, despite their diagnoses. Last, the ambiguity surrounding what constitutes a reasonable accommodation also works to the disadvantage of employees with psychiatric disabilities.

For twenty years, the EEOC Enforcement Guidance has recommended that the reasonableness of accommodations "must be determined on a case-by-case basis."⁵⁸ Likewise, courts have required such individualized analysis for more typical forms of accommodation such as leave.⁵⁹ In contrast, the decisions in which employees with psychiatric disabilities are denied accommodations demonstrate how courts have permitted employers to rely on diagnoses or general notions about qualities required of all employees to justify the denial of an accommodation for a person with a psychiatric disability. With more individualized analyses, employees with psychiatric disabilities would be given the opportunity to show how a requested accommodation would enable them to perform the job duties of their position.

Along with this lack of individualized analysis, court decisions reviewed in this article exemplify how the extensive use of summary judgment in ADA claims has undermined access to reasonable accommodations. Summary judgment is appropriate only when the employer can establish as a matter of law and without any questions of fact that the person with a disability was not "otherwise qualified," even with a reasonable accommodation proposed by the employee, or that the accommodation would

⁵⁸U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <https://www.eeoc.gov/policy/docs/accommodation.html> (describing that the modification of a workplace policy can be a reasonable accommodation).

⁵⁹*See, e.g., García-Ayala*, 212 F.3d at 650 (stating that, "These are difficult, fact intensive, case-by-case analyses, ill-served by *per se* rules or stereotypes.").

impose an undue hardship.⁶⁰ Despite some courts' declarations that "the determination of whether a particular accommodation is reasonable is 'ordinarily a question of fact' that is best left to the jury,"⁶¹ courts often resolve factual issues underlying a request for accommodation on a motion for summary judgment, resulting in no obligation to accommodate.⁶² In granting summary judgment for employers, courts often defer to an employer's determination that the employee with a psychiatric disability cannot perform the essential job duties or poses a direct threat in the workplace without considering the reasonableness of accommodations that might enable that employee to be successful in the workplace.

Despite the duty to accommodate, little discussion of accommodation arises in the numerous decisions in which courts accept employers' allegations that employees with psychiatric disabilities pose a direct threat. In one decision, for example, the court concluded that the plaintiff "was a disruptive influence by his threatening behavior," based on conflicts with coworker relations.⁶³ The court failed to consider whether any accommodations might ameliorate those conflicts in the future. On a motion for summary judgment, the plaintiff lacked an opportunity to present facts that might establish the reasonableness of an accommodation to enable her to perform the essential job duties or to negate any potential threat.

Generally, accommodations involving modifications of the work environment can provide people with psychiatric disabilities the opportunity to meet an employer's expectations. However, people with psychiatric disabilities may find it more difficult to get the accommodations they need because employers are more reluctant to provide, and courts are less likely to require, accommodations altering the structure

⁶⁰*Burdett-Foster v. Blue Cross Blue Shield of Mich.*, 574 F. App'x 672, 680 (6th Cir. 2014).

⁶¹*See EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010) (stating that the reasonableness of an accommodation is a question of fact to be decided by a jury).

⁶²*See, e.g., Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 900 n.9 (7th Cir. 2000) (rejecting as a matter of law that the accommodation was unreasonable).

⁶³*See, e.g., Krasner v. City of New York*, No. 11 Civ.2048(PGG), 2013 WL 5338558, at *12 (S.D.N.Y. Sept. 23, 2013) (stating that the ADA does not immunize disabled employees from discipline or discharge for incidents of misconduct in workplace).

of the workplace, such as when and how the work is completed or supervised, compared to providing accommodations that physically modify the job tasks or the workplace environment.⁶⁴ These modifications can address an employee's inability to perform the essential job duties, such as a person's inability to interact positively with a particular supervisor, but may be perceived as a threat to an employer's control over the social arrangement structure and overall authority in the workplace.⁶⁵ In general, however, the courts reviewing the denial of accommodations that would have allowed the performance of job duties often find that such accommodations are unreasonable on a motion for summary judgment, typically without requiring employers to show that the accommodation would impose an undue hardship on the employer.⁶⁶

Instead of resolving factual issues on a motion for summary judgment, courts should allow a jury to determine factual issues regarding the employee's ability to perform the essential functions of the job. For example, one court refused to dismiss the claim of a Boeing maintenance technician with PTSD by resolving factual issues related to her ability to handle stress and interact with others on the job.⁶⁷ Similarly, courts should follow the U.S. Supreme Court's guidance that, to survive a motion for summary judgment, a plaintiff "need only show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases."⁶⁸ In a subsequent decision, for example, a court refused to grant Boeing summary judgment on the question of whether it adequately accommodated its technician.⁶⁹ This exercise of restraint in

⁶⁴Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 5–6 (2014).

⁶⁵Sharon L. Harlan & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation*, 25 WORK & OCCUPATION 397, 424 (1998).

⁶⁶Vicki A. Laden & Gregory Schwartz, *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*, 21 BERKELEY J. EMP. & LAB. L. 246, 268 (2000).

⁶⁷*Peeler v. Boeing Co.*, No. C14-0552RSL, 2015 WL 6627984, at *4 (W.D. Wash. Oct. 30, 2015).

⁶⁸*See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002) (plaintiff satisfied burden on reasonableness by showing that the accommodation was feasible); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138–39 (2d Cir. 1995) (declaring that the plaintiff may meet the "burden of production" by identifying "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.").

⁶⁹*Peeler*, 2015 WL 6627984, at *4.

dismissing claims by employees with psychiatric disabilities provides them with the opportunity to present facts to a jury that may establish their ability to perform their job duties if they were reasonably accommodated.

B. Denial of Accommodations to Enable Performance of Job Duties

Accommodation is important to enable people with psychiatric disabilities both to perform essential job duties and to exhibit the characteristics or qualities deemed essential for a position. Beyond specific skills or education, essential duties can include the nature of interactions between supervisors and subordinates as well as tolerance of stress and insensitivity or abuse by supervisors or coworkers.⁷⁰ Defining the scope of the duty to accommodate has become particularly important when the employer claims that the applicant or employee is not qualified for a position because of a psychiatric disability.⁷¹ The duty to accommodate can help to address traditional assumptions about how work is performed and how employees must behave while at work.⁷² Such accommodations can include addressing negative behavior of coworkers and supervisors arising from stigma and stereotypes, as well as allowing work to be performed in different ways and assuring the job-relatedness of rules that govern workplace behavior.⁷³ Allowing such accommodations benefits people with psychiatric disabilities who are seeking to enter or remain in the workforce, and would enable employers to retain the talents and the diversity that these employees bring to the workplace.

Some employers willingly provide accommodations for employees with psychiatric disabilities, evidencing the potential benefits of such accommodations.⁷⁴ Overall, at least some employers report some benefit to

⁷⁰Stefan, *supra* note 4, at 802.

⁷¹*Id.* at 799; Basas, *supra* note 21, at 68; Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 829–30 (2003).

⁷²Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP'T POL'Y J. 293, 374 (2005).

⁷³*Id.*

⁷⁴*See, e.g.*, Christine Binui & Brian H. Kleiner, *New Developments Concerning Mental Disabilities Discrimination*, 19 EQUAL OPPORTUNITIES INT'L 62, 63 (2000) (discussing treatment of employees with psychiatric disabilities offered by the federal government).

supporting mental health among their employees.⁷⁵ Such accommodations typically include assistance from an employment support worker or job coach and flexible scheduling, with less frequent provision of modifications in training and supervision, or physical accommodations in the workplace.⁷⁶ Despite the success of these practices, many employers and courts continue to refuse to require atypical accommodations that would enable persons with psychiatric disabilities to perform their job duties and otherwise exhibit required characteristics or qualities.⁷⁷

Under the ADA, one is qualified for a position if the individual “satisfies the requisite skill, experience, education and other job-related requirements of the employment position,” and can perform the essential functions of the position with or without reasonable accommodation.⁷⁸ In determining which job functions are essential, EEOC guidance focuses on whether an employer actually requires that an employee perform a particular function.⁷⁹ The 2009 ADA amendments made it easier for claimants to establish that they have an impairment that could constitute a disability under the ADA, but claimants must still establish that they have a substantial limitation, while nonetheless showing they are otherwise qualified to perform the duties of the position.⁸⁰ A person with a psychiatric disability can find it difficult to meet these seemingly

⁷⁵Janda, *supra* note 38, at 435.

⁷⁶McDowell & Fossey, *supra* note 10, at 199.

⁷⁷*Id.* at 198; *see also* Delman et al., *supra* note 17, at 180 (employers are wary of hiring people with serious mental illness despite low cost of many accommodations); H. Stephen Kaye et al., *Why Don't Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUPATIONAL REHAB. 526, 533–35 (2011) (stating that cost and fear of litigation are given as reasons for not hiring people with disabilities); Anne Honey, *The Impact of Mental Illness on Employment: Consumers' Perspectives*, 20 WORK 267, 271 (2003) (documenting experiences with discrimination).

⁷⁸Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 269 (2005).

⁷⁹Margaret Hart Edwards, *The ADA and the Employment of Individuals with Mental Disabilities*, 18 EME REL. L.J. 347, 358 (1992).

⁸⁰Swanson et al., *supra* note 44, at 122; *see also* Kaminer, *supra* note 45, at 239 (describing how more plaintiff-friendly outcomes regarding disability status are offset by more employer-friendly outcomes with respect to qualified status).

conflicting proofs.⁸¹ Without a more expansive interpretation of the requirement to provide reasonable accommodation, this potential conflict can result in loss of employment for employees with disabilities.⁸²

Since the 2009 ADA amendments, courts have more frequently found that claimants are not otherwise qualified,⁸³ often based on the employer's belief that the impairment interferes with the performance of essential job duties.⁸⁴ Even the EEOC gives employers "substantial latitude" in determining which accommodations are reasonable,⁸⁵ which can result in the exclusion of people with psychiatric disabilities. In apparent contradiction to its allowance for deference to employers, the EEOC has warned against deferring to an employer's inclusion of subjective characteristics such as "optimism" or "happiness" as essential job duties.⁸⁶ Despite this warning, some courts have continued to defer to employers' determinations regarding subjective characteristics, such as the ability to maintain a "harmonious workplace,"⁸⁷ even when based on associated stigma and stereotypes.⁸⁸ By accepting these more subjective job duties,⁸⁹ employers can require mental health as a job requirement based on "traditional workplace views of how work is to be conducted,

⁸¹Margaret E. Vroman, *Mentally Disabled Employees and the ADAAA: What's an Employer to Do?*, 16 QUINNIPIAC HEALTH L.J. 149, 178 (2013).

⁸²See McDowell & Fossey, *supra* note 10, at 200–01; Chow et al., *supra* note 32, at 1130–31 (describing the importance of accommodations for employees with psychiatric disabilities).

⁸³Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2032 (2013); Paetzold, *supra* note 72, at 340.

⁸⁴See, e.g., *Kelley v. Amazon.com, Inc.*, 652 F. App'x 524, 526 (9th Cir. 2016) (stating that migraines interfered with ability to perform duties); *Stevens v. S. Nuclear Operating Co.*, 209 F. Supp. 3d 1372, 1378–79 (S.D. Ga. 2016) (concluding that the employee was unqualified to serve as nuclear security officer because of emotional instability).

⁸⁵Harlan & Robert, *supra* note 65, at 405.

⁸⁶U.S. Equal Emp't Opportunity Comm'n, *Technical Assistance Manual: Title I of the ADA § 2.3(a)*, JOB ACCOMMODATION NETWORK (1992), <https://askjan.org/links/ADAtam1.html#II>.

⁸⁷Janda, *supra* note 38, at 419; see also Kaminer, *supra* note 45, at 239 (courts give deference to employer's determination).

⁸⁸Paetzold, *supra* note 72, at 341, 370–71.

⁸⁹*Id.* at 373–74.

particularly with regard to workplace cultures and attitudes regarding persons with mental disorders.”⁹⁰

Under such deference, employers can choose to define the social skills that are “essential” for a variety of jobs, such as interacting with supervisors and coworkers in a certain way.⁹¹ Such discretion allows employers to refuse to accommodate employees with psychiatric disabilities who might be able to fulfill the social aspects of a job, albeit in a way that differs from the employer’s expectations. Instead, courts have allowed employers to refuse to accommodate employees with psychiatric disabilities based on an assumption that they cannot meet that employer’s specific expectations regarding social behavior, often by relying on diagnoses or the employee’s actions in a completely different setting or situation. For example, a person’s inability to get along with one or a few people may be generalized into an inability to get along with anyone, making that person unqualified for the job.⁹² Thus, a person with a psychiatric disability displaying any inability to get along with others may be assumed to be unqualified for a position based only on the possibility that the person is likely to engage in the prohibited conduct in the future.⁹³

In addition to relying on such assumptions, employers could refuse to accommodate an employee who allegedly imposes hedonic costs on others in the workplace such as making coworkers feel uncomfortable or sad.⁹⁴ Allowing employers to require the absence of hedonic costs as a job requirement undermines the ADA’s protection for people with

⁹⁰*Id.* at 325.

⁹¹Stefan, *supra* note 4, at 821–22; *see also* Timmons, *supra* note 78, at 269–70 (describing that an essential function of every job is to refrain from disruptive, contentious, or insubordinate behavior); Emens, *supra* note 30, at 454 (stating that essential job functions can include not “offending customers” and “getting along” with others).

⁹²Stefan, *supra* note 4, at 821.

⁹³Timmons, *supra* note 78, at 269–70.

⁹⁴Thomas E. Joiner, Jr. & Jennifer Katz, *Contagion of Depressive Symptoms and Mood: Meta-Analytic Review and Explanations from Cognitive, Behavioral, and Interpersonal Viewpoints*, 6 CLINICAL PSYCHOL.: SCI. & PRAC. 149, 150 (1999) (describing that meta-analysis shows “strong overall support” for the “phenomenon of contagious depression”); *see, e.g.*, EEOC v. Amego, Inc., 110 F.3d 135, 137 (1st Cir. 1997) (stating that a depressed, suicidal employee could not perform essential functions of a job that included administering prescription medication to mentally disturbed clients).

psychiatric disabilities.⁹⁵ Thus, such subjective job requirements should be “evaluated very carefully” to ensure that the requirement is a “core aim of the job, not a means to the job’s aim, and not peripheral to it.”⁹⁶

This deference to employers’ positions that they cannot accommodate a lack of certain social or employability skills is illustrated by decisions that have dismissed claims of employees who have an intolerance for stressful work environments, who allegedly pose a direct threat in the workplace, and who have difficulty interacting with a particular supervisor. Instead, courts should follow the lead of a minority approach in which an employer cannot assume that an employee is unqualified based on one negative incident in the past, particularly when the person’s ability to perform with accommodation is supported by a health care professional.⁹⁷

1. Accommodations to Avoid Stress

Courts have refused to require accommodations that would help an employee with a psychiatric disability handle work-related stress, despite the EEOC’s position that reasonable accommodations “may involve changes to workplace policies, procedures, or practices.”⁹⁸ The ability to tolerate stress without accommodation is an example of a “skill” that is increasingly deemed a prerequisite for work,⁹⁹ which could be enhanced by atypical accommodations. Because some people with psychiatric disabilities may be triggered by stress, or may need to employ unconventional coping strategies to ameliorate stressors (such as the comfort animal requested by the Ford employee), requiring such a “skill” as a subjective job requirement has a significant negative impact. Without engaging in a more individualized inquiry to determine if a particular

⁹⁵Emens, *supra* note 30, at 454.

⁹⁶*Id.* at 456; *see also* Timmons, *supra* note 78, at 278 (courts should not assume that “getting along” with coworkers and customers is an essential function of every job).

⁹⁷*See* Monroe v. Co. of Orange, No. 14-CV-1957 (KMK), 2016 WL 5394745, at *4–5 (S.D.N.Y. Sept. 27, 2016).

⁹⁸U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58 (describing that the modification of a workplace policy can be a reasonable accommodation).

⁹⁹Stefan, *supra* note 4, at 825–27; *see, e.g.*, Koessel v. Sublette Co. Sheriff’s Dep’t, 717 F.3d 736, 743–44 (10th Cir. 2013) (determining that the sheriff’s office employee was required to handle stressful situations).

job requires toleration of specific stress-inducing situations, courts typically accept an employer's assertion that stress is an inherent part of any job and that interventions to reduce potential stressors are not reasonable accommodations.¹⁰⁰ Courts have explained that the ADA does not require that an employer provide a "work environment without aggravation," by altering the composition of a work group or requiring that coworkers or even supervisors alter their behavior as an accommodation.¹⁰¹ For example, avoiding aggravations of an employee's stress was an unreasonable accommodation where the accommodation would depend upon the employee's stress level at any given time.¹⁰²

Rather than requiring that an employer demonstrate that the reduction of stressors for a particular employee would impose an undue hardship, courts have dismissed such claims on motions for summary judgment based on plaintiffs' failure to show that the reduction of stressors would be reasonable.¹⁰³ A "stressful or abusive workplace is still commonly defended as the employer's prerogative," and "such changes in working conditions threatens deeply held beliefs about employer prerogatives."¹⁰⁴ Deference to an employer's imposition of stress toleration as a job duty hearkens back to courts' reluctance to curb an employer's control over the workplace.¹⁰⁵

For example, a family service caseworker could not refuse to handle a particularly difficult case that aggravated her depression and anxiety, because allowing her to refuse cases would undermine the management of the agency.¹⁰⁶ To that employer's credit, the plaintiff was offered other ways to deal with the difficult case, such as supervisor accompaniment on visits. Even so, the employer was never required to prove that the reassignment of one case would impose an undue hardship.

¹⁰⁰Stefan, *supra* note 4, at 805; *see, e.g.*, Mayo v. PCC Structural, Inc., 795 F.3d 941, 945 (9th Cir. 2015) (stating the ability to handle stress is an essential function).

¹⁰¹Kaminer, *supra* note 45, at 243.

¹⁰²Gaul v. Lucent Techs., Inc., 134 F.3d 576, 579, 581 (3d Cir. 1998).

¹⁰³Stefan, *supra* note 4, at 841.

¹⁰⁴*Id.*

¹⁰⁵Paetzold, *supra* note 72, at 373–74.

¹⁰⁶*See* Hill v. Walker, 737 F.3d 1209, 1217 (8th Cir. 2013).

A second trial court expanded on this reasoning and found an accommodation to be unreasonable because it included avoiding coworkers engaging in behaviors such as excessive talking and profanity, which aggravated the plaintiff's stress.¹⁰⁷ The court concluded that such an accommodation would impose an "extraordinary administrative burden" on the employer, without requiring that the employer actually prove an undue hardship. Instead, the court opined that "[n]either the ADA nor this Court can ensure good manners" and that "judicial micro-management" of the employer's personnel arrangements was "inappropriate."¹⁰⁸ These decisions, which find it unreasonable to require that employers address causes or triggers of an employee's stress, allow employers to require working in a stressful environment without any proof from the employer that addressing such stressors would impose an undue hardship on their operations. Thus, employers are allowed to define the duties of a position so as to exclude directly people with psychiatric disabilities who cannot tolerate certain stressors, regardless of whether the job could be restructured or social accommodations could be provided that could reduce those stressors. A minority of courts have required that employers at least reorganize work duties to address stressful circumstances, in contrast to the decisions that refused to provide such a reorganization of work.

These decisions demonstrate that a rearrangement of duties can be effective in addressing the stressors that interfere with the performance of an employee with a psychiatric disability. For example, a jail employee was able to survive a motion for summary judgment based on his reasonable request to be assigned to less demanding situations after suffering a panic attack, where less stress-inducing situations were available and the jail had made similar arrangements in the past.¹⁰⁹ This plaintiff benefited from the characterization of his accommodation as a request to be assigned to light duty, rather than a more ambiguous request for a reduction in stressors.

¹⁰⁷Williams v. N.Y. State Dep't of Labor, No. 98 Civ. 3816 (RMB), 2000 WL 33175735, at *18 (S.D.N.Y. May 24, 2000).

¹⁰⁸*Id.*

¹⁰⁹Monroe v. Co. of Orange, No. 14-CV-1957 (KMK), 2016 WL 5394745, at *20 (S.D.N.Y. Sept. 27, 2016).

Allowing employers to require tolerance of stress for any job makes access to the workplace difficult for people with psychiatric disabilities for several reasons. First, this means there is no job for which they are qualified as all jobs have the *potential* to be stress-inducing,¹¹⁰ when in fact some workplaces may not be stressful for a particular individual. Second, such an assumption prevents employees with some sensitivity to stressors from exploring potential changes to their workplaces that could alleviate that stress without imposing too great a burden on the employer, as in the decision involving the jail. Rather than allowing employers to require a general and unmitigated toleration of all stressors for any position, courts should require at a minimum that employers consider the reasonableness of specific changes in work arrangements, such as the presence of a service dog or change in assignments, which could enable the person with a psychiatric disability to continue working.

2. Accommodations to Avoid Posing a Direct Threat

Analogous to the inability to handle stress, employees may also be unqualified for a position under the ADA if they pose a direct threat to themselves or others.¹¹¹ Employers often assert that an employee with a psychiatric disability poses a direct threat based on a diagnosis alone or on a past failure to comply with employer policies.¹¹² Of course, employers have an interest in promoting a nonthreatening workplace,¹¹³ but a direct threat defense is only as valid as the accuracy of the

¹¹⁰Angela T. Hall et al., *Relationships Between Felt Accountability As a Stressor and Strain Reactions: The Neutralizing Role of Autonomy Across Two Studies*, 11 J. OCCUPATIONAL HEALTH PSYCHOL. 87, 90 (2006).

¹¹¹42 U.S.C. § 12111(3) (2012).

¹¹²*See, e.g.*, *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003) (concluding that an employee whose unacceptable behavior threatens the safety of others is not qualified); *Palmer v. Circuit Court of Cook Cty.*, 117 F.3d 351, 352 (7th Cir. 1997) (stating that the ADA only protects “qualified” employees, excluding employees who threaten other employees); *see also*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58 (employee who threatens supervisor with physical harm is “no longer a qualified individual”).

¹¹³*See, e.g.*, *Cooper v. CLP Corp.*, 679 F. App’x 851, 854 (11th Cir. 2017) (explaining employer’s obligations to avoid liability for hostile work environment).

employer's prediction that the employee does in fact pose such a threat.¹¹⁴

An employer should make an individualized assessment of the risk posed by the particular individual in the specific job, based on current medical knowledge or other objective evidence regarding that individual employee, not based on a diagnosis alone.¹¹⁵ An employer's "belief that a significant risk existed, even if maintained in good faith," cannot establish a direct threat.¹¹⁶ Moreover, the ADA requires that employers consider the possibility that an accommodation would ameliorate the threat.¹¹⁷

Instead of engaging in an objective analysis of whether a direct threat exists, employers often rely on stereotypes to support their concerns that an employee with a psychiatric disability will be a threat in the workplace. Without challenging this reliance on stereotypes, courts have deferred to an employer's decision that an employee who has engaged in misconduct poses a direct threat and can be disciplined or discharged even for behavior arising because of the person's disability.¹¹⁸ Even without such misconduct, courts have long been deferential to general assumptions and employer conclusions regarding whether a person with a psychiatric disability poses a direct threat.¹¹⁹ For example, an employer was allowed to conclude that a power company's customer information consultant with a history of panic attacks posed a direct threat based on the occasional need for her to handle safety

¹¹⁴Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 (2002).

¹¹⁵29 C.F.R. § 1630.2(r) (2012); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58, at Questions 32, 34; *see also* Timmons, *supra* note 78, at 268; Laden & Schwartz, *supra* note 66, at 263–64.

¹¹⁶Bragdon v. Abbott, 524 U.S. 624, 649 (1998).

¹¹⁷42 U.S.C. § 12111(3) (2012).

¹¹⁸*See* Timmons, *supra* note 78, at 189; *see also* Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 587, 646 (2003) (holding employee to same standard of performance even when misconduct is caused by psychiatric disability).

¹¹⁹*See, e.g.*, Franklin v. U.S. Postal Service, 687 F. Supp. 1214 (S.D. Ohio 1988) (holding that a service station clerk with history of antisocial behavior and uncontrollable paranoid schizophrenia poses a direct threat).

sensitive calls, without any demonstrated inability to do so in the past.¹²⁰ Another court went so far as to dismiss the claim of a Customs and Border Protection Officer with disputed depression and suicidal ideations based on his employer's belief that he posed a direct threat, repeating an earlier court's reasoning that an employment discrimination case "is not a vehicle for substituting the judgment of a court for that of the employer."¹²¹ As one expert noted, "the scientific approach to risk advanced by the ADA has frequently been subordinated to a less rigorous approach characterized by overgeneralization, stereotyping, and other forms of heuristic thinking."¹²²

To avoid overreliance on stereotypes, a limited number of courts require employers to make an individualized assessment of whether a person with a psychiatric disability poses a direct threat.¹²³ These courts have required an employer to provide evidence to allow the court to "definitely conclude" that the person with a psychiatric disability posed a threat.¹²⁴ Some have recognized that a person with behavioral manifestations of a psychiatric disability need not necessarily act the same as those people who do not have a psychiatric disability to avoid posing a direct threat.¹²⁵

An employee with a psychiatric disability may be characterized as unqualified based on violation of an employer policy or rule, or even a broader expectation of appropriate workplace behavior, because compliance with such standards often is seen as protection against threatening

¹²⁰See *Emerson v. N. States Power Co.*, 256 F.3d 506, 513–14 (7th Cir. 2001); *but see* *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220–21 (2d Cir. 2001) (concluding that an employee with epilepsy did not pose a direct threat without evidence of past harm, with support from neurologist's opinion); *Branham v. Snow*, 392 F.3d 896, 907–08 (7th Cir. 2004) (determining that an IRS investigator applicant with diabetes did not pose direct threat based on past ability to control condition).

¹²¹*Cousin v. United States*, 230 F. Supp. 3d 475, 492 (E.D. Va. 2017), *aff'd*, 691 F. App'x 780 (4th Cir. 2017) (citing *DeJarnette v. Corning Inc.*, 133 F.3d 293, 298–99 (4th Cir. 1998)).

¹²²*Laden & Schwartz*, *supra* note 66, at 264.

¹²³*Kaminer*, *supra* note 45, at 247.

¹²⁴*Id.*

¹²⁵*Korn*, *supra* note 118, at 642.

behavior.¹²⁶ As provided for employees with physical disabilities, courts should be sure to provide similarly positioned employees with psychiatric disabilities an opportunity to establish that any such violations were explainable by circumstances other than their psychiatric disability.¹²⁷

Even with objective evidence of a threat, an employer should consider accommodations that can ameliorate a threat posed by an employee with a psychiatric disability.¹²⁸ In the case of the customer consultant, for example, the court did consider the validity of the employer's position that her potential inability to handle safety sensitive calls could be accommodated.¹²⁹ Despite the duty to accommodate, little discussion of accommodation arises in the numerous decisions in which employers have established that employees with psychiatric disabilities pose a direct threat.

Where an employee's misconduct does not constitute a direct threat, courts still have held that "ignoring or excusing employee misconduct—even if caused by an underlying illness—is not a reasonable accommodation."¹³⁰ Even where the rule violation arguably has had no negative impact on the employer, courts have held that a second chance was not a reasonable accommodation because "the ADA's reasonable accommodation provisions refer to changes in 'ordinary work rules, facilities, terms, and working conditions,' not altering the employment relationship itself."¹³¹ Thus, employers have not been required to establish the necessity of the conduct standard violated or that some relaxation of that standard would somehow impose an undue hardship on that employer.

3. Transfers Away from Supervisor or Coworkers

Like toleration for stress, employees are expected to tolerate any and all conduct by their assigned supervisor as an essential job duty. This logic

¹²⁶Laden & Schwartz, *supra* note 66, at 267.

¹²⁷*See, e.g.,* Stragapede v. City of Evanston, 865 F.3d 861, 867 (7th Cir. 2017) (holding that the jury is free to conclude that water services worker with traumatic brain injury did not pose direct threat, based on explanation for past incidents).

¹²⁸Hubbard, *supra* note 39, at 864–65.

¹²⁹Emerson, v. N. States Power Co., 256 F.3d 506, 514–15 (7th Cir. 2001).

¹³⁰Kaminer, *supra* note 45, at 245.

¹³¹Timmons, *supra* note 78, at 290.

has had seriously negative consequences for employees with psychiatric disabilities, particularly where their symptoms are aggravated by the behavior or even the harassment of a particular supervisor. Courts have been fairly consistent in refusing to require a change in supervisors as a reasonable accommodation.¹³² For example, one court explained that it was “loathe to tell a company how to structure its workforce.”¹³³ These decisions fail to consider that, rather than reassigning supervisors or employees, employees with psychiatric disabilities may only need to be supervised in a different way. Managers often lack the knowledge to recognize and manage psychiatric disabilities among their employees, and many employers lack a plan to address mental health in the workplace in the absence of such knowledge.¹³⁴

Courts regularly find that an employer is not required to assign an employee to a different supervisor as a reasonable accommodation, because employees should be able to tolerate any supervisor, even if interpersonal difficulties result for the employee with a disability.¹³⁵ Like the reluctance to direct a reduction in stress in the workplace, one court justified the rejection of a request for change in supervision because reasonable accommodation does not include a supervisor “ideally suited” to the needs of the employee with a disability.¹³⁶ As a second court explained, it would be unreasonable to require an employer to “juggle personnel so as to entirely remove the possibility that a supervisor may offend a particular employee.”¹³⁷ Even though a per se rule against changing supervisors as an accommodation has been seen as inconsistent with the ADA, those courts still presume that requiring

¹³²See *Pack v. Ill. Dep’t of Healthcare & Family Svcs.*, No. 13-cv-8930, 2015 WL 507555, at *4–5 (N.D. Ill. Feb. 5, 2015); *Roberts v. Kaiser Found. Hosp.*, No. 2:12-cv-2506-CKD, 2015 WL 545999, at *7–8 (E.D. Cal. Feb. 10, 2015), *aff’d*, 690 F. App’x 535 (9th Cir. 2017); *Gazzano v. Stanford Univ.*, No. 5:12-cv-05742-PSG, 2014 WL 794803, at *4 n.59 (N.D. Cal. Feb. 27, 2014).

¹³³See *Bradford v. City of Chicago*, 121 F. App’x 137, 140 (7th Cir. 2005) (determining that the choice of supervisor belongs to employer, not employee).

¹³⁴*Janda*, *supra* note 38, at 429.

¹³⁵*Stefan*, *supra* note 4, at 801.

¹³⁶*Ghoston v. Nissan N. Am., Inc.*, No. 3:05CV766HTW-LRA, 2008 WL 879737, at *5 (S.D. Miss. Mar. 30, 2008).

¹³⁷*Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 131 (D.N.H. 1995).

a change of supervisors would be unreasonable.¹³⁸ Plaintiffs with psychiatric disabilities have been successful only if a request for a change in supervision is presented as a request for a transfer to a vacant position for which the employee is qualified,¹³⁹ which has been readily accepted as a reasonable accommodation.¹⁴⁰ Courts are willing to require such transfers as reasonable accommodations if the availability of a vacancy shows that there is little “organizational cost” to allowing such a transfer.¹⁴¹

Courts have refused to require an employer to transfer an employee away from a supervisor even if the interaction with that supervisor aggravates or even caused their condition.¹⁴² For example, an employee subjected to harassment by a supervisor was denied separation from that supervisor as a reasonable accommodation.¹⁴³ In that case, the plaintiff’s job functions required interaction with the harassing supervisor, and the harassment continued even when the employer attempted to separate the harassing supervisor from the employee with a disability.¹⁴⁴ This court explained that, even if separation from a supervisor was reasonable as an accommodation, that accommodation would not allow the employee with a disability to perform the essential functions of his position.¹⁴⁵

¹³⁸Theilig v. United Tech. Corp., 415 F. App’x 331, 333 (2d Cir. 2011); Bento v. City of Milford, 213 F. Supp. 3d 346, 363 (D. Conn. 2016).

¹³⁹See, e.g., Lozano v. Cty. of Santa Clara, No. 5:14-cv-02992-EJD, 2017 WL 945025 at *2–4 (N.D. Cal. Jan. 13, 2017) (treating request for change in supervision as request for transfer to another position).

¹⁴⁰Stacy M. Hickox, *Transfer As an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 196–201 (2009).

¹⁴¹Felix v. City & Cty. of Denver, 729 F. Supp. 2d 1243, 1264 (D. Colo. 2010).

¹⁴²Kaminer, *supra* note 45, at 243; Timmons, *supra* note 78, at 287; see, e.g., Beair v. Summit Polymers, No. 5:11-420-KKC, 2013 WL 4099196, at *8 (E.D. Ky. Aug. 13, 2013) (transferring employee to be subjected to less supervision is not reasonable accommodation); Larson v. Va. Dep’t of Transp., No. 5:10-cv-00136, 2011 WL 1296510, at *2 (W.D. Va. Apr. 5, 2011) (concluding that there was no right to transfer away from supervisor who was genesis of condition).

¹⁴³Whalen v. City of Syracuse, No. 5:11-CV-0794, 2014 WL 3529976, at *3–8 (N.D.N.Y. July 15, 2014) (determining that interaction could not be avoided).

¹⁴⁴*Id.* at *18.

¹⁴⁵*Id.*

The ability to get along with coworkers or comply with supervisors, and other such behavioral standards, are assumed to be unvarying and universal.¹⁴⁶ Thus, an employer has not been expected to accommodate an employee by requiring that a supervisor apply “softer management approaches,”¹⁴⁷ even without changing supervision. Moreover, the employee requesting the accommodation may find it difficult to meet the burden of showing that the costs of the change of supervision or even supervisory methods do not exceed the benefits.¹⁴⁸ Despite this reference to costs, one court failed to place the burden of proof on the employer to establish that the accommodation would impose an undue hardship, instead ruling on a motion for summary judgment that the accommodation was unreasonable.¹⁴⁹ Furthermore, these courts have not considered requiring an employer to address the supervisory practices that aggravated the plaintiffs’ impairments.

Like changes in supervision, courts have been reluctant to require accommodations for employees who have difficulties interacting with others. Even if a person with a psychiatric disability reacts as a victim of harassment, that reaction has been characterized as a “personality conflict,” which does not warrant accommodation.¹⁵⁰ Like the tolerance for stress, abuse in the workplace has been characterized as a “natural, necessary, and defensible prerogative of superior rank,” requiring “stamina and resilience” from victims.¹⁵¹ Consequently, courts applying the ADA have not required that employers address

¹⁴⁶*See, e.g.*, *Keil v. Select Artificials*, 169 F.3d 1131, 1137 (8th Cir. 1999) (concerning a deaf employee that was denied any permanent accommodation and discharged for confronting supervisor in front of several coworkers).

¹⁴⁷*Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 131 (D.N.H. 1995).

¹⁴⁸*Theilig v. United Tech. Corp.*, 415 F. App’x 331, 333 (2d Cir. 2011); *Kennedy v. Dresser Rand*, 193 F.3d 120, 123 (2d Cir. 1999). Many accommodations for employees with psychiatric disabilities require little to nothing in direct costs. Korn, *supra* note 118, at 619; Teresa L. Scheid, *Employment of Individuals with Mental Disabilities: Business Response to the ADA’s Challenge*, 17 BEHAVIORAL SCI. & L. 73, 82 (1999).

¹⁴⁹*Theilig*, 415 F. App’x at 313.

¹⁵⁰*Stefan*, *supra* note 4, at 813–14; *see, e.g.*, *Bradford v. City of Chicago*, 121 F. App’x 137, 140 (7th Cir. 2005) (stating that the ADA does not protect people from general stresses of the workplace).

¹⁵¹Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 1–2 (1988).

harassment of people with psychiatric disabilities or even “insist on a workplace environment of civility.”¹⁵² Thus, employees with psychiatric disabilities who have been screamed at, assaulted, treated unfairly by supervisors, or mocked by coworkers have been unsuccessful in seeking accommodation to escape such mistreatment, even when the court recognized that the treatment was unfair, a violation of the employer’s conduct, or even intolerable.¹⁵³ In contrast, interpersonal difficulties associated with a physical impairment have been recognized as protected and worthy of accommodation under the ADA.¹⁵⁴

In rare circumstances, an employee with a psychiatric disability has argued successfully for a “normal” workplace as an accommodation. In a case where the harassing environment triggered her emotional dysregulation,¹⁵⁵ for example, the court refused to dismiss the employee’s claim because she could potentially prove at trial that her symptoms would not occur if she were assured a “normal” workplace.¹⁵⁶ At trial, however, her claim was dismissed in part because she failed to establish that the work environment was sufficiently severe or pervasive to create an abusive working environment, supporting the conclusion that she lacked the coping skills needed to return to work in that environment regardless of any potential accommodation.¹⁵⁷

Even these decisions that analogize a request for a change of supervision to readily accepted requests for transfers as accommodations show the barriers to accommodation faced by employees with psychiatric disabilities. Such accommodations should be treated as reasonable in the case of a supervisor or coworker who has created a hostile work environment for the employee with a disability. By addressing behaviors by supervisors and coworkers that may create an “abnormal” workplace or

¹⁵²Stefan, *supra* note 4, at 801.

¹⁵³*Id.* at 803–04.

¹⁵⁴*Id.* at 814; *see, e.g.*, *Gilday v. Mecosta Cty.*, 124 F.3d 760, 765 (6th Cir. 1997) (stating that the change of duties may have allowed employee with diabetes to control blood sugar fluctuations that made him rude).

¹⁵⁵*Peeler v. Boeing Co.*, No. C14-0552RSL, 2015 WL 6627984, at *1–4 (W.D. Wash. Oct. 30, 2015).

¹⁵⁶*Id.*

¹⁵⁷*Id.*

even a workplace that includes triggers for that employee, the ADA could enhance opportunities for such employees to succeed without imposing a formidable cost on employers.

III. STIGMA'S IMPACT ON EMPLOYMENT OF PEOPLE WITH PSYCHIATRIC DISABILITIES

The stigma and stereotypes associated with people with psychiatric disabilities has had a significant impact on their employment. In 2016 persons with disabilities aged sixteen to sixty-four had a labor force participation rate¹⁵⁸ of 31.2% and an unemployment rate of 11.5%, compared to a participation rate of 76.4% and an unemployment rate of 4.7% among persons with no disability.¹⁵⁹ These rates represent a downward trend in the employment of people with disabilities since the ADA came into effect.¹⁶⁰ Data on the employment of people with psychiatric disabilities in particular are limited, but one study found that persons with cognitive difficulties, including individuals with psychiatric disabilities, had a labor force participation rate of seventeen percent and an employment rate¹⁶¹ of twenty-one percent, compared to an employment rate of seventy percent for working age people without a disability.¹⁶² At least some of this disparity in labor force participation can be attributed to employers' reluctance to hire or retain people with psychiatric

¹⁵⁸The labor force participation rate is the percentage of the civilian noninstitutional population sixteen years and older that is either employed or actively seeking work. Steven F. Hipple, *Labor Force Participation: What Has Happened Since the Peak?*, MONTHLY LAB. REV. (BUREAU OF LABOR STATISTICS) 1 (2016), <https://www.bls.gov/opub/mlr/2016/article/pdf/labor-force-participation-what-has-happened-since-the-peak.pdf>.

¹⁵⁹*Bureau of Labor Statistics, supra* note 3, at tbl. A.

¹⁶⁰Burt S. Barnow, *The Employment Rate of People with Disabilities*, MONTHLY LAB. REV. (BUREAU OF LABOR STATISTICS) 44, 47 (2008), <https://www.bls.gov/opub/mlr/2008/11/art3full.pdf>.

¹⁶¹Employment rate defined as persons in employment as a percentage of the population of working age (fifteen to sixty-four years of age). *Glossary of Statistical Terms*, ORG. FOR ECON. CO-OPERATION DEV., <https://stats.oecd.org/glossary/detail.asp?ID=785> (last visited Mar. 24, 2018).

¹⁶²Michelle Yin & Dahlia Shaewitz, *One Size Does Not Fit All: A New Look at the Labor Force Participation of People with Disabilities*, AM. INSTS. FOR RES. 4 (2013), <http://www.air.org/sites/default/files/downloads/report/Labor-Force-Participation-People-with-Disabilities-Yin-Sept-2015.pdf>.

disabilities.¹⁶³ This reluctance arises at least in part from employers' negative perceptions about employing people with psychiatric disabilities based on both actual behavior¹⁶⁴ and the stigma attached to certain impairments.¹⁶⁵

Some psychiatric disabilities can interfere with a person's work, but accommodations can enable that person to perform his or her duties. Employees with psychiatric disabilities most commonly need accommodation for functional limitations in the areas of cognitive and social–interpersonal functioning in the workplace, as well as physical and emotional limitations,¹⁶⁶ which can include learning job tasks, concentrating, working independently, interacting with coworkers or customers, managing stress, adjusting to changes in the workplace, and experiencing physical side effects of medications.¹⁶⁷

Despite some common limitations, neither employers nor courts should assume that all people with psychiatric disabilities exhibit these limitations all the time,¹⁶⁸ particularly where appropriate medication and other treatments can address those limitations.¹⁶⁹ In determining whether a person is qualified for a position, with reasonable accommodation, “the applicant's or employee's skills are to be considered independent of preconceived attitudes about the relation of disability to current job qualifications.”¹⁷⁰ Thus, an employer should not assume based on a

¹⁶³Heather Stuart, *Mental Illness and Employment Discrimination*, 19 CURRENT OPINION IN PSYCHIATRY 522, 523 (2006) (describing that employers are more likely to hire applicants with physical disabilities).

¹⁶⁴Kaminer, *supra* note 45, at 213.

¹⁶⁵Scheid, *supra* note 148, at 76; *see also* Paetzold, *supra* note 72, at 325 (describing that stereotypes and stigmas prevent entry and retention of persons with psychiatric disabilities in workplace).

¹⁶⁶Kim L. MacDonald-Wilson et al., *Identifying Relationships Between Functional Limitations, Job Accommodations, and Demographic Characteristics of Persons with Psychiatric Disabilities*, 18 J. VOCATIONAL REHAB. 15, 16 (2003).

¹⁶⁷*Id.* at 22.

¹⁶⁸Akabas & Gates, *supra* note 29, at 174.

¹⁶⁹*Mental Health Medications*, NAT'L ALLIANCE ON PSYCHIATRIC DISABILITIES (August 2017), <https://www.nami.org/Learn-More/Treatment/Mental-Health-Medications>.

¹⁷⁰Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 355 (1997).

diagnosis alone that a person with a psychiatric disability cannot perform the essential job duties of her position. Instead, employers should consider the individual characteristics of the person with a psychiatric disability, as the ADA requires,¹⁷¹ rather than concluding that an accommodation will be ineffective or overly burdensome based on an employee's diagnosis alone. While some people with a psychiatric disability may truly lack the ability to perform a particular job, many others may indeed be qualified with a combination of effective treatment and reasonable accommodations.

Those people with psychiatric disabilities who are capable of work still face the more significant barriers of stigma as well as stereotypes.¹⁷² Such a stigma has been defined as "undesired differentness" from what society deems to be "normal" or expected.¹⁷³ Stigma attached to disability is compounded for people with psychiatric disabilities, due to "sanism," which is defined as an irrational prejudice against anyone diagnosed with a psychiatric disability.¹⁷⁴ Stigma against people with psychiatric disabilities may be more profound because negative attitudes about this group may be more socially acceptable, based on a perception that "psychiatric disabilities are more amorphous and culturally constructed than other kinds of impairments."¹⁷⁵ Because psychiatric disabilities often are episodic, periods of being symptom free do not guarantee future behavior, and even health-care providers may not be able to define what constitutes recovery.¹⁷⁶ At the same time, a symptom-free person can suffer the effects of the stigma despite a "solid work history and impressive credentials."¹⁷⁷

In addition to these assumed negative traits, perceptions of fault also play a role in employers' unwillingness to tolerate and accommodate

¹⁷¹42 U.S.C. § 12111(8) (2012) and 29 C.F.R. § 1630.2(m) (2011) define "qualified individual" as a person with a disability who, "with or without reasonable accommodation, can perform the essential functions" of the position.

¹⁷²Paetzold, *supra* note 72, at 325.

¹⁷³Bagenstos, *supra* note 71, at 437.

¹⁷⁴Waterstone & Stein, *supra* note 35, at 1365.

¹⁷⁵Emens, *supra* note 30, at 404–06.

¹⁷⁶Kaminer, *supra* note 45, at 214–15.

¹⁷⁷Janda, *supra* note 38, at 427.

employees with psychiatric disabilities.¹⁷⁸ Society has often viewed psychiatric disabilities as “internally generated” and resulting from poor character and/or an unwillingness to conform.¹⁷⁹ As one psychologist observed, the behaviors of people with psychiatric disabilities “are commonly disapproved of in our society, and they should be held morally responsible for them.”¹⁸⁰ Such assumptions may explain the relatively stronger negativity associated with psychiatric disabilities as compared to people with physical impairments.¹⁸¹ This notion of fault may also explain the unwillingness of both employers and courts to require broader accommodations for people with psychiatric disabilities.

The ADA was adopted in large part to combat the stigma associated with people with disabilities,¹⁸² which often resulted in employers’ unwillingness to hire such individuals.¹⁸³ Even with the ADA in place, stigma can lead employers to exclude people with psychiatric disabilities from the workplace based on assumed lack of abilities.¹⁸⁴ This stigma affects employment decisions “by influencing how individuals process and recall information about other people.”¹⁸⁵ Thus, negative behaviors or attributes of a person with a psychiatric disability may be attributed to that impairment, rather than other situational factors.¹⁸⁶ Because psychiatric disabilities are often assumed to be “virtually untreatable,”¹⁸⁷ an

¹⁷⁸Anna T. Florey & David A. Harrison, *Responses to Informal Accommodation Requests from Employees with Disabilities: Multistudy Evidence on Willingness to Comply*, 43 ACAD. MGMT. J. 224, 230 (2000).

¹⁷⁹Hensel & Jones, *supra* note 53, at 54–55.

¹⁸⁰G. E. Zuriff, *Medicalizing Character*, 123 PUB. INT. 94, 99 (1996).

¹⁸¹Korn, *supra* note 118, at 602.

¹⁸²Bagenstos, *supra* note 71, at 436.

¹⁸³Harlan & Robert, *supra* note 65, at 401–02.

¹⁸⁴Waterstone & Stein, *supra* note 35, at 1361; *see also* Hensel & Jones, *supra* note 53, at 54 (stating seventy percent of employees believed employers treated them as “less competent”).

¹⁸⁵*See* Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 142 (2010) (arguing stereotypes affect perception, storage, and recall of information under theory of confirmation bias).

¹⁸⁶*Id.*

¹⁸⁷Korn, *supra* note 118, at 605.

applicant or employee will find it difficult to overcome this attribution. In addition, employers may be sensitive to the actual or perceived unwillingness of other employees to work with or be assisted by someone with a psychiatric disability,¹⁸⁸ particularly when employees and customers are assumed to share the decision-maker's preferences about members of certain groups.¹⁸⁹

Like the impact of stigma, stereotyping is negatively correlated with the target group's representation in the larger group, perception of fit with their occupations, the ambiguity of evaluation criteria, and the fluidity and team-oriented approach in the workplace.¹⁹⁰ Thus, both stigma and stereotypes can lead employers to make negative decisions about both applicants and employees when a psychiatric disability becomes known to a decision-maker.

The influence of stigma and stereotypes on employees with psychiatric disabilities is exemplified by courts' deference to employers' beliefs that employees with psychiatric disabilities pose a direct threat.¹⁹¹ A direct threat defense is only as valid as the accuracy of the employer's prediction that the employee does have a "potential of future violence."¹⁹² Instead of engaging in an objective analysis of whether a direct threat exists, employers often rely on stereotypes to support their concerns that an employee with a psychiatric disability will be a threat in the workplace.

Without challenging this reliance on stereotypes, courts have deferred to an employer's decision that an employee with a psychiatric disability poses a direct threat and can be disciplined or discharged even for misconduct arising because of the person's disability, without an opportunity to challenge the job-relatedness or necessity of the

¹⁸⁸Bernice A. Pescosolido et al., "A Disease Like Any Other"? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence, 167 AM. J. PSYCHIATRY 1321, 1324 (2010) (stating sixty-two percent of general public are unwilling to work closely with people diagnosed with schizophrenia and forty-seven percent are unwilling for those with depression).

¹⁸⁹Robert E. Thomas & Bruce Louis Rich, *Under the Radar: The Resistance of Promotion Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301, 311 (2005).

¹⁹⁰Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 484-86 (2005).

¹⁹¹42 U.S.C. §§ 12111(3), 12113(b) (2012).

¹⁹²*See, e.g.*, *Bodenstab v. Cty. of Cook*, 569 F.3d 651, 658-59 (7th Cir. 2009).

conduct standard.¹⁹³ Courts have long been deferential to employer assumptions regarding an employee's potential to pose a threat.¹⁹⁴ As one expert noted, "the scientific approach to risk advanced by the ADA has frequently been subordinated to a less rigorous approach characterized by overgeneralization, stereotyping, and other forms of heuristic thinking."¹⁹⁵

The power of such stigmas and attributions makes it particularly important that employers carry the burden of demonstrating that a proposed accommodation will create an undue hardship on their organizations, rather than relying on subjective information to justify the denial of an accommodation. Instead of relying on stigma and stereotypes, employers should engage in an individualized assessment of the risk posed by the particular individual in the specific job,¹⁹⁶ based on current medical knowledge and that employee's particular behavior, not based on a diagnosis alone.¹⁹⁷ Thus, to rely on the direct threat defense, an employer should not be able to assume that all persons with psychiatric disabilities, or even those with a particular diagnosis, pose a threat in the workplace; nor should an employer be permitted to rely on "popular myths and stereotypes" rather than "sound scientific analysis to establish a direct threat."¹⁹⁸

In making determinations about whether a person with a psychiatric disability is qualified for a job or poses a direct threat in the workplace, employers should only rely on objective evidence that a particular person does not possess specific skills or characteristics essential for the job, or

¹⁹³Timmons, *supra* note 78, at 189.

¹⁹⁴*See, e.g.*, Franklin v. U.S. Postal Serv., 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (holding that an employee with history of antisocial behavior with uncontrollable paranoid schizophrenia poses a direct threat).

¹⁹⁵Laden & Schwartz, *supra* note 66, at 264.

¹⁹⁶Kaminer, *supra* note 45, at 247; Korn, *supra* note 118, at 600, 608.

¹⁹⁷U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58, at Questions 32, 34; H.R. REP. NO. 485, pt. 2, at 58–59 (1990); S. REP. NO. 116, at 28 (1989) (noting that focus on group abilities goes against aims of ADA); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (defining of disability "requires that disabilities be evaluated 'with respect to an individual'"); Laden & Schwartz, *supra* note 66, at 263–64 (stating that disabilities need to be evaluated "with respect to an individual").

¹⁹⁸Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2000).

that a substantial threat of harm to themselves or others is established. Such a requirement should take into consideration the social science research,¹⁹⁹ which can help determine whether the employer's determinations are reasonable and should be deferred to by the reviewing court. The alternative is speculation, which may be cheaper, quicker, and simpler, but comes "at the cost of scientific reliability."²⁰⁰ Reliance on objective evidence also should be required in determinations of whether an accommodation is reasonable and if it imposes an undue hardship on the employer.

IV. EMPLOYERS SHOULD BE REQUIRED TO PROVIDE ATYPICAL ACCOMMODATIONS

Employers should consider accommodating people with psychiatric disabilities despite the limitations of the ADA's provision of the right to accommodation, because atypical accommodations can overcome many negative characteristics associated with an employee's psychiatric disabilities.²⁰¹ Instead, employers resist providing atypical accommodations for employees with psychiatric disabilities,²⁰² "even where expense is not an issue and the employer would approve similar requests for other reasons."²⁰³ This resistance may stem from the aforementioned stigma, including questions of blame and morality tied to those diagnoses.²⁰⁴ Moreover, entry into the workforce for those with preexisting psychiatric disabilities may be difficult because of their reluctance to request accommodations for an impairment that carries a significant stigma and because accommodations are less likely to be granted for employees without a history of past performance.²⁰⁵

¹⁹⁹See *infra* text accompanying notes 230–48, 280–311, 317–35 (discussing this research).

²⁰⁰Gregory Mitchell et al., *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109, 1155 (2011).

²⁰¹Emens, *supra* note 30, at 458.

²⁰²Stefan, *supra* note 4, at 800.

²⁰³Hubbard, *supra* note 39, at 854.

²⁰⁴See *supra* text accompanying notes 167–89.

²⁰⁵Florey & Harrison, *supra* note 178, at 230.

The duty to accommodate begins with the employer's duty to interact with an employee seeking an accommodation. This interaction can enhance an employer's appreciation of the importance of the accommodation to the employee with a psychiatric disability, since the need may not be obvious. Moreover, the interactive process itself may lead to a reduced reliance on stigma and stereotypes in employers' assessments of the employee's ability to perform the job without posing a direct threat.²⁰⁶

This part outlines specific ways in which employers can accommodate people with psychiatric disabilities to promote success in the workplace. Such accommodations should be provided unless an employer can establish that the change would impose an undue hardship on the employer's operations. These recommendations should be deemed reasonable without such a showing because of the support by extensive social science research that establishes how important these accommodations can be to support the inclusion of people with a psychiatric disability in the workplace.²⁰⁷ This research also establishes the viability of these accommodations, demonstrating that courts should carefully review an employer's assertion that an accommodation is unreasonable or poses an undue hardship.

A. Duty to Interact

Employees with psychiatric disabilities would benefit from the enforcement of the employer's duty to interact to find a reasonable accommodation.²⁰⁸ The ADA envisions that the duty to accommodate will begin with an interaction wherein the employee requests an accommodation and the employer reciprocates with communication to reach an understanding about what changes are needed in the workplace and whether those changes would be unduly disruptive to the employer's operations.²⁰⁹ Courts have held that an employer should engage in an "interactive

²⁰⁶See *Lee, supra* note 190, at 484–86 (increasing representation in group can decrease influence of stereotypes).

²⁰⁷See *infra* text accompanying notes 230–48, 280–311, 317–35 (discussing this research).

²⁰⁸*EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010).

²⁰⁹29 C.F.R. § 1630.2(o)(3) (2011).

process” to “determine what specific accommodations are necessary.”²¹⁰ The circumstances of a person with a disability may require “the employer ... to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.”²¹¹

As part of this duty to interact, employers must make a “good-faith effort to seek accommodations,”²¹² which involves “communication and good-faith exploration” of the request for accommodation.²¹³ The interactive process should seek to “discover a way in which the employee’s disability could be reasonably accommodated,”²¹⁴ including the “types of accommodations which would be most effective” for the particular employee.²¹⁵ The interactive process allows for the gathering of information to determine if an accommodation is reasonable. For example, a school district was required to engage in the interactive process to determine whether a teacher could work under the influence of her pain medication.²¹⁶ An employer cannot “sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome.”²¹⁷ Employers who discharge an employee rather than engage in the interactive process in good faith could be liable under the ADA if a reasonable accommodation were available.²¹⁸

For employees with psychiatric disabilities, this interactive process would be particularly useful in identifying reasonable accommodations that would not impose an undue hardship on the employer. First, interaction with employees about both their abilities and limitations would

²¹⁰*Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996).

²¹¹*Id.*

²¹²*Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315, 317 (3d Cir. 1999).

²¹³*EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009).

²¹⁴*Taylor*, 184 F.3d at 317.

²¹⁵*Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1115 (9th Cir. 2000), *vacated sub nom.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397–98 (2002).

²¹⁶*Nelson v. Hitchcock Ind. Sch. Dist.*, No. 3:11-CV-00311, 2012 WL 6681917, at *3–4 (S.D. Tex. Dec. 21, 2012).

²¹⁷*Taylor*, 184 F.3d at 317.

²¹⁸*Barnett*, 228 F.3d at 1114; *Chevron Phillips Chem. Co.*, 570 F.3d at 621.

help undermine the influence of the stigma and stereotypes attached to people with psychiatric disabilities.²¹⁹ Second, interaction may help inform an employer about some nontraditional accommodations, such as those outlined below, which could enable effective performance by the employee with a psychiatric disability. Last, interaction would enable the employee seeking accommodation to address any hardship concerns raised by the proposed accommodation before its rejection by the employer.

B. Reasonable Atypical Accommodations

Atypical accommodations can be essential for employees with psychiatric disabilities to fulfill their essential job duties. These accommodations can include avoiding or addressing triggers that can aggravate a person's negative behaviors or other symptoms of psychiatric disabilities as well as educating and/or arranging for additional support from coworkers and supervisors.²²⁰

Rather than dismissing claims for such accommodations as unreasonable, courts should consider individual circumstances, which could demonstrate that such accommodations would enable effective performance by at least some employees with psychiatric disabilities. As indicated by social science research, at least some of these employees should be able to establish both the effectiveness of atypical accommodations for them in particular and that for their particular position, these accommodations would be feasible.²²¹ Then the burden should shift to the employer to demonstrate that the accommodation would impose an undue hardship on its operations,²²² based on the employer's "particular circumstances."²²³ Based on the employer's financial resources and the type of operation, as well as the cost of the

²¹⁹See *supra* text accompanying notes 167–89.

²²⁰*Akabas & Gates, supra* note 29, at 178 (stating groups created by social worker provided support to employee seeking accommodation).

²²¹See discussion of accommodations at *infra* notes 234–40, 249–52 and accompanying text.

²²²42 U.S.C. § 12112(b)(5)(A) (2012); *Johnson v. Cleveland City Sch. Dist.*, 443 F. App'x 974, 982–83 (6th Cir. 2011).

²²³*Reyazuddin v. Montgomery Cty.*, 789 F.3d 407, 414 (4th Cir. 2015).

accommodation,²²⁴ the employer would still have the opportunity to demonstrate that such atypical accommodations would be too costly or interfere with the operations of that particular employer.²²⁵

In assessing whether an accommodation for an employee with a psychiatric disability imposes an undue hardship on an employer, employers should also be required to weigh the benefits of hiring or retaining such employees.²²⁶ Courts interpreting the undue hardship defense under the ADA have long recognized that both reasonableness and undue hardship analyses should consider not only the cost of an accommodation, but also the extent of the benefit to be gained.²²⁷ Thus, the studies demonstrating the crucial role that atypical accommodations play in the hiring and retention of employment by people with psychiatric disabilities should not be ignored.

In assessing the reasonableness and undue hardship associated with atypical accommodations, courts should strongly consider the research that demonstrates the potential effectiveness of changes to the workplace structure and social interactions.²²⁸ Atypical accommodations can mean the difference between successful performance and unemployment for people with psychiatric disabilities. Reliance on such research in this context is supported by courts' long history of relying upon guidance from legal scholars.²²⁹ Additionally, social science research is increasingly relied upon by organizations. For example, Google has begun

²²⁴42 U.S.C. § 12111(10)(B) (2012); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58.

²²⁵*See, e.g.*, *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 438–39 (D. Md. 2016) (holding that the hospital failed to show that cost of an interpreter would impose undue hardship where budget allocated \$0 for reasonable accommodations); *Anderson v. Harrison Cty.*, 639 F. App'x 1010, 1015 (5th Cir. 2016) (holding that the employer presented evidence that change in hours would impose a hardship on other employees).

²²⁶*See supra* text accompanying notes 29–42.

²²⁷*Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (stating that, "cost could not be disproportionate to the benefit").

²²⁸*See infra* text accompanying notes 230–48, 280–311, 317–35 (discussing this research).

²²⁹Louis J. Sirico, *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 INDIANA L.J. 1009, 1010 (2000).

conducting its own social science–related research activities.²³⁰ Moreover, data suggest that best practices generated via scholarly research can be used to produce beneficial, real-world results.²³¹

1. Structural Changes

People with disabilities may seek changes to the structure of the job itself as an accommodation, often because a conflict arises after hire between the essential duties or other requirements of the job and the employees' abilities as limited by their impairment. For this reason, accommodation requests may seek changes to duties that are performed, or the way that duties are performed, as well as changes in work hours or schedule and other alterations in how employer-wide policies are applied to them. For people with psychiatric disabilities, it is particularly important for courts to ensure that an employer does not define essential job duties so as to exclude them automatically.

Behavioral accommodations for people with mental disabilities can help protect the employee's privacy or reduce stress as well as excusing at least some unusual behavior and the need for additional instructions.²³² Stress reduction in particular plays an important role in the maintenance of health for those with a psychiatric disability diagnosis.²³³ Thus, employers should consider requests that will reduce stress for mentally ill employees, not only to promote their success in the workplace, but also to address absenteeism that can result from adverse reactions to stress.²³⁴

²³⁰Rawan Shah, *Future Tech Jobs: We Need Social Science Graduates*, FORBES (June 22, 2011), <https://www.forbes.com/sites/rawnshah/2011/06/22/future-tech-jobs-we-need-social-science-graduates/#67140c4e3f26>; Evan Nesterak, *Google re:Work: Shaping the Future of HR*, PSYCH REPORT (Dec. 2, 2014), <http://thepsychreport.com/business-org/google-rework-shaping-future-hr/>.

²³¹Jean M. Bartunek, *A More Relevant Approach to Relevance in Management Studies: An Essay on Performativity*, 41 ACAD. MGMT. REV. 367, 379 (2016); Kathleen M. Eisenhardt et al., *Grand Challenges and Inductive Methods: Rigor Without Rigor Mortis*, 59 ACAD. MGMT. J. 1113, 1115–17 (2016).

²³²Stefan, *supra* note 4, at 842.

²³³Jenny Secker et al., *The How and Why of Workplace Adjustments: Contextualizing the Evidence*, 27 PSYCHIATRIC REHAB. J. 3, 5 (2003).

²³⁴Janda, *supra* note 38, at 429.

Accommodations can reduce environmental factors causing stress that can trigger aggravation of psychosocial impairments.²³⁵ During the interactive process, employers should be required to engage in an individualized analysis to determine how an individual employee will react to various potential stressors.²³⁶ In addition, reduction of stress can not only benefit employees with psychiatric disabilities, but can benefit other employees who respond to similar triggers as well.²³⁷ Other environmental changes, such as requesting that employees not wear perfumes, colognes, or other heavily scented personal products, have also been found to be helpful accommodations.²³⁸

The ADA allows for job modification or restructuring as an important accommodation for employees with psychiatric disabilities,²³⁹ as long as the employee continues to perform the essential job duties the position requires. Such accommodations are appropriate under the social model that focuses on the “the environmental effects that limit work performance and produce contextual disability,”²⁴⁰ which can include “risk factors” in the environment that can give rise to problems.²⁴¹

Stress can be reduced by allowing changes in the ways in which job duties are completed, other environmental changes, or schedule adjustments.²⁴² For example, for a group of employees with psychiatric disabilities in a supported employment program, fifty-two percent of accommodations involved changes in company procedures, including changes in how the job duties were completed.²⁴³ Similarly, changes in

²³⁵*Id.* at 421–22.

²³⁶Paetzold, *supra* note 72, at 378.

²³⁷*Id.* at 379.

²³⁸Workplace Strategies for Mental Health, *Accommodation Strategies*, GREAT-W. LIFE CTR. FOR MENTAL HEALTH IN THE WORKPLACE, <https://www.workplacestrategiesformentalhealth.com/managing-workplace-issues/accommodation-strategies> (last visited Mar. 24, 2018).

²³⁹Kim L. MacDonald-Wilson et al., *An Investigation of Reasonable Workplace Accommodations for People with Psychiatric Disabilities: Quantitative Findings from a Multi-Site Study*, 38 CMTY. MENTAL HEALTH J. 35–36, 47 (2002).

²⁴⁰Paetzold, *supra* note 72, at 318.

²⁴¹*Id.*

²⁴²Secker et al., *supra* note 233, at 5.

²⁴³MacDonald-Wilson et al., *supra* note 239, at 47.

job tasks were important to increasing confidence and developing skills in another group of employees with psychiatric disabilities.²⁴⁴ These changes did not eliminate essential job duties, but instead involved adjustment of contact with customers or computerized systems, which can be difficult for employees with such impairments.²⁴⁵

Like adjustments in how work is done, physical changes to the workplace may be important in accommodating employees with psychiatric disabilities as well.²⁴⁶ For those who have difficulty with concentration, for example, an employer can provide partitions or other soundproofing or visual barriers or allow an employee to wear headphones to improve that employee's ability to concentrate.²⁴⁷ Other structural changes can include providing memory aids and/or written instructions to employees with memory impairment²⁴⁸ and appropriate tools for employees lacking time management or organizational skills.²⁴⁹ To reduce susceptibility to panic attacks, employers can allow the use of relaxation techniques or a personal support animal as well as removing environmental triggers.²⁵⁰

The request of a Ford employee to bring a service dog to work to help address his PTSD symptoms²⁵¹ exemplifies the potential for changes in the work environment. Rather than denying such a request outright, an employer could allow such an accommodation, at least on a trial basis, to determine whether the accommodation does in fact help address the employee's symptoms and to establish whether the accommodation would in fact interfere with the employer's operations.

Requests for structural changes should be deemed reasonable by both employers and reviewing courts if they enable the employee to complete

²⁴⁴Secker et al., *supra* note 233, at 5.

²⁴⁵*Id.*

²⁴⁶MacDonald-Wilson et al., *supra* note 166, at 21.

²⁴⁷U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58, at Question 24; Beth Loy & Melanie Whetzel, *Accommodation and Compliance Series: Employees with Mental Health Impairments*, JOB ACCOMMODATION NETWORK, <http://askjan.org/media/Psychiatric.html> (last visited Mar. 24, 2018).

²⁴⁸Paetzold, *supra* note 72, at 377.

²⁴⁹*Id.*

²⁵⁰Loy & Whetzel, *supra* note 247.

²⁵¹*See supra* text accompanying notes 13–15.

required job duties, albeit in a different way. Under the burden to establish an undue hardship, the employer would then need to show that such a structural change would impose an undue hardship on its operations. For example, one can imagine certain workplaces where the presence of a service dog would impose such a hardship because of safety or health concerns. Placing the burden on the employer to demonstrate such harm makes sense since the employer holds the information that would be relevant. To preserve the right to accommodation, employers should not be allowed to deny otherwise reasonable accommodations without demonstrating such actual harm.

2. Changes in Conduct Standards

Accommodation involving some variation from employers' standards of conduct may be appropriate because the employee's impairment includes behavior that violates those standards,²⁵² such as rules or policies associated with working time, violence prevention, and other safety risks.²⁵³ An employer is not expected to excuse past misconduct²⁵⁴ or tolerate a direct threat,²⁵⁵ and an employee may be disciplined for violating a workplace conduct standard, even if the violation resulted from the impairment, so long as the standard is job related for the position in question and is consistent with business necessity.²⁵⁶

Under the EEOC guidelines,²⁵⁷ when an employee's disability-related misconduct conflicts with an employer's conduct standard, the employer should first consider the necessity of the rule. If the rule is deemed trivial, the employer should then consider how that standard could be crafted to meet its purposes while still providing a reasonable

²⁵²Dorrian, *supra* note 49, at 3.

²⁵³Andrew Hsieh, Comment, *The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities*, 44 McGEORGE L. REV. 989, 1003 (2013).

²⁵⁴Kaminer, *supra* note 45, at 245.

²⁵⁵U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58 (stating that an employee who has hostile altercation with supervisor and threatens supervisor with physical harm is "no longer a qualified individual").

²⁵⁶*Id.* at Question 30.

²⁵⁷*Id.*

accommodation.²⁵⁸ The accommodation could address the causes of the misconduct or grant an exception to the standard or the consequences for violating it.

Employers may be resistant to behavioral modifications to the workplace, despite the inexpensive nature of many such changes, as compared to physical changes that improve accessibility.²⁵⁹ An employer's conduct standards may well be a product of "social, environmental, and other norms that may pervade the workplace."²⁶⁰ Those norms may have even been generated by outside counsel based on general societal norms. However, those sources do not excuse an employer from allowing those standards to "live a little bit" to allow room for at least some of the unusual conduct of employees with psychiatric disabilities.²⁶¹

As an example, an employer policy limiting access to medication should not provide the basis for outright rejection of a request for access to medication but instead should be subjected to an undue hardship analysis. Because people with psychiatric disabilities often rely on medications to control their symptoms, variations from rules that restrict access to medications or prevent activities needed to address the side effects of such medication can be important accommodations.²⁶² For example, the EEOC has taken the position that employees should have access to beverages to combat the side effects of medication, regardless of the employer's policy regarding such access.²⁶³ Under an undue hardship analysis, an employer could still demonstrate on an individualized basis that use of medication on the job would unduly interfere with its operations, balanced against the benefit that access to medication provides to the employee.

Limiting an employer's obligation to allow exceptions to its own behavioral standards has been justified by a desire to encourage employees

²⁵⁸Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997).

²⁵⁹Timmons, *supra* note 78, at 287.

²⁶⁰Paetzold, *supra* note 72, at 319.

²⁶¹Katarina E. Klenner, *Medical Inquiry Restrictions Complicate Accommodating Hidden Disabilities*, BLOOMBERG BNA (Nov. 16, 2016), <https://www.bna.com/medical-inquiry-restrictions-n57982082812/>.

²⁶²Paetzold, *supra* note 72, at 377.

²⁶³U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58.

with disabilities to seek treatment and discuss potential issues with their employers rather than engaging in misconduct in the workplace.²⁶⁴ Allowing an employee with a disability to have a “second chance” after violating such a rule arguably comports with the ADA’s purposes of promoting inclusion and preventing potential disparate impact of enforcing rules based on a disability-free workforce.²⁶⁵ Such an accommodation might be appropriate if the violation of the rule has not undermined the employee’s ability to perform the essential functions of the job.²⁶⁶

Excuse from punishment for a violation of an employer’s conduct rules should be deemed reasonable as an accommodation in these situations: there is little evidence of employee fault with respect to both the misconduct and not requesting a reasonable accommodation prospectively; the misconduct is of low severity, including its impact on operations and failure to cause a direct threat; and there is little likelihood that the misconduct will recur, such that the employee could still be expected to perform the essential duties of the position in the future.²⁶⁷ Obviously the third factor will be easier to establish if the misconduct does not relate to an essential function of the job. This notion of fault aligns with broader concerns that people with psychiatric disabilities are somehow responsible for their impairment, although an employer could conclude that an employee’s failure to take prescribed medication or otherwise address symptoms justifies a refusal to accommodate her.²⁶⁸

Even if an employer is not expected to waive adherence to its conduct standards as an accommodation, employers at a minimum should only base discipline on justifiable standards that are applied consistently across employees with and without disabilities. Requiring development of more objective conduct standards will guard against the influence of implicit biases against people with psychiatric disabilities because consideration of objective, individualized information about employees can prevent employers from making decisions based on more subjective information,

²⁶⁴Timmons, *supra* note 78, at 290.

²⁶⁵*Id.*

²⁶⁶*Id.* at 290–91.

²⁶⁷*Id.* at 291.

²⁶⁸*Id.* at 291–92.

such as assumptions associated with a mental health diagnosis.²⁶⁹ Thus, as suggested by the EEOC regulations, employers should not hold people with psychiatric disabilities to a higher standard than they are actually tolerating in others or is necessary for completion of the actual job duties.²⁷⁰

If the interpretation or application of the rule is at all subjective, the stigma or stereotypes associated with psychiatric disabilities could heighten its consequences for employees with psychiatric disabilities.²⁷¹ Thus, insistence that a conduct standard be administered without the influence of such stigma or stereotypes could be viewed as a reasonable accommodation. Reliance on stereotypes fails to recognize that the vast majority of persons with mental disabilities never engage in violence, either in the workplace or elsewhere.²⁷² Broad generalizations creating a link between psychiatric disabilities and the risk of violence can be “grossly inaccurate given the wide variability in individual risk, the modest levels of overall risk, and the realistic danger that the employer’s group-based judgment is skewed by widespread, irrational fears of persons diagnosed with mental disorders.”²⁷³

Rather than allowing reliance on anecdotal or outdated information to conclude that an employee poses a direct threat, accommodation could include requiring reliance on current medical knowledge or other objective evidence²⁷⁴ as well as research related to the characteristics and

²⁶⁹Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1143, 1165–66, 1191–92 (2006).

²⁷⁰Edwards, *supra* note 79, at 354.

²⁷¹See *supra* text accompanying notes 167–89 for discussion of stigma.

²⁷²Hubbard, *supra* note 39, at 885; see also Kaminer, *supra* note 45, at 219 (stating research is mixed, but any correlation that exists is both small and overly exaggerated in the public’s mind).

²⁷³Hubbard, *supra* note 39, at 887.

²⁷⁴See *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 288 (1988) (finding that determination of significant risk is to be based on “reasonable medical judgments given the state of medical knowledge,” with deference to reasonable medical judgments of public health officials); see also 29 C.F.R. § 1630.2(r) (2011) (requiring a direct threat determination to be based on “individualized assessment of the individual’s present ability to perform,” with that assessment based on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence”).

environmental factors shown to be predictive for violence.²⁷⁵ An individualized assessment should consider historic and dynamic triggers and environmental factors that could affect an individual's potential to pose a threat.²⁷⁶ Social science suggests that future behavior can most accurately be predicted based on recent past behavior, presence of triggers, and other contributing factors such as alcohol or illicit drug abuse,²⁷⁷ which can be better predictors than mental health status.²⁷⁸ While employers may be resistant to engage in such an analysis, the ADA's admonition against relying on stigma and stereotypes and the right to reasonable accommodation arguably requires it.

Employers should also be more willing to accommodate an employee who allegedly poses a direct threat where the employer is responsible for creating an environment where violence is more likely to occur. Some workplace conflicts may arise because employees with psychiatric disabilities are the targets of harassment, bullying, coercion, or even outright violence by a coworker or supervisor.²⁷⁹ If such mistreatment leads a person with a psychiatric disability to respond inappropriately, the employer should not automatically react by removing the relatively innocent person with a psychiatric disability rather than addressing the surrounding hostile environment.²⁸⁰ Instead, the employer should first respond reasonably to any workplace harassment, as required by nondiscrimination statutes.²⁸¹ The victim of harassment should be disciplined only if the reaction was wholly inappropriate, considering the provocation by others.

Overall, changes in the work environment can eliminate or reduce triggers for the symptoms of an employee's psychiatric disability, thereby

²⁷⁵Ronald Schouten, *Workplace Violence and the Clinician*, in *TEXTBOOK OF VIOLENCE ASSESSMENT AND MANAGEMENT* 510–11 (Robert I. Simon & Kenneth Tardiff eds., 2008).

²⁷⁶*Id.* at 514–15; Hubbard, *supra* note 39, at 853, 880–81; Laden & Schwartz, *supra* note 66, at 261.

²⁷⁷Hubbard, *supra* note 39, at 872–73.

²⁷⁸Bruce G. Link et al., *The Violent and Illegal Behavior of Mental Patients Reconsidered*, 57 *AM. SOC. REV.* 275, 290 (1992); Hubbard, *supra* note 39, at 886.

²⁷⁹Hubbard, *supra* note 39, at 855.

²⁸⁰*Id.* at 886, 907.

²⁸¹*See, e.g.,* Cooper v. CLP Corp., 679 F. App'x 851, 854 (11th Cir. 2017) (explaining employer's obligations to avoid liability for hostile work environment).

enabling him or her to perform productively. In at least some limited circumstances, employers should also consider how their conduct standards are affecting employees with psychiatric disabilities. Unless that standard is essential to the productivity and harmony of the workplace, employers should consider accommodating the employee's impairment in the enforcement of such standards.

As discussed for structural changes in the workplace, an employer would retain the opportunity to show that a change or waiver of a conduct standard would cause an undue hardship. Importantly, the burden should rest with the employer to justify the standard, rather than requiring that an employee demonstrate why that rule is not essential for the employer's operations. An employer, not an employee, is best positioned to demonstrate which rules are essential.

3. Social Accommodations

Many of the workplace difficulties for employees with psychiatric disabilities arise from their interactions with others, compounded by the frequency with which accommodations related to relationships are denied.²⁸² Overall, one study found that people with psychiatric disabilities were able to work, even during times of emotional distress and exacerbation of the illness, if they worked in a supportive work environment.²⁸³ In contrast, another study of employees with psychiatric disabilities revealed that unsatisfactory job terminations were most often associated with interpersonal difficulties as well as job dissatisfaction, poor work performance, and lack of dependability.²⁸⁴ To avoid such negative outcomes, employees with psychiatric disabilities "need help with their social interactions on the job" as well as support in managing their psychiatric, medical, and substance abuse problems.²⁸⁵

Workplace success of a person with a psychiatric disability can be enhanced by social accommodations such as changes in communication or other interactions with supervisors and coworkers. For example, for

²⁸²*Id.*

²⁸³Scheid, *supra* note 148, at 75.

²⁸⁴Deborah R. Becker et al., *Job Terminations Among Persons with Severe Mental Illness Participating in Supported Employment*, 34 *CMTY. MENTAL HEALTH J.* 71, 79 (1998).

²⁸⁵*Id.*

one group of employees with psychiatric disabilities in a supported employment program, most accommodations included changes in the way other people interacted/intervened with the employee, or specific training activities that help people do things differently in relation to the employee with the disability.²⁸⁶ In another related study of a supported employment program, provision of extra supervision and/or coworker support were important for employees with social impairments, second only to employees with cognitive limitations.²⁸⁷

Social accommodations can be implemented at relatively little cost to the employer. These accommodations can include improving the methods of supervision to address the specific needs of an employee with a psychiatric disability as well as allowance of job coaches to address some difficulties faced by employees with a psychiatric disability. To address some of the negative attitudes and behaviors toward people with psychiatric disabilities, employers should be required to provide a harassment-free environment and to provide education to address some of those biases. All of these accommodations can help to address some of the intangible, but very real, difficulties that people with psychiatric disabilities face in the workplace.

The duty to accommodate employees with psychiatric disabilities should include adjustments to how they are supervised that could support successful performance. As one expert noted, “supervisors are the link between the organization and the individual and essential for carrying out the accommodation process.”²⁸⁸ The 2002 EEOC guidelines state that while an employer is not required to change a person’s supervisor as a reasonable accommodation, “the ADA may require that supervisory methods be altered as a form of reasonable accommodation,” and “an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.”²⁸⁹

The EEOC Enforcement Guidance explains in more detail that “[s]upervisors play a central role in achieving effective reasonable

²⁸⁶MacDonald-Wilson et al., *supra* note 239, at 47.

²⁸⁷MacDonald-Wilson et al., *supra* note 166, at 21.

²⁸⁸Lauren B. Gates, *Workplace Accommodation as a Social Process*, 10 J. OCCUPATIONAL REHAB. 85, 87 (2000).

²⁸⁹*Id.*

accommodations for their employees.”²⁹⁰ Supervisors can “adjust their methods as a reasonable accommodation,” including utilizing the most effective methods of communicating assignments or instructions, and by providing additional training or modified training materials.²⁹¹ Thus, changes in methods of supervision as an accommodation can result in improving the supervisor’s ability to oversee the work of all subordinates, by tailoring supervision to individual employee’s needs.

Improving the quality of supervision is an important accommodation for employees with psychiatric disabilities.²⁹² As with any employees, the supervision of employees with psychiatric disabilities can be improved with more training, more support from the employer, and more feedback.²⁹³ Such support combined with fair treatment by supervisors has been found to be important in job maintenance for employees with psychiatric disabilities.²⁹⁴

As part of improved supervision, facilitating communication, as well as providing praise and regular feedback and setting clear expectations, should be considered as reasonable accommodations.²⁹⁵ Thirty-two percent of respondents in a recent survey believed that supervisors and managers are most responsible for miscommunication in the workplace.²⁹⁶ Ensuring that supervisors provide clear, detailed instructions and constructive feedback can be a reasonable accommodation if such improvements in communication enable the person with a psychiatric disability to perform the duties of the position.²⁹⁷ Improvement in communication with employees with psychiatric disabilities can be expected

²⁹⁰U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58.

²⁹¹*Id.*

²⁹²Dorrian, *supra* note 49, at 3; MacDonald-Wilson et al., *supra* note 239, at 47; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58, at Question 26.

²⁹³MacDonald-Wilson et al., *supra* note 166, at 16.

²⁹⁴Akabas & Gates, *supra* note 29, at 175–76.

²⁹⁵U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58, at Question 26.

²⁹⁶FIERCE & QUANTUM WORKPLACE, THE STATE OF MISCOMMUNICATION: 6 INSIGHTS ON EFFECTIVE WORKPLACE COMMUNICATION 13 (2017), <https://marketing.quantumworkplace.com/hubfs/Website/Resources/PDFs/The-State-of-Miscommunication.pdf?hsCtaTracking=e6e1e05e-cfcd-4245-88bf-b891cf05b552%7Cb78ee96a-d273-4eba-859e-6bceb04bf990>.

²⁹⁷Hubbard, *supra* note 39, at 916.

to impose no more burden on the employer than facilitating communication with a sensory impaired employee.²⁹⁸

Effective management techniques that can serve as appropriate accommodations for employees with psychiatric disabilities also can include developing strategies to deal with conflict.²⁹⁹ For example, supervisors can be trained to approach employees in a less confrontational manner.³⁰⁰ Employees with psychiatric disabilities may also benefit from implementation of conflict resolution strategies.³⁰¹ Some of the training outlined below can help supervisors improve their supervisory skills.³⁰²

In addition to improving the quality of supervision, changes to the level of supervision might also be appropriate as an accommodation. The EEOC has suggested that “[a]djusting the level of supervision or structure sometimes may enable an otherwise qualified individual with a disability to perform essential job functions.”³⁰³ For example, an employee in need of more supervision could benefit from weekly meetings to review the status of large projects and identify which steps need to be taken next.³⁰⁴ To provide additional supervision, job coaches have been identified by both employers and employees with a psychiatric disability as helpful in enhancing both performance and job retention.³⁰⁵ Thus, access to a job coach can be a successful reasonable

²⁹⁸*Id.* at 916, 925.

²⁹⁹Loy & Whetzel, *supra* note 247.

³⁰⁰Timmons, *supra* note 78, at 287.

³⁰¹Paetzold, *supra* note 72, at 375.

³⁰²*See infra* text accompanying notes 316–35 for discussion of training.

³⁰³U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58, at Question 26.

³⁰⁴*Id.*

³⁰⁵Scheid, *supra* note 148, at 86; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 58, at Question 27; Daniel Tucker, *Accommodations and Compliance Series: Job Coaching in the Workplace*, JOB ACCOMMODATION NETWORK (June 18, 2013), <http://askjan.org/topics/jobcoaching.htm>.

accommodation,³⁰⁶ particularly for employees experiencing issues with interacting with others and learning the job tasks.³⁰⁷

Employees with psychiatric disabilities are frequently the victims of harassment in the workplace, in large part because of stigma and stereotypes.³⁰⁸ Employees with psychiatric disabilities who have received some accommodation may also be targeted for harassment because they are seen as receiving preferential treatment, leading to resentment.³⁰⁹

Harassment of this kind can affect a person's ability to perform successfully at work, including interference with one's ability to concentrate and control stress at work, as well as impacting interactions with others both at work and at home.³¹⁰ For a person with a psychiatric disability, harassment can act as a trigger that produces symptomatic behaviors,³¹¹ including anger or an inability to cope.³¹² As one study noted, "supervisors who are bullies, screamers, beraters, and who otherwise treat subordinates with abusive lack of respect" create problems for people with bipolar disorder.³¹³

Employees with a psychiatric disability caused or aggravated by such harassment should be accommodated, even if the harassment has not created an actionable hostile work environment.³¹⁴ At a minimum, social accommodations for people with psychiatric disabilities should protect them from harassment that can affect their ability to perform effectively and can aggravate the symptoms of their impairment. An employer that

³⁰⁶U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 58, at Question 27; Heather Peters & Trevor C. Brown, *Mental Illness at Work: An Assessment of Co-Worker Reactions*, 26 CAN. J. ADMIN. SCI. 38, 44–45 (2009).

³⁰⁷MacDonald-Wilson et al., *supra* note 239, at 47–48.

³⁰⁸Janda, *supra* note 38, at 404; Hensel & Jones, *supra* note 53, at 72.

³⁰⁹Paetzold, *supra* note 72, at 320.

³¹⁰*Id.* at 320.

³¹¹*Id.* at 319, 375–76.

³¹²Stefan, *supra* note 4, at 810.

³¹³Paetzold, *supra* note 72, at 375.

³¹⁴*See, e.g.*, Williams v. FedEx Corp. Servs., 849 F.3d 889, 896–903 (10th Cir. 2017) (increasing responsibilities, belittling and calling names, and threatening transfer did not create hostile environment); Sellers v. Deere & Co., 791 F.3d 938, 945 (8th Cir. 2015) (determining that an employee with work-induced PTSD could not show hostile work environment).

promotes a hostility-free work environment for all, including employees with psychiatric disabilities, will enjoy a “more productive, satisfied and safer workforce.”³¹⁵ By doing so, employers can enjoy indirect benefits including improved interactions with coworkers (69.3%), increased overall company morale (60.7%), and increased overall company productivity (57.0%), as well as improved interactions with customers (42%), increased workplace safety (42.3%), and increased overall company attendance (36.0%).³¹⁶ Employers will also benefit by creating a workplace free of discrimination and harassment of employees with psychiatric disabilities, which will increase productivity by preventing lost labor and turnover costs when mentally ill workers become unemployed, and by decreasing absenteeism.³¹⁷ Such benefits should be considered in determinations of whether an accommodation addressing harassing behavior would impose an undue hardship on a particular employer.

4. Education and Training

Reliance on stereotypes and unconscious bias are admittedly hard to control, even if an employer is willing to adopt diversity education programs.³¹⁸ Even so, the education and training of supervisors and coworkers can be an important accommodation for employees diagnosed with psychiatric disabilities.³¹⁹ Educational programs can increase knowledge about psychiatric disabilities in the workplace as well as spur significant changes in both employees’ behavior and attitudes.³²⁰ Importantly, changes in behavior included increased positive behaviors and

³¹⁵Paetzold, *supra* note 72, at 375.

³¹⁶*Id.*

³¹⁷*Id.*

³¹⁸Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1133, 1161, 1169, 1185–86 (1999).

³¹⁹*Id.*; Loy & Whetzel, *supra* note 247.

³²⁰Pescosolido, *supra* note 188, at 1324; *see also* Corrigan et al., *supra* note 43, at 968 (stating that education can result in significant improvements in both affect and behavioral intention).

reductions in discriminatory behavior, some of which were shown to be sustained over time, even without attitudinal change.³²¹

To address the negative ramifications of a hostile work environment, the duty to accommodate should require that an employer include better education and training for supervisors and coworkers, which can improve attitudes or at least moderate negative behavior toward people with psychiatric disabilities.³²² Employers should specifically address harassment of mentally ill employees in antiharassment training for all employees, stressing that derogatory terms associated with psychiatric disabilities will not be tolerated and that no one should discuss a coworker's possible mental health condition.³²³

Education of employees can take on several additional forms, including increasing awareness about psychiatric disabilities and how to support work by employees with psychiatric disabilities as well as education regarding the right to accommodation for such an impairment. Without education about psychiatric disabilities, both coworkers and managers are likely to continue to rely on stereotypes and to discriminate against mentally ill workers who are willing and able to work.³²⁴ The influence of stereotypes can be reduced if a decision-maker is made aware of those potential biases³²⁵ and is motivated and trained to address them.³²⁶

Education can include topics, such as basic information about psychiatric disabilities, to decrease reliance on myths and stereotype, as well as ways to recognize psychiatric disabilities.³²⁷ Education about various mental impairments in conjunction with information about rights under the ADA, including protection against retaliation, can support self-reporting and affirmative requests for accommodation as well as

³²¹Sabine E. Hanisch et al., *The Effectiveness of Interventions Targeting the Stigma of Mental Illness at the Workplace: A Systemic Review*, 16 BMC PSYCHIATRY 1, 7–8 (2016).

³²²Paetzold, *supra* note 72, at 375–76; *see also* Timmons, *supra* note 78, at 287 (eliminating harassing conduct in workplace or transferring employee away from abusive supervisor can help reduce misconduct by employees with psychiatric disabilities).

³²³Janda, *supra* note 38, at 438–39.

³²⁴*Id.* at 429, 437.

³²⁵Lee, *supra* note 190, at 486.

³²⁶Pederson, *supra* note 185, at 143–44.

³²⁷Janda, *supra* note 38, at 438.

provision of accommodations on a proactive basis. For example, where a position that requires social-interpersonal functioning may be more difficult for a person with a psychiatric disability,³²⁸ both coworkers and supervisors could be provided with training to help facilitate their interactions with the person with the psychiatric disability. Both managers and coworkers of people with psychiatric disabilities can benefit from education.³²⁹ With a greater awareness of what psychiatric disabilities really are, and recognition of the prevalence of psychiatric disabilities, coworkers may become more compassionate, tolerant, and open to employees with psychiatric disabilities.³³⁰ Without such training, the practices of coworkers can have a significant negative impact on the performance of those with psychiatric disabilities.³³¹

Education makes accommodations for employees with psychiatric disabilities more effective, by addressing any lack of understanding and otherwise facilitating communication regarding a needed accommodation.³³² In the work group of the person to be accommodated, a trainer can address the social dimensions of the accommodation to improve the responsiveness of the work environment to the needs of the employee with a disability.³³³ As a result, both supervisors and coworkers can become resources rather than barriers for employees with disabilities, and the group can develop a plan and strategy to respond to the needs and deficits of the person with a psychiatric disability as well as the accommodation.³³⁴ Training for supervisors and coworkers should also address broader questions about the role of the ADA in the workplace, including an employer's responsibilities and the need to provide accommodation, which has been found to be very effective in supporting and improving the provision of accommodations for employees with psychiatric disabilities.³³⁵ Awareness may improve coworkers' acceptance of

³²⁸MacDonald-Wilson et al., *supra* note 166, at 22; Secker et al., *supra* note 233, at 5.

³²⁹Tucker, *supra* note 305, at 42.

³³⁰Janda, *supra* note 38, at 435.

³³¹Scheid, *supra* note 148, at 89.

³³²Akabas & Gates, *supra* note 29, at 177.

³³³Gates, *supra* note 288, at 85–86.

³³⁴*Id.* at 89.

³³⁵Akabas & Gates, *supra* note 29, at 177–78.

the provision of accommodations for others, avoiding negative reactions associated with a feeling that employees with disabilities are receiving “special treatment.”³³⁶ Although perhaps less likely, education of coworkers may even inspire them to be more tolerant of employees with psychiatric disabilities. For example, customers or coworkers could be expected to tolerate some behavior that they might otherwise find offensive if they understood its association with a coworker’s psychiatric disabilities.³³⁷

CONCLUSION

Accommodations for people with psychiatric disabilities can mean the difference between productive participation in the labor market and unemployment. Based on the depth of research showing how successful these changes to the structure of the workplace and social interactions can be,³³⁸ employers should not rely on stereotypes and stigma to make decisions that exclude people with psychiatric disabilities from the workplace. Instead, determinations about whether an accommodation is reasonable or imposes an undue hardship on the employer should be based on the existing social science research. Reliance on research to guide individualized assessment, rather than making assumptions that accommodations would not enable the person to work, would make the ADA more effective in promoting the inclusion of all people with disabilities in the labor force. Reliance on social science research to define reasonableness and undue hardship would promote an employer’s obligation to analyze each request for an accommodation on an individual basis.³³⁹

If provided with the structural and social accommodations suggested here, employees with psychiatric disabilities should face less resistance to their inclusion and retention in the workplace. The results should benefit those individuals as well as the employers who can benefit from the employee’s talents and strengths. Education and inclusion in the

³³⁶Befort, *supra* note 83, at 2031.

³³⁷Timmons, *supra* note 78, at 277.

³³⁸See *supra* text accompanying notes 230–48, 280–311, 317–35 (discussing this research).

³³⁹29 C.F.R. § 1630 (2011); *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000).

workplace should also help to address some of those biases that lead to the exclusion of people with psychiatric disabilities from the labor force. Perhaps then people with psychiatric disabilities can begin to enjoy some of the benefits implemented by the ADA that are aimed at increasing their workforce participation and productivity.