JANUARY MENTAL HEALTH AND DE&I UPDATE

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Not all disabilities are visible to the eye. Among those that are often non-apparent are **mental health conditions**.

According to the National Alliance on Mental Illness (NAMI), one in five American adults will experience a diagnosable mental health condition in any given year. In addition, according to the Substance Abuse and Mental Health Services Administration (SAMHSA), one in five American adults with mental illness also had a co-occurring substance use disorder (SUD). Recent challenges, including the COVID-19 pandemic, coupled with an increased understanding of the prevalence of mental health conditions, are prompting many employers to consider strategies they can use to support their employees' mental health.

These strategies are good for **employees**. They demonstrate your business's commitment to inclusion and offer workers the support they need to meet their mental health needs. These practices also benefit **employers** by empowering employees to deliver their best on the job, today and in the years ahead.

EARN's Mental Health Toolkit is a gateway to background, tools and resources that can help employers learn more about mental health issues and cultivate a welcoming and supportive work environment for employees who may be facing mental health issues or need help for a co-occurring substance use disorder. It also presents an easy-to-follow framework for fostering a mental health-friendly workplace, all built around the "4 A's": **Awareness**, **Accommodations**, **Assistance** and **Access**.

https://askearn.org/page/mental-health-toolkit

*If you or someone you know is in crisis, free and confidential 24-hour support is available. Call the National Suicide Prevention Lifeline at **1-800-273-TALK (8255),** or call or text **988**.*

SHRM Recommended Resources for Mental Health and ADA Questions

Center for Workplace Mental Health

The Center for Workplace Mental Health offers a range of tools to help employers create a more supportive workplace environment and advance mental health policies at their organizations. Resources include ready-to-use trainings and case studies of workplace mental health initiatives in action.

Employee Assistance Professionals Association (EAPA)

EAPA is a membership organization that provides education and services to employee assistance professionals (EAPs) and others interested in behavioral health and employee wellbeing. As part of this, it also assists employers in understanding EAP services and options for offering them.

Employer Assistance and Resource Network on Disability Inclusion (EARN)

EARN helps employers recruit, hire, retain and advance qualified people with disabilities and build disability-I inclusive workplace cultures. Among its resources is a Mental Health Toolkit, which outlines best practices and mental health initiatives implemented by a variety of companies. EARN is funded by the U.S. Department of Labor's Office of Disability Employment Policy.

Job Accommodation Network (JAN)

JAN is the leading source of free, expert and confidential guidance on job accommodations. It offers a range of resources on its website as well as one-on-one assistance to both employers and individuals with a range of disabilities, including mental health conditions. JAN is funded by the U.S. Department of Labor's Office of Disability Employment Policy.

Mental Health America

Mental Health America promotes mental health through advocacy, education, research and services to individuals with mental health conditions and their families, including through peer support. It also offers a range of resources for use in the workplace, including the Bell Seal for Workplace Mental Health recognition program for employers.

National Alliance on Mental Illness (NAMI)

NAMI works to build better lives for the millions of Americans affected by mental health conditions. It has hundreds of local affiliates across the U.S. that raise awareness and provide support to individuals and families. Through its "StigmaFree Company" program, businesses can pledge to create an accepting and mentally healthy work culture, and access resources to assist.

Substance Abuse and Mental Health Services Administration/Center for Mental Health

SAMHSA is a federal agency that works to reduce the impact of substance abuse and mental health conditions on America's communities. It offers a variety of materials employers can use to educate employees about substance abuse and mental health, including treatment locators to help employees access help for themselves or their families.

Workplace Guide

The Mental Health at Work: What Can *I* Do? *Workplace Guide* is a companion resource to the PSA. It shares important background and outlines things we can all do to promote a mental health-friendly workplace. Organizational leaders, employee resource groups (ERGs) and others can use the guide to raise awareness about mental health in their own workplaces and/or facilitate discussions about collaborative approaches to workplace wellbeing.

View the interactive online version of the Workplace Guide
Order a printed version of the Workplace Guide
Download and print the PDF of the Workplace Guide

https://www.whatcanyoudocampaign.org/psa-campaigns/mental-health-psa/workplace-mental-health-resources/

The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work

Many people with common mental health conditions have a right to a reasonable accommodation at work under the Americans with Disabilities Act (ADA). When requesting accommodations, clients may sometimes need supporting documentation from their mental health providers. This Fact Sheet briefly explains the law of reasonable accommodation and the mental health provider's role in the accommodation process.

1. What Is the ADA?

The ADA is a federal law that prohibits employers with 15 or more employees from discriminating on the basis of disability, and gives employees and job applicants with disabilities a right to a reasonable accommodation at work. It also provides rights outside the employment context, not discussed here.

2. What Is a Reasonable Accommodation?

A reasonable accommodation is a change in the way things are normally done at work that enables an individual to do a job, apply for a job, or enjoy equal access to a job's benefits and privileges. Common reasonable accommodations include **altered break and work schedules** (e.g., scheduling work around medical appointments), **time off for treatment**, **changes in supervisory methods** (e.g., providing written instructions, or breaking tasks into smaller parts), **eliminating a non-essential (or marginal) job function that someone cannot perform because of a disability**, and **telework**. Where an employee has been working successfully in a job but can no longer do so because of a disability, the ADA also may require **reassignment to a vacant position** that the employee can perform. These are just examples; employees are free to request, and employers are free to suggest, other modifications or changes.

3. Does My Client Need to Have a Particular Condition to Get a Reasonable Accommodation?

A reasonable accommodation may be obtained for any condition that would, if left untreated, "substantially limit" one or more major life activities, which include brain/neurological functions and activities such as communicating, concentrating, eating, sleeping, regulating thoughts or emotions, caring for oneself, and interacting with others. (The client does not actually have to stop treatment. The client's symptoms in the absence of treatment are merely considered in order to determine whether the person has a "disability" under the ADA.)

A condition does not have to result in a high degree of functional limitation to be "substantially limiting." It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. Further, if the client's symptoms come and go, what matters is how limiting they would be when present. Federal regulations say that some disorders should easily be found to be disabilities, including major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Other conditions may also qualify depending on the individual's symptoms. Additionally, an individual may qualify for a reasonable accommodation if he or she has had a substantially limiting impairment in the past.

The ADA, however, does not protect individuals currently engaging in the illegal use of drugs, where an employer takes an action based on such use. Someone with alcoholism or who was addicted to drugs in the past may be entitled to a reasonable accommodation, such as time off for treatment. However, the ADA specifically says that employers are not required to tolerate employees using or being under the influence of alcohol or illegal drugs on the job, or unsatisfactory performance or conduct relating to the use of alcohol or illegal drugs.

4. What Kind of Reasonable Accommodation Could My Client Get?

If your client has a disability, the employer is legally required to provide a reasonable accommodation that would help your client do the job. If more than one accommodation would work, the employer may choose which one to provide. However, an employer cannot be required to provide an accommodation that is simply unreasonable on its face (that is, not plausible or feasible), or that would cause significant financial or operational difficulty. It also never has to excuse a failure to meet production standards or rules of conduct that are both necessary for the operation of the business and applied equally to all employees, or to retain an individual who cannot do the job even with a reasonable accommodation.

5. When Is It Important for My Client to Request a Reasonable Accommodation?

Because an employer does not have to excuse failure to meet production standards that are consistently applied, even if the difficulty was caused by a health condition or the side effects of medication, it could be in your client's interest to request an accommodation before any problems at work occur or become worse. An accommodation may help to prevent discipline or even termination by enabling your client to perform the job successfully.

6. How Can I Help My Client Get a Reasonable Accommodation?

Your client may ask you to document his or her condition and its associated functional limitations, and to explain how a requested accommodation would help. The employer, perhaps in consultation with a health care professional, will use this information to evaluate whether to provide a reasonable accommodation, and if so which one. The person evaluating the accommodation request also may contact you to ask for clarification of what you have written, or to provide you with additional information to consider. For example, you may be told about a particular job function and asked whether the requested accommodation would help your client to perform it, or you may be asked whether a different accommodation would be effective where, for example, the requested accommodation would be too difficult or costly for the employer to provide.

Employers are required to keep all information related to reasonable accommodation requests confidential.

7. Am I Permitted to Disclose My Client's Medical Information?

The ADA does not alter a health provider's ethical or legal obligations. You should request a reasonable accommodation on behalf of a client or provide an employer with medical information about the client only if he or she asks you to do so and signs a release.

8. Could an Employer Discriminate Against My Client Because of the Information I Provide?

The ADA prohibits employers from harassing your client because of a mental health condition, and from terminating or taking other adverse actions against your client because of a mental health condition. Therefore, unless the information you provide shows that your client is

unable to perform the essential duties of the job even with a reasonable accommodation, the employer legally cannot take adverse action based on the information.

However, employers sometimes discriminate illegally. You therefore may wish to discuss with your client the risks associated with disclosing the condition (such as potential illegal discrimination), and with not disclosing it (such as not having a reasonable accommodation that may be necessary to do the job).

9. What Kind of Documentation Would Be Helpful?

Employers may require documentation that establishes how your client's condition limits job performance, and how an accommodation would help to overcome the limitations. However, you should not simply provide your client's medical records, because they will likely contain unnecessary information. Documentation is most likely to help your client obtain a reasonable accommodation if it explains, using plain language, the following:

- Your professional qualifications and the nature and length of your relationship with the client. A brief statement is sufficient.
- The nature of the client's condition. Based on your professional judgment, state the nature of the client's mental health condition, even if the client is currently not experiencing symptoms (e.g., because of the use of medication or because the condition is in remission). If your client asks you not to disclose the specific diagnosis, it may be sufficient to state the general type of disorder (e.g., "an anxiety disorder"), or to describe how the condition substantially limits a brain/neurological function or some other major life activity.
- The client's functional limitations in the absence of treatment. Describe the extent to which the condition *would* limit a brain or neurological function, or another major life activity (e.g., concentrating, interacting with others, eating, sleeping, learning, reading, communicating, or thinking), in the absence of therapy, medication, and any other treatment. If the symptoms of the condition come and go or are in remission, describe the limitations during an active episode. It is sufficient to establish substantial limitation of one major life activity.
- The need for a reasonable accommodation. Explain how the client's condition makes changes at work necessary. For example, if your client needs an accommodation to perform a particular job function, you should explain how the client's symptoms - *as they actually are, with treatment* - make performing the function more difficult. If necessary, ask your client for a description of his or her job duties. *Limit your discussion to the specific problems that may be helped by a reasonable accommodation*. Also explain to the employer why your client may need an accommodation such as a schedule change (e.g., to attend a therapy appointment during the workday) or time off (e.g., to adjust to a new medication, receive treatment, or recover).

- Suggested Accommodation(s). If you are aware of an effective accommodation, you may suggest it. Do not overstate the need for a particular accommodation, in case an alternative is necessary.

For more information about reasonable accommodations and disability discrimination, visit the Equal Employment Opportunity's (EEOC's) website (http://www.eeoc.gov), or call the EEOC at 800-669-4000 (voice) or 800-669-6820 (TTY).

https://www.eeoc.gov/laws/guidance/mental-health-providers-role-clients-request-reasonable-accommodation-work

Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

If you have depression, post-traumatic stress disorder (PTSD), or another mental health condition, you are protected against **discrimination** and **harassment** at work because of your condition, you have workplace **privacy** rights, and you may have a legal right to get reasonable **accommodations** that can help you perform and keep your job. The following questions and answers briefly explain these rights, which are provided by the Americans with Disabilities Act (ADA). You may also have additional rights under other laws not discussed here, such as the Family and Medical Leave Act (FMLA) and various medical insurance laws.

1. Is my employer allowed to fire me because I have a mental health condition?

No. It is illegal for an employer to **discriminate** against you simply because you have a mental health condition. This includes firing you, rejecting you for a job or promotion, or forcing you to take leave.

An employer doesn't have to hire or keep people in jobs they can't perform, or employ people who pose a "direct threat" to safety (a significant risk of substantial harm to self or others). But an employer cannot rely on myths or stereotypes about your mental health condition when deciding whether you can perform a job or whether you pose a safety risk. Before an employer can reject you for a job based on your condition, it must have objective evidence that you can't perform your job duties, or that you would create a significant safety risk, even with a reasonable accommodation (see Question 3).

2. Am I allowed to keep my condition private?

In most situations, you can keep your condition private. An employer is only allowed to ask medical questions (including questions about mental health) in four situations:

- When you ask for a reasonable accommodation (see Question 3).

- After it has made you a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions.
- When it is engaging in affirmative action for people with disabilities (such as an employer tracking the disability status of its applicant pool in order to assess its recruitment and hiring efforts, or a public sector employer considering whether special hiring rules may apply), in which case you may choose whether to respond.
- On the job, when there is objective evidence that you may be unable to do your job or that you may pose a safety risk because of your condition.

You also may need to discuss your condition to establish eligibility for benefits under other laws, such as the FMLA. If you do talk about your condition, the employer cannot discriminate against you (see Question 5), and it must keep the information confidential, even from co-workers. (If you wish to discuss your condition with coworkers, you may choose to do so.)

3. What if my mental health condition could affect my job performance?

You may have a legal right to a reasonable accommodation that would help you do your job. A reasonable accommodation is some type of change in the way things are normally done at work. Just a few examples of possible accommodations include altered break and work schedules (e.g., scheduling work around therapy appointments), quiet office space or devices that create a quiet work environment, changes in supervisory methods(e.g., written instructions from a supervisor who usually does not provide them), specific shift assignments, and permission to work from home.

You can get a reasonable accommodation for any mental health condition that would, if left untreated, "substantially limit" your ability to concentrate, interact with others, communicate, eat, sleep, care for yourself, regulate your thoughts or emotions, or do any other "major life activity." (You don't need to actually stop treatment to get the accommodation.)

Your condition does not need to be permanent or severe to be "substantially limiting." It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. If your symptoms come and go, what matters is how limiting they would be when the symptoms are present. Mental health conditions like major depression, post-traumatic stress disorder (PTSD), bipolar disorder, schizophrenia, and obsessive compulsive disorder (OCD) should easily qualify, and many others will qualify as well.

4. How can I get a reasonable accommodation?

Ask for one. Tell a supervisor, HR manager, or other appropriate person that you need a change at work because of a medical condition. You may ask for an accommodation at any time. Because an employer does not have to excuse poor job performance, even if it was caused by a medical condition or the side effects of medication, it is generally better to get a reasonable accommodation **before** any problems occur or become worse. (Many people choose to wait to

ask for accommodation until after they receive a job offer, however, because it's very hard to prove illegal discrimination that takes place before a job offer.) You don't need to have a particular accommodation in mind, but you can ask for something specific.

5. What will happen after I ask for a reasonable accommodation?

Your employer may ask you to put your request in writing, and to generally describe your condition and how it affects your work. The employer also may ask you to submit a letter from your health care provider documenting that you have a mental health condition, and that you need an accommodation because of it. If you do not want the employer to know your specific diagnosis, it may be enough to provide documentation that describes your condition more generally (by stating, for example, that you have an "anxiety disorder"). Your employer also might ask your health care provider whether particular accommodations would meet your needs. You can help your health care provider understand the law of reasonable accommodation by bringing a copy of the EEOC publication The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work to your appointment.

If a reasonable accommodation would help you to do your job, your employer must give you one unless the accommodation involves significant difficulty or expense. If more than one accommodation would work, the employer can choose which one to give you. Your employer can't legally fire you, or refuse to hire or promote you, because you asked for a reasonable accommodation or because you need one. It also cannot charge you for the cost of the accommodation.

6. What if there's no way I can do my regular job, even with an accommodation?

If you can't perform all the essential functions of your job to normal standards and have no paid leave available, you still may be entitled to unpaid leave as a reasonable accommodation if that leave will help you get to a point where you can perform those functions. You may also qualify for leave under the Family and Medical Leave Act, which is enforced by the United States Department of Labor. More information about this law can be found at www.dol.gov/whd/fmla.

If you are permanently unable to do your regular job, you may ask your employer to reassign you to a job that you can do as a reasonable accommodation, if one is available. More information on reasonable accommodations in employment, including reassignment, is available here.

7. What if I am being harassed because of my condition?

Harassment based on a disability is not allowed under the ADA. You should tell your employer about any harassment if you want the employer to stop the problem. Follow your employer's reporting procedures if there are any. If you report the harassment, your employer is legally required to take action to prevent it from occurring in the future.

8. What should I do if I think that my rights have been violated?

The Equal Employment Opportunity Commission (EEOC) can help you decide what to do next, and conduct an investigation if you decide to file a charge of discrimination. Because you must file a charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. **It is illegal for your employer to retaliate against you for contacting the EEOC or filing a charge**. For more information, visit http://www.eeoc.gov, call 800-669-4000 (voice) or 800-669-6820 (TTY), or visit your local EEOC office (*see* https://www.eeoc.gov/field for contact information).

https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights

Reminder—Destigmatization of Mental Illness In The Workplace

There is a lot of talk these days about diversity and inclusion. And about accommodating those with disabilities. Remember: providing accommodations applies to employees with mental impairments too.

Recently, the US Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the anti-discrimination laws, has reminded employers about the significance of building a corporate culture that destigmatizes mental illness in the workplace.

Apparently, charges of discrimination based on mental health disabilities are on the rise. According to preliminary data from the EEOC, the Corporate Wellness Magazine recently reported that the EEOC resolved almost 5,000 charges of discrimination based on mental health conditions *and* obtained approximately $20 million for individuals with mental health conditions who were denied employment and reasonable accommodations in FY 2016.

As a result of these stats, the EEOC published two new guidelines for employers: *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights* and *The Mental Health Provider's Role in a Client's Request for Reasonable Accommodation at Work*.

The first publication explains what we have told you here—the Americans with Disabilities Act ("ADA") prohibits employers from taking an adverse action (demotion, termination, etc.) against employees with physical disabilities and mental health impairments as long as they can perform the essential functions of the job with or without a reasonable accommodation.

The second explains the reasonable accommodation law to mental health providers.

Common Mental Health Conditions

Mental health conditions that may qualify for a reasonable accommodation are those that substantially limit one or more major life activities, including brain/neurological functions and

activities like communicating, thinking, concentrating, regulating thoughts or emotions, and interacting with others. They can include:

- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder
- Schizophrenia

General anxiety disorder is often considered a disability too (but less so if it is caused by the workplace environment).

The EEOC notes that an employee may qualify for a reasonable accommodation if (s)he *has or had* a substantially limiting impairment, and, as I told you here, the ADA's protection includes workplace discrimination based on *perceived* impairments.

The Interactive Process Is Key

Why is this important?

Well, it's critical for mental health providers to understand how important their role can be in assisting with the interactive process. As always, document the interactive process, and understand, that engaging in the interactive process in not "one and done" but an ongoing duty.

But what if you and the employee can't figure which accommodations might work?

To comply with the ADA, you, as the employer, need to understand how the disability affects the employee's ability to do the job, and, with disabilities that can be "invisible," like mental health conditions, that can be tough to do without guidance from the employee's mental health provider who can explain the limitations caused by the mental health impairment and what reasonable accommodations might help the employee still perform the essential functions of the job.

You, as the employer, can request information, including regarding the functional limitations caused by the disability, from an employee's medical provider so as to understand the employee's difficulties, how an accommodation could alleviate an employee's limitations, and which accommodations may be appropriate.

A wide range of reasonable accommodations exist for any mental impairment. Check the EEOC website, the JAN Network, or consult with an employment attorney.

One in four adults in the U.S. suffer from some type of mental disability. Do you know your obligations under the law?

https://employmentlaw.fisherbroyles.com/2018/05/10/reminder-destigmatization-of-mental-illness-in-the-workplace/

Prioritizing Mental Health At Work With A Different Kind of "Happy" Hour

Have an Employee Assistance Program? Check.

Have a policy explaining to employees that they can request reasonable accommodations for a physical or mental health disability and how to go about that? Check.

Trained your managers to recognize requests for accommodations? Check.

Talking with your teams about mental health? Communicating authentically about mental health in your workplace so that others feel psychologically safe to do the same?

Indeed, the pandemic ripped off the Band-Aid about that aspect of mental health. In 2020, the Centers for Disease Control and Prevention ("CDC") reported that almost 41% of US adults are struggling with their mental health or substance use, double pre-pandemic reports.

Results from one (pre-pandemic) study states that nearly 85% of people say they're uncomfortable discussing mental illness at work, and NAMI estimates that 8 in 10 workers with a mental health condition do not get treatment because of the shame and stigma associated with it. If people aren't seeking treatment and are uncomfortable talking about mental illness at work, they sure aren't seeking reasonable accommodations either.

But talking about mental health struggles? Being so vulnerable? At work? That's a tougher item to check off the list. Yet, it is so critical. Especially at a law firm.

Talking about mental health is a business necessity for lawyers. Lawyers have always been susceptible to higher rates of mental health challenges, such as depression, addiction, and suicide, compared to the general population.

If we talk about it, do we look weak? Will people still trust our judgment?

Enter "Happy" Hour.

At FisherBroyles, I open up a one hour video chat for any of my partners to talk about mental health. You see, here, at my firm, we walk the walk.

Since I joined FisherBroyles in 2016, I have been writing about how we manage and reframe mental health in the workplace.

Lawyers gotta lawyer so usually, I write in the context of managers who violate the Americans with Disabilities Act (ADA) or fail to recognize requests for reasonable accommodations.

I write, too, about destigmatizing the whole idea of mental health as a "problem" and reframing it as a workplace challenge. We crave human interaction.

How could I do this at my cloud-based law firm where I do not just walk into my partners' offices? It started with one person.

Flashback to 2019

We say often that ***leaders must lead by example***. As I've written countless times in this blog, organizational leaders set the tone, and people tend to follow the leader.

When managers or the C-suite prioritizes mental health, employees or other partners are more likely to do so as well.

So in 2019 when Global General Counsel Joel Ferdinand explained to about 200 partners the ways in which he managed his anxiety, a seed planted in my brain.

FINALLY, I thought, people are talking about mental health.

What Is "Happy" Hour?

As Employment Counsel to this same law firm, I work daily with Joel and the rest of the leadership team. I know the statistics about mental health. I write about it. I live it in my family.

So I thought, as a leader at my firm, I want to create that same sense of psychological safety in my workplace through disclosure and share our mental health journeys and challenges together.

According to Joel, and he and I talk about this quite a bit:

Talking about anxiety, depression, or otherwise enables leaders to acknowledge what their team experiences, and allows them to be there for their team. I truly care for our team, and treat them like family. However, to treat someone like family is to know them on a personal level, without which you do not know their experiences, stresses, or personal achievements. Knowing our team on a personal level enables me to check in often on more than a facial level, but, rather, on a personal level to ensure that they are healthy and happy human beings.
When you mainstream mental health challenges and talk about it, it becomes less scary to people. We find solace in knowing we are not alone in our struggles and in our sleepless nights.

I started a monthly meeting for whomever wanted to join, and I have shared, and I have listened.

My law partner Justin Nahama thought of the name, and I loved the irony of it.

"Happy" hour is totally voluntary and, of course, confidential. Managers do not attend as managers. They attend as human beings.

We talk about stress and burnout.

Lawyers are stressed? Who knew?! According to the ABA Journal, lawyers responding to a Bloomberg Law survey reported feeling burnout an average of 47% of the time in the first half of the year.

The last quarter of 2021 was the first time average burnout exceeded 50% since the publication began polling on the issue in 2020.

The legal profession is demanding, and self-care has traditionally been undervalued. Legal employers need to continue to develop and offer well-being programs, and address attorney mental health and substance use disorders.

https://news.bloomberglaw.com/business-and-practice/analysis-attorney-burnout-abating-but-not-extinguished
Indeed.

During "Happy" Hour, we talk about the overwhelm, connecting with purpose, and know that **it's ok to ask for help.** It's not a weakness. It's a human need.

We talk about breathing because I believe breathing is a critical tool in a self-care tool kit. And, yes, we talk a lot about prioritizing self-care through exercise, meditation, mindfulness, and taking the time for therapy if we need it. I'm barely scratching the surface, but you get the idea.

As lawyers, we think we are too busy to prioritize our mental health. Honestly, we cannot afford *not* to prioritize mental health.

https://employmentlaw.fisherbroyles.com/2022/10/20/prioritizing-mental-health-at-work-with-a-different-kind-of-happy-hour/?utm_source=mondaq&utm_medium=syndication&utm_content=inarticlelink&utm_campaign=article

Accurate Job Descriptions Remain Critical for ADA Compliance

Under the Americans with Disabilities Act (ADA), employers do not have to excuse an employee from performing an essential function of a job as a reasonable accommodation. Several courts have found that a job duty is an essential function where an employee performs it up to twenty percent of the time, particularly where the job description suggests that an employee must be able to perform it. The Eleventh Circuit has recently gone in a different direction. In *Brown v. Advanced Concept Innovations, Inc.*, the Eleventh Circuit held that such a function was not essential, and thus, an employer violated Florida's anti-discrimination law (which courts interpret consistently with the ADA) by failing to excuse an employee from performing it. While *Brown* may arguably be an outlier, it reinforces the importance of maintaining accurate and up-to-date job descriptions.

The Decision

Timethia Brown worked for Advanced Concept Innovations, LLC (ACI), a packaging and manufacturing company, in a clerical job, that primarily required her to work at her desk in the office, but that also required her to work on the production floor up to twenty percent of her working time. Brown developed a condition that caused her to produce an excessive amount of saliva and asked ACI to allow her to use a "spit cup" while working at her desk and to excuse her from working on the production floor, where sanitation and cleanliness requirements prohibited her from spitting in a cup. ACI allowed her to use a spit cup at her desk, but it did not excuse her from working on the production floor because it determined that doing so was

an essential function of her job. Because ACI determined that Brown could not perform that duty with or without a reasonable accommodation, it terminated her employment.

Brown subsequently filed a lawsuit alleging that ACI had violated the disability-discrimination provisions of the Florida Civil Rights Act. A jury found that working on the production floor was not an essential function of Brown's job and found in her favor. Applying ADA regulations and cases to Brown's state-law claim, the Eleventh Circuit affirmed the jury's decision, relying principally on three facts. First, Brown worked on the production floor at most only twenty percent of the time. Second, other employees could perform her work in that area. Finally, although the job description included "walking to and from the production area is required" under "Physical Demands," it did not specifically refer to performing work in the area under a section describing the job's "Primary Responsibility."

Employer Takeaways

Brown arguably diverges from other circuits' decisions and earlier Eleventh Circuit cases holding that a job duty is an essential function where the employee performed it up to twenty percent of the time and the job description at least indicated that performing the duty was part of the employee's job. Nonetheless, the decision in *Brown* serves as a reminder to employers, particularly in the Eleventh Circuit (which covers the states of Alabama, Florida, and Georgia), of the importance of maintaining accurate job descriptions. Employers should review, and if, necessary, revise, their job descriptions to ensure they not only identify all essential functions, but also expressly describe them as duties or responsibilities. Additionally, since job duties may change more rapidly than an employer can update its job descriptions, employers may also want to consider noting in their job descriptions that supervisors may assign additional duties and responsibilities.

https://www.natlawreview.com/article/accurate-job-descriptions-remain-critical-ada-compliance

Enforcement Guidance:
Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. This Guidance sets forth an employer's legal obligations regarding reasonable accommodation; however, employers may provide more than the law requires.

This Guidance examines what "reasonable accommodation" means and who is entitled to receive it. The Guidance addresses what constitutes a request for reasonable accommodation, the form and substance of the request, and an employer's ability to ask questions and seek documentation after a request has been made.

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and modified schedules. Reassignment issues addressed include who is entitled to reassignment and the extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

The final section of this Guidance discusses undue hardship, including when requests for schedule modifications and leave may be denied.

https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada

No Discrimination When Decision-Maker Was Unaware of Disability

Takeaway: Employers may take adverse action against employees with disabilities or members of other protected categories if they are insubordinate.

A federal district court in Connecticut granted summary judgment against disability and gender discrimination and failure-to-accommodate claims brought by a seasonal campground worker who was fired after she was involved in a public altercation and slapped her supervisor's hand.

The plaintiff worked as a temporary, seasonal employee during the employer's camping season from 2012 through 2016 and returned after a two-year hiatus in 2019. Prior to the 2019 camping season, a manager contacted the plaintiff, who was a licensed bingo caller, to hire her to help with bingo, to design medals and certificates, and to schedule employees and camper activities.

The plaintiff had been diagnosed with post-traumatic stress disorder (PTSD) and major depressive disorder. The manager who contacted her to return to work in 2019 was aware the plaintiff was diagnosed with PTSD and depression.

The plaintiff made several accommodation requests relating to her disability, including asking for time off for medical and therapy appointments and informing the manager that she had "an

issue with being around big crowds of people." The plaintiff admitted that she was never promised she could avoid working with others altogether.

In April 2019, the plaintiff began working at the campground fulfilling the responsibilities discussed above and, in addition, finding employees on the campground and calling bingo "around huge crowds when [she] didn't want to do it."

During the 2019 camping season, the plaintiff was involved in verbal arguments on four occasions. During the fourth argument, she slapped a supervisor's hands and began slapping herself in the face.

The plaintiff took a break after this incident, and her employment was terminated when she returned. The general manager decided to terminate the plaintiff's employment based on her physically slapping a supervisor during a hostile, public altercation. The general manager was unaware of the plaintiff's disability when he made the decision.

The plaintiff's termination was consistent with the termination of a male employee who had used physical force when he grabbed a cellphone from the hand of a guest who was filming him as he addressed a noise complaint.

Court Action

The plaintiff brought claims for disability discrimination and failure to accommodate under the Americans with Disabilities Act (ADA) and Connecticut Fair Employment Practices Act (CFEPA) and gender discrimination under Title VII of the Civil Rights Act of 1964. The court analyzed these claims under the *McDonnell Douglas* burden-shifting framework.

The court relied on a summary order of the 2nd Circuit in granting summary judgment on the plaintiff's disability discrimination claims under the ADA and CFEPA. The court explained that the ADA and CFEPA employ different causation standards for proving the discriminatory intent required to establish a prima-facie case.

The ADA applies a "but-for" cause standard, whereas the CFEPA employs a more easily satisfied "motivating factor" test. Nonetheless, the court found the plaintiff had failed to establish a prima-facie case under both standards because she did not show that the manager who made the decision to terminate her employment had knowledge of her disabilities.

Summary judgment was also granted on the plaintiff's gender discrimination claims because the plaintiff failed to establish a prima-facie case under Title VII. The court reasoned that the evidence did not support a finding that a similarly situated male would be treated differently. The plaintiff had not been disciplined for past incidents, two other women involved in arguments with the plaintiff were not terminated, and the employer had terminated a male employee for using physical force.

The court also granted summary judgment on the plaintiff's failure-to-accommodate claims. The court found that an essential function of the plaintiff's job was working with people in small groups. It rejected the plaintiff's allegation that her employer had failed to accommodate her

when she was assigned to work in a corn maze with three to four other employees. The plaintiff's accommodation request had been to avoid big groups, not small ones, and the court noted that the plaintiff's sister was among those in the small group.

https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-ada-disability-discrimination-insubordination.aspx

Red Roof Inns, Inc. Will Pay $43,188 to Settle EEOC Disability Discrimination Suit

Employee Told Not to Waste Time Applying for Promotional Opportunity Because of His Visual Impairment, Federal Agency Charged.

Red Roof Inns, Inc. (Red Roof) will pay $43,188.00 to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency announced today.

According to the EEOC's lawsuit, Red Roof failed to provide an employee who is blind working in its Contact Center in Springfield, Ohio, with a reasonable accommodation so that he could participate in an information seminar to learn more about a promotional opportunity in its Online Connectivity department. The lawsuit further alleged that Red Roof denied the employee the opportunity to compete for, or hold, the vacant position because of his disability or need for reasonable accommodation, telling the employee it would be a waste of his time to apply for the position because his visual impairment could not be accommodated.

Such conduct violates the Americans with Disabilities Act (ADA), which requires employers to provide reasonable accommodations that enable disabled employees to enjoy equal benefits and privileges of employment and perform the essential functions of the job they hold or desire. The ADA also prohibits employers from failing to promote or hire disabled applicants or employees because of their disability or the need to provide a reasonable accommodation.

The EEOC filed suit (Civil Action No. 3:20-cv-381) in U.S. District Court for the Southern District of Ohio, Western Division at Dayton, after first attempting to reach a pre-litigation settlement through its voluntary conciliation process.

In addition to providing the now former employee $43,188 in monetary relief, the sixteen-month consent decree settling the suit permanently enjoins Red Roof from failing to provide reasonable accommodations that enable disabled employees to perform the essential functions of their jobs; failing to provide reasonable accommodations that enable disabled employees to enjoy equal benefits and privileges of employment; and failing to promote or hire disabled applicants or employees because of disability or the need to provide a reasonable accommodation.

Additionally, Red Roof must provide comprehensive ADA training to its vice president of Distribution Services, vice president of Human Resources, and managers, supervisors and human resources personnel who make employment decisions pertaining to the Online Connectivity department. Red Roof is also subject to notice posting, compliance monitoring and periodic reporting to the EEOC.

“It is essential that managers, supervisors and human resources personnel are properly trained regarding their obligations under the Americans with Disabilities Act, including their duty to engage in the interactive process with their disabled employees about reasonable accommodation needs,” said EEOC Indianapolis District Director Michelle Eisele.

EEOC’s Indianapolis Regional Attorney, Ken Bird, added, “Employers have the duty under the ADA to reasonably accommodate disabled individuals. Employers may not refuse to hire an applicant for a job because of the need to provide a reasonable accommodation.”

For more information on disability discrimination, please visit https://www.eeoc.gov/disability-discrimination.

The case was litigated by the Louisville Area Office, which is part of the EEOC’s Indianapolis District, with jurisdiction over Indiana, Kentucky, Michigan and parts of Ohio.

https://www.eeoc.gov/newsroom/red-roof-inns-inc-will-pay-43188-settle-eeoc-disability-discrimination-suit

'It’s really across the board': People with disabilities face employment discrimination

Even with legislation protecting people with disabilities against discrimination and company mission statements touting “equal opportunity employer” status, advocacy groups say people with disabilities are still subjected to unfair treatment regarding hiring opportunities.

Earlier this month, the Disability Employment Subcommittee of the Commission on the Status of Persons with Disabilities met to analyze initiatives that increase employment opportunities for individuals with disabilities.

Subcommittee member Carl Richardson, who identifies as deafblind and serves as the Statehouse’s ADA coordinator, said his resume always got him the interview when he was on the job hunt, but what followed after the interview was when things took a turn.

“The only thing they could focus on was how am I going to get to work every day?” Richardson said. “And I actually said to them, ‘You know what? It’s not your concern whether I can get to

work every day. It's your concern whether I can do the job.' I blew the interview because of that."

Of the 62,000 workplace discrimination charges filed with the U.S. Equal Employment Opportunity Commission over the pandemic, 66% were disability-related. The lawsuits alleged employers had violated the Americans with Disabilities Act of 1990.

In his years of handling employment discrimination cases, Tom Murphy, supervising attorney at the Disability Law Center in Massachusetts, said he sees all kinds of disabilities used against employees.

"Unfortunately, it's really across the board," said Murphy. "It could be individuals with developmental or intellectual disabilities, individuals with physical disabilities, sensory disabilities, but I would say I probably deal with more cases involving individuals who have a psychiatric diagnosis of some kind."

Murphy added that case success rates depend on the type of case pursued.

"If it's an issue that involves somebody who needs an accommodation currently in the workplace, those are a little more straightforward," he said. "The focus there is, 'What is the accommodation that they're seeking? How does it impact their ability to perform the essential functions of their job? And is it reasonable for the employer?'"

"If it's a termination case and somebody's lost their job, for many reasons, it can be a bit more complicated," Murphy said. "It's pretty rare that there's what we call 'direct evidence' of discrimination where [there are] clear words or written statements that an employer has terminated somebody because of their disability, so those are usually more of an indirect method of proof."

Oz Mondejar, Senior Vice President of Mission & Advocacy at Mass General Brigham, said the myth and anxiety that individuals with disabilities can't perform their job adequately should also be addressed in diversity, equity and inclusion efforts.

"Unlike other communities that employees are required to do work on in terms of inclusion, the disability side doesn't always get included in the diversity efforts," Mondejar said. "I've lived in those shoes, where we talk about Latino, LGBT, Black [communities], which is terrific, but disability is always a subset."

Rep. Mathew Muratore, R-Plymouth, said financial incentives could serve as a bridge to get employees "comfortable with the population of people [with disabilities]."

"I think now's the time to act on that because so many employers are looking for so many employees, and they can't get them," he said. "So this is a population that if somehow we can educate to get rid of the stigma, maybe initial and some more tax credits for them would be helpful."

There has been traction on Beacon Hill regarding tax credits for employers to hire more people with disabilities.

The Disability Employment Tax Credit states that after a minimum of 12 months of continuous employment, employers can claim a state tax credit, equal to $5,000 or 30% of the wages paid to each qualified employee with a disability … whichever is less."

Richardson said it might be fruitful to approach promoting the value of hiring people by treating it like a deal.

"I think you have to make a business argument to employers. I would probably say, 'Listen – according to the last census, almost 20% of people have disabilities," he said. "By not hiring people with disabilities, you're segmenting yourself from 20% of the population [that] have an incredible and talented pool. You're hurting yourself financially.'"

Gyasi Burks-Abbott, who serves on the boards and committees of several autism and disability organizations, including Advocates for Autism of Massachusetts and the Massachusetts Developmental Disabilities Council, said that, above all, hiring people with disabilities is the right thing to do.

"There's a deeper argument," said Burks-Abbott, an autism self-advocate. "Hiring disabled people gives you a different perspective, for instance, that might help you make decisions in a different way, or might change your business."

https://www.heraldnews.com/story/business/2022/12/18/people-with-disabilities-continue-to-face-employment-discrimination/69733814007/

Ethics Consult: Genetic Testing for Potential Employees? MD/JD Weighs In

Congress passed the Genetic Information Nondiscrimination Act of 2008 (GINA) with bipartisan backing. Both President Bill Clinton and President George W. Bush had advocated for the bill, and it passed the Senate 95-0 and the House of Representatives 414-1, with only libertarian congressman Ron Paul dissenting.

The legislation bans discrimination in employment and health insurance on the basis of one's genetics. (Notably, however, life insurance and disability insurance are not covered, leaving an ongoing deterrent to genetic testing.) The purpose of the law was to combat "genoism," a term coined by "Gattaca" film director Andrew Niccol to describe discrimination against a person based on their genetic resume.

While employers can test for a condition likely to cause current harm, they cannot test for future risks. So a bus company would be allowed to test drivers for a gene mutation likely to cause sudden heart attacks or seizures on the job at present, but not a mutation expected to cause blindness down the road.

Advocates of the law compare genetic discrimination to racial prejudice. Critics are quick to slam this analogy. Andrew Sullivan in 2000 wrote in the *New York Times*: "The point of laws against racial bias is to outlaw irrational discrimination based on irrelevant characteristics. The point of laws against genetic discrimination is to outlaw rational bias based on relevant information." While Sullivan conceded that such genetic data is "speculative," he argued that it was speculative in the same way that SAT scores are speculative: some low performers may succeed in college, but that does not mean the tests do not have some predictive value. Similarly, then, Irwin's plan to hire only employees who test negative for lung cancer markers on chromosome 15 could be considered perfectly rational, whether or not it is just.

Allowing discrimination based upon genetic risks that may display themselves in the future strikes many people as unfair, but is it really so much more unfair than discriminating against traits that already display themselves? For example, nobody would expect Greyhound to hire a blind bus driver. So why expect the company to hire a bus driver who has a genetic condition that makes them 99% more likely to go blind within 5 years? The company would squander resources training an employee who would not be able to work in the near future, while that employee would lose an opportunity to learn a trade they could continue to perform after the blindness sets in.

More concern exists, however, for prospective employees who have conditions likely to prevent employment anywhere. One can easily imagine a situation where companies outside the tobacco industry also refuse to hire workers positive for the lung cancer markers on chromosome 15. The law offers blanket protections against employment discrimination for such genetically unlucky individuals.

How to permit rational genetic discrimination without closing off meaningful opportunities for those who have lost the so-called genetic lottery remains an unresolved ethical dilemma.

https://www.medpagetoday.com/opinion/ethics-consult/102453

United States: Why The "Speak Out Act" Is More Like A Whisper

On December 7, 2022, Congress passed the "Speak Out Act" (the "Act"), which codified into federal law limits on what types of information employers are allowed to include in nondisclosure or non-disparagement clauses. Specifically, under the Act, employers are now prohibited from requiring employees to sign pre-dispute agreements that contain nondisclosure clauses or non-disparagement clauses that would have the effect of silencing employees concerning claims of sexual harassment or sexual assault. However, while aimed at preventing "Me Too" situations, the Act does not require confidentiality and non-disparagement clauses to expressly provide that they do not prohibit employees from speaking out against sexual harassment or sexual assault, meaning these contracts may still silence employees.

At first glance, the law may seem like an unnecessary measure. Plenty of employee handbook policies require employees to report sexual harassment/abuse and prohibit retaliation for doing so. However, such mandatory reporting policies become blurred when employees are also required to sign confidentiality, nondisclosure, non-disparagement, and similar agreements that prohibit them from discussing certain topics about the business since these topics could indeed be interpreted to include claims of sexual harassment or sexual assault.

Now, under the Act, such agreements violate federal law. Importantly, this does not mean employee confidentiality and non-disparagement agreements are prohibited. On the contrary, the Act is clear that such agreements are allowed and still a critical tool for protecting company trade secrets and proprietary information; they just cannot be used to curtail speech related to claims of sexual harassment or sexual assault. (Note, the Act does not say "confidential information"; it says "trade secrets or proprietary information.")

Also noteworthy, the Act does not apply to *post-dispute* agreements, such as settlement agreements entered into after an employee raises a sexual assault or sexual harassment allegation. For example, the Act would not prohibit an employee and employer from entering into a settlement agreement after an employee has registered a sexual harassment complaint to a company's human resources department.

Finally, the Act does not prohibit federal, state, or local laws that regulate nondisclosure and non-disparagement clauses so long as those laws are as protective or more protective than the Act's protections. This means that more protective measures on the books in California, New Jew Jersey, New York, Oregon, and Virginia remain intact.

While a good start, the Act does not go far enough in some respects. Specifically, the Act does not penalize employers for including non-disparagement or nondisclosure provisions in employee agreements, nor does it require such agreements to expressly state that they do not prohibit the employee from discussing or raising claims of sexual harassment or sexual assault. Instead, the Act's impact is simply that those offending agreements will not be enforceable if they seek to suppress speech about sexual harassment or sexual assault in the workplace. It also means that the issue will have to be prosecuted to have any applicability, forcing victims of sexual harassment and sexual assault to litigate the enforceability of the confidentiality agreement while simultaneously litigating claims of workplace sexual harassment/assault. As such, without more clarity, employees subject to confidentiality agreements will likely be confused about what they can and cannot say when claims of sexual harassment are involved and remain silent.

Employer Takeaways: The Speak Out Act took effect on December 7, 2022, and applies to "claims filed under Federal, State, or Tribal law" after that date. Employers should review their current employee confidentiality agreements and revise them before having any employee sign in the future to ensure they include exceptions to nondisclosure and non-disparagement clauses related to allegations of sexual assault or sexual harassment.

And, since most employers are (or should be) making year-end updates to their employee policies and template contracts, it is probably a good idea to review the more-restrictive state laws and ensure their policies and contracts include all necessary bells and whistles.

https://www.mondaq.com/unitedstates/discrimination-disability--sexual-harassment/1266254/why-the-speak-out-act-is-more-like-a-whisper-

Company To Pay $250K After Boss 'Joked' About Shooting Black People: Feds

An Oklahoma-based company has settled a lawsuit alleging that a supervisor **used the N-word** to refer to a Black employee and made **racist and threatening "jokes."**

American Piping Inspection, Inc. struck a deal with federal prosecutors and agreed to pay $250,000 in compensation over the alleged racist treatment of a Black employee, the U.S. Equal Employment Opportunity Commission said in a news release per the Fort Worth Star-Telegram.

The federal lawsuit stemmed from the company's Midland, Texas office where the employee was hired as a radiographer in 2017. According to the suit, his boss made jokes about shooting Black people.

"What is the best way to see a Black man? At the end of a scope," the supervisor said as he gestured at the employee "as if aiming a firearm," per the suit.

When the employee voiced his concerns to a company vice president, the supervisor faced no consequences and the racist behavior continued, the lawsuit states. The suit also alleges that the employee was a victim of retaliation, citing his termination in September 2018.

The company falsely accused the employee of improperly storing and logging equipment, an infraction that "at least" 10 white radiographers committed and weren't fired for, the lawsuit says.

Following the settlement deal, the company is also required to "revise its anti-discrimination policies" and mandate training for managers and other employees to "ensure they know their legal obligation to prevent, address, and remedy workplace discrimination," the EEOC news release states.

https://www.binnews.com/content/2022-12-28-company-to-pay-250k-after-boss-joked-about-shooting-black-people-feds/

Commentary: Mansplaining is a problem in the workplace

OTTAWA: Since the term "mansplaining" has entered the cultural zeitgeist as a social media phenomenon and hashtag, its popularity and usage has only skyrocketed. In just six months between November 2016 and April 2017, for example, it was mentioned at least 10,000 unique times on Twitter.

Mansplaining is a portmanteau combining "man" and "explain" that refers to a man providing an unrequested explanation to a woman. It is characterized by the confidence of the speaker, a condescending tone, an interjection or interruption and the underlying assumption that the target has no prior knowledge of the subject.

The term mansplaining was first popularized by Rebecca Solnit in her 2008 essay, Men Explain Things to Me. In it, Solnit described an interaction with a man where he explained to her the premise and importance of a book he assumed she had no knowledge of — a book that Solnit wrote herself. He continued doggedly despite her friend's repeated insistence of "that's her book".

In other notable examples, an astrophysicist tweeting about climate change was told to "learn actual science" and a NASA astronaut was challenged on her own tweet about an experiment that she conducted in a space-equivalent zone.

The ongoing social media discourse around mansplaining and its connection to the professional experiences of women questions whether this form of behaviour can be found in the workplace and, if so, what effect it is having.

COVERT WORKPLACE MISTREATMENT

Research suggests that covert forms of workplace mistreatment have increased over the last 20 years. This is sometimes attributed to the increased condemnation of overt discrimination.

Most incidents of mistreatment in today's workplace are due to a lack of civility or violations of social norms, rather than openly discriminatory, hostile or violent behaviours. Covert mistreatment such as disrespect, condescension and degradation are particularly harmful because of the ambiguous nature of intent.

We set out to explore how the term "mansplaining" is being used in popular discourse surrounding the workplace. We also wanted to know if mansplaining exists outside of social media, or whether it is just another example of online backlash against experts. To do so, we investigated the prevalence of mansplaining in the workplace.

Finally, we wanted to establish who is experiencing mansplaining, who is perpetrating mansplaining and its potential impact on the target.

A WORKING DEFINITION

To define mansplaining in the workplace context, we scraped Twitter for tweets that mentioned mansplaining and included work-related terms.

Our analysis expanded the definition of mansplaining: Someone (usually a man) providing an unsolicited — or unwelcome — condescending or persistent explanation to someone (usually not a man) that questions their knowledge or assumes a lack of knowledge — regardless of the veracity of the explanation.

We then surveyed working North Americans to ask them if they had experienced mansplaining, how frequently it occurred if they did and the perceived gender of the perpetrator.

We were particularly interested in knowing whether the "man" part of mansplaining was appropriate. As such, we asked people of all genders to report on the behaviours we associated with mansplaining and didn't specifically ask respondents about mansplaining itself.

BEYOND SOCIAL MEDIA

Our research indicates that mansplaining is much more than a social media phenomenon and permeates beyond the virtual realm to affect people in their working lives.

Nearly every individual in our study, regardless of gender, experienced at least one of the mansplaining behaviors. However, employees experienced a wider range of the characteristic behaviors and experienced them much more often.

This suggests that mansplaining may represent a type of gendered incivility in the workplace — a form of rudeness most often experienced by women and gender minority employees and most likely to be perpetrated by men.

The term "mansplaining" may be an overgeneralization, but it does seem to accurately reflect the experiences of women and gender minority employees.

Our results also suggest that mansplaining has significant detrimental effects on the targets — much like workplace incivility does. Each of the mansplaining experiences were associated with lower organisational commitment and job satisfaction and higher turnover intentions, emotional exhaustion and psychological distress.

MANSPLAINING IS NOT A FAD

Organisations should not dismiss mansplaining as a product of social media rudeness or as a passing fad. Instead, mansplaining should be understood as an issue related to selective incivility where individuals are targeted based on their identity and made to feel like they do not belong.

Once identified as a form of incivility, mansplaining can and should be addressed in the workplace. Interventions that are effective at counteracting incivility might also be effective at mitigating mansplaining.

The Civility, Respect and Engagement in the Workplace intervention is one such training that mitigates incivility and encourages civility in the workplace. A Canadian hospital system that used the intervention saw improvements in respectful behaviour, job satisfaction and trust in management, while employee burnout and absenteeism dropped.

The book, Subtle Acts of Exclusion, might also be a handy resource for leaders and employees aiming to address this covert form of gendered mistreatment. This handbook helps organiations prevent microaggressions so that employees feel a sense of belonging and inclusion in their workplaces.

It's up to workplaces to mitigate the harms caused by mansplaining and prevent it from becoming a recurring issue in the workplace. The productivity and well-being of employees depends on it.

https://www.channelnewsasia.com/commentary/workplace-gender-equality-mansplain-male-female-employees-3168041

United States: Speak Out Act Speaks (But Not Dramatically)

On December 7, 2022, President Biden signed the "Speak Out Act" into law. The Act prohibits pre-dispute agreements not to disclose sexual harassment and assault allegations.

Supported by #MeToomovement advocates, and enjoying a level of bipartisan support, the Act is designed to facilitate transparency and to allow victims of sexual harassment to communicate their stories. However, while employers need to be aware of the Act and its requirements, it does not represent a sea change.

First, the Act only applies to non-disclosure and non-disparagement provisions entered into "before the dispute arises." While the meaning of this phrase likely will be the subject of litigation, it clearly allows such clauses in settlement and severance agreements entered into after a sexual harassment claim (and probably an allegation) has been communicated. This is less restrictive than initial versions of the bill, which only allowed such provisions in agreements

after litigation, and the more stringent laws of states such as California, New York, and Illinois(which the Act expressly does not preempt). Ultimately, Congress recognized that requiring actual litigation before allowing such provisions would delay and reduce potential settlements.

Second, existing laws such as the National Labor Relations Act already provides some protection regarding employee speech. In light of such protection, it is questionable whether many employers have been relying on pre-dispute employee handbook and employment contract provisions to muzzle such speech.

Third, unlike an earlier version, the Act does not preclude such non-disclosure and non—disparagement provisions in other civil rights areas, such as race harassment and discrimination.

Finally, the penalty for including an offending provision only appears to be that it is not enforceable.

However, like the federal statute passed earlier this year prohibiting mandatory pre-dispute arbitration of sexual harassment and assault cases, the Speak Out Act carves out sexual harassment/assault for special treatment and places limitations on blanket pre-dispute agreements designed to prevent disclosure.

Employers should review contracts, handbooks and other employment documents, so that they can eliminate pre-dispute non-disparagement and non-disclosure clauses that are applicable to sexual harassment and assault. Employers should also recognize that states such as California, Illinois, and New York impose greater limitations, and be aware that other states may very well follow suit. Finally, to the extent that it is unclear whether "a dispute has arisen," employers should realize that the enforceability of such confidentiality provisions is subject to attack and consider adding reference to specific sexual harassment allegations in the settlement agreement.

https://www.mondaq.com/unitedstates/discrimination-disability--sexual-harassment/1264116/speak-out-act-speaks-but-not-dramatically

United States: A Post-Pandemic Workplace: Highlights From The EEOC Update To COVID-19 FAQs

In the wake of the COVID-19 pandemic, on July 12, 2022, the Equal Employment Opportunity Commission ("EEOC") released updated guidelines to its frequently asked questions ("FAQs") regarding certain issues related to the COVID-19 pandemic, specifically regarding the application of the Americans with Disabilities Act ("ADA"). The update, as discussed and detailed below, includes updated guidance on mandatory vaccination programs, when

employees can be required to undergo testing for COVID-19, and delays to the interactive process by which the employer and employee determine reasonable accommodations for the employee's disability. The full update can be found here.

Returning to the Workplace and Employee Vaccination Mandates

The updated guidelines provide that federal employment opportunity laws do not prevent an employer from requiring that all employees physically entering a workplace be vaccinated. Information regarding an employee's COVID-19 vaccination status is confidential.

The update provides specific guidelines for employers with respect to employees who have sought an exemption based on a disability. An employer may require an individual with a disability to meet a qualification standard (though that standard must be applied to all employees) such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity as applied to that employee.

Additionally, once an employee does return to the workplace, an employer may choose to conduct medical exams and make disability-related inquires, so long as the inquiry is job-related and consistent with business necessity.

The update also suggests that employers may choose to contact all employees returning to the workplace to invite them to request a reasonable accommodation that an employee might need for a disability if the employee believes he or she is at a higher risk for severe illness following COVID-19 or if the employee has a sincerely held religious belief preventing the employee from obtaining the COVID-19 vaccination.

Consistent with federal laws, an employer may not discriminate against an employee on the basis of age, which may come up if the employee is prevented from returning to the workplace due to a perceived higher risk of becoming severely ill from COVID-19.

Employee Testing Requirements

The EEOC FAQs provide that an employer may administer a COVID-19 viral test to evaluate whether an employee can remain in or come into the workplace so long as the employer can show the test is "job-related and consistent with business necessity." A COVID-19 viral test is considered a medical examination within the meaning of the ADA. However, an employer may not require employees to subject themselves to antibody testing to re-enter the workplace.

Reasonable Accommodations

The EEOC FAQs are clear that the pandemic and resulting impacts of the pandemic may result in excusable delays of the "interactive process": the process by which the employer and

employee exchange information to determine reasonable accommodations for the employee's disability. If delays ensue, the employer must show that a specific pandemic-related extenuating circumstance caused the delay.

An employer may generally require employees to wear personal protective equipment. However, if any employee has a disability or a sincerely held religious belief that affects the ability to wear personal protective equipment, the employer should discuss this with the employee and provide a reasonable accommodation, so long as it does not cause undue hardship on the operation of the employer's business under the ADA or Title VII.

An employee who has a specific medical condition (that the CDC has deemed may put a person at higher risk for severe illness from COVID-19) must let the employer know that the employee needs a reasonable accommodation related to a medical condition or medical need. After the employee alerts the employer, the employer may inquire or request medical documentation to decide if that individual has a disability within the scope of the ADA. An employer's duty to provide reasonable accommodation applies only if an employee has an actual disability or a record of a disability, as defined in the ADA; this means not every individual with one of the medical conditions that might place them at higher risk of COVID-19 complications will automatically satisfy these ADA definitions of disability.

Employer Incentives for Employees to Obtain Vaccine

The ADA does not limit the incentives (which includes both rewards and penalties) an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination, or to provide confirmation of vaccination, if the health care provider administering a COVID-19 vaccine is not the employer or its agent. By contrast, if an employer offers an incentive to employees to voluntarily receive a vaccination administered by the employer or its agent, the ADA's rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive.

Doctor's Note Request

The FAQs provide that employers may require confirmation from a qualified medical professional that the individual is able to safely return to work. The justification is consistent with the ADA standard that any such employee inquiries be job-related and consistent with business necessity meaning the inquiry is related to either the transmission of the virus to other employees or out of a concern for the employee to be able to complete his or her job. Practically speaking, however, the EEOC also provides that employers may conceive other ways to determine the safety of allowing an employee to return to the workplace, such as email communication from a doctor confirming the individual is no longer infectious and is able to resume working.

Job Offers and COVID-19

An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as the employer screens all candidates for the same type of job. An employer should consult any current CDC guidance in determining whether to withdraw a job offer if an applicant is determined to need to start the position immediately and then becomes exposed or positive to COVID-19 weighed against if that position would require such proximity to others and if the position could be performed in a manner as to not be in close proximity to others. An employer may not postpone a start date or withdraw a job offer if the candidate is older, pregnant or has an underlying health condition that the employer perceives puts them at a higher risk of illness from COVID-19.

https://www.mondaq.com/unitedstates/health-safety/1264408/a-postpandemic-workplace-highlights-from-the-eeoc-update-to-covid19-faqs

Research: Workplace Stigma Around Menopause Is Real

Summary. For half the global population, menopause is a natural part of life. It also happens to overlap exactly with the age at which employees are most likely to be qualified to advance into top leadership positions — and the authors' new research shows that people...more

In the United States, the average CEO is hired at the age of 54. For many of us, middle age promises to be the peak of our careers, in which decades of hard work finally pay off and we are seen as having the expertise, self-confidence, and stability necessary to move into high-level management and leadership roles. But for half the population, middle age also means another major shift: menopause.

The menopausal transition — that is, the period in which reproductive hormone levels become highly variable and menstruation cycles eventually cease — typically starts between the ages of 45 and 55, and lasts around seven years. During this time, women (or anyone with female anatomy) experience a range of symptoms, including both relatively hidden changes such as depression, sleep issues, and mood shifts, as well as the much more visible symptoms of hot flashes: unpredictable moments of overheating, flushing, and perspiration. And while the invisible symptoms are no less significant, many people are particularly embarrassed to experience hot flashes at work out of concern that being visibly "outed" as menopausal might harm their careers. But is this fear warranted?

To better understand the impact of hot flashes in the workplace, I conducted a series of studies (in collaboration with my colleagues, Terri Frasca, Vanessa Burke, Didar Zeytun, and Jes Matsick) exploring the stereotypes associated with menopause, the potential costs to women's careers, and strategies to help men and women alike overcome these biases.

Women Experiencing Menopause Seem Less Leader-Like…

In our first study, we asked 300 U.S-based full-time workers to share their first impressions of a hypothetical coworker who was described as "a menopausal woman," "a middle-aged woman," or "a middle-aged man." And in our next study, we had nearly 200 college students read a workplace scenario involving a middle-aged woman described as having menopausal hot flash symptoms, a middle-aged woman without symptoms, or a middle-aged man. In both experiments, the participants reported that the menopausal women seemed less confident and less emotionally stable (two traits we've shown to be associated with leadership) than the non-menopausal women — despite the scenarios being otherwise identical.

…Unless They Talk About Menopause Openly

The good news is, our next several studies identified an effective strategy to overcome this bias. We asked more than 240 full-time workers to imagine that they were attending a meeting in which a female, middle-aged colleague was observed having a hot flash: She was visibly uncomfortable, flushing, fanning herself, and wiping sweat from her face. In one scenario, when a coworker asked how she was doing, she said, "I'm ok, just warm," while in the other scenario, she replied, "I'm ok, it's just that menopausal time of life." When the woman openly disclosed that her symptoms were caused by menopause, she was seen as more confident, stable, and leader-like than when she claimed to be "just warm."

We also determined that this effect held regardless of the woman's race, or the gender makeup of the group: We tested scenarios in which the woman was explicitly described either as Black or white, as well as scenarios in which the meeting was either evenly split between men and women or male-dominated, and the participants consistently thought that the menopausal women were more leader-like if they openly disclosed that they were having a hot flash.

This may seem counterintuitive. After all, our first study showed that there are clear negative stereotypes associated with being menopausal. But our analysis suggests that the act of disclosing your own menopausal status conveys confidence and stability, essentially cancelling out the negative biases that people would otherwise hold.

It's also important to note that it's not just that people appreciate getting an explanation for what's going on: In another scenario, participants were told to imagine that a *colleague* explained that the woman's symptoms were due to menopause, rather than the woman explaining the symptoms herself. These participants knew that the woman's symptoms were menopausal, and yet they still rated her as less leader-like. This suggests that simply educating people about what hot flashes look like isn't enough to overcome biases — to boost perceptions of leadership potential, self-disclosure is critical.

Normalizing Menopause at Work

Of course, while the benefits of talking openly about menopause (and other workplace taboos) are clear, many people are still understandably uncomfortable doing so. A recent survey of women in the UK found that almost half didn't feel comfortable disclosing their menopausal status at work, and in our own survey of nearly 100 women, about a third said they wouldn't talk about menopause at work, a third would share only with specific people, and just a third would disclose openly. While some women felt that it was important to connect authentically with their colleagues about this "natural part of aging," those who felt less comfortable discussing menopause in the workplace expressed fears of discrimination and embarrassment.

As such, to overcome bias against people experiencing menopause, it will be critical to build workplace cultures that encourage talking about it openly. Our research shows that especially for women who are actively striving to become leaders, acknowledging hot flashes when they happen and simply stating — without embarrassment or shame — that they are due to menopause is an effective way to demonstrate self-confidence and leadership potential. Moreover, each time someone talks openly about menopause, they normalize the experience and make it easier for others to follow suit.

At the same time, it's also important to recognize that it isn't the sole responsibility of people experiencing menopause to address these issues. Managers should strive to create psychologically safe workplaces in which everyone feels safe to disclose issues and ask for support without fear of retribution or discrimination. To foster this type of workplace, leaders can start by being open about their own lives (whether with regard to menopause or other circumstances) and clearly demonstrating a willingness to listen to and learn from others' experiences. They can also help by supporting employee resource groups (ERGs), providing educational resources to help everyone learn about the impact of menopause, offering accommodations such as cooler temperatures and fans, and most importantly, proactively challenging menopause stigma whenever it arises.

For half the global workforce, menopause is a natural (and unavoidable) part of life. It also happens to overlap exactly with the period in which people are most likely to be qualified to advance into top leadership positions. Thus, to avoid overlooking high-potential leaders in this important demographic, men and women alike must work to acknowledge and eliminate harmful stigmas related to menopause and the natural aging experience. It's up to those who have already made it to the top to build awareness, fight biases, and ensure that everyone feels supported — not silenced — as they progress through the phases of their careers and lives.

https://hbr.org/2022/12/research-workplace-stigma-around-menopause-is-real

Reverse Bias Claims Fail in Absence of Any Evidence of Discrimination

Takeaway: When a white employee failed to show any connection between his race and his failure to receive either of two jobs, his reverse discrimination claims could not proceed to trial.

A white school district employee who claimed that he was rejected for two athletic administration positions at public high schools because of reverse discrimination could not go forward with his claims, a federal appeals court ruled. There was no evidence that would allow a jury to find that the school district, in offering the positions to a Black applicant, discriminated against the employee because he is white, the court said.

The employee began working for the school district as a social studies teacher in 1991, and in 2007 became the athletic director at one of the district's high schools. In 2017, he applied to serve as corporation director of athletics, a newly created, districtwide position.

The district superintendent interviewed four applicants and ultimately recommended someone else for the position. The superintendent explained that the chosen applicant interviewed very well, inspiring confidence in his ability to repair the school district's strained relationship with the state's high school athletic association. The employee interviewed poorly, seeming to boast of firing 24 coaches during his tenure at the high school, the superintendent said.

Furthermore, the superintendent said, he questioned the employee's ability to restore the school district's relationship with the state association, given that prior instances of noncompliance with athletics regulations occurred while the employee was a high school athletic director. The school board hired the applicant recommended by the superintendent.

The employee then sued the school district under Title VII of the Civil Rights Act of 1964, alleging reverse discrimination. He claimed that he was much more qualified than the chosen applicant for the position, and that, therefore, his not receiving it had to be the result of unlawful discrimination. He alleged that the superintendent, himself Black, wanted the chosen applicant, who is also Black, in the role.

In March 2019 the school district announced the elimination of the corporation director of athletics position and the creation of a hybrid dean of students/athletics position at each of the four high schools in the district. The employee, the person previously chosen for the corporation director of athletics position, and seven other candidates applied for the four new positions. Although the employee was interviewed, he did not receive a job offer. The former corporation director of athletics was offered a position at one of the high schools. The principal who offered him the position explained that the offer was based in large part on the applicant's interview.

The employee then amended his original complaint to add a claim of race discrimination based on his not receiving one of the new dean of students/athletics positions.

The school district moved to have the lawsuit dismissed before trial, and the court granted the motion, explaining that the employee had failed to identify any evidence upon which a jury could rely to find he did not receive the two jobs in question because of his race.

The employee appealed.

No Evidence of Pretext

The employee relied on the McDonnell Douglas burden-shifting framework in his attempt to get his reverse discrimination claims to trial. He met his initial burden, and the employer offered a nondiscriminatory justification for the challenged employment actions. It was therefore up to the employee to prove that the employer's proffered nondiscriminatory reason was a pretext for discrimination.

Plaintiffs like the employee most often seek to show pretext by pointing to weaknesses, inconsistencies or contradictions in the nondiscriminatory justification that would permit a reasonable jury to infer that the employer did not tell the truth, the appeals court noted. But, the court stressed, identifying an inconsistency—or even a lie—is not necessarily sufficient to prove that the employer's rationale was a pretext for discrimination. What ultimately matters is causation: The plaintiff must point to evidence that would allow a jury to find a connection between the employee's race and the employee failing to receive either of two athletic administration jobs.

In other words, the court said, the employee had to show not only that the school district lied about its reason for not hiring him, but also that the true reason was because of racial discrimination. He did not clear this hurdle, the court concluded.

As to the employee's claim that he was far more qualified than the chosen applicant for the first districtwide position, the court conceded that the employee might have been the more qualified candidate on paper alone. But the school district explained that side-by-side resume comparisons were not the only measure. How applicants performed in interviews mattered, and, on this measure, the chosen applicant greatly outperformed the employee, the court said.

And although these assessments were subjective, they were entirely proper, the court said, especially given the absence of anything suggesting that considerations of race influenced the hiring decision.

As to the second position, the court said, the evidence showed that the chosen applicant received the job based largely on the quality of his interview. The employee interviewed poorly, ranking last among all nine applicants in the scoring compiled by the school district's interview committee. Furthermore, the difference in qualifications on paper between the employee and the chosen applicant had narrowed at the time the school district created the new position: The chosen applicant had accumulated two more years of relevant experience by serving as the corporation director of athletics.

The appeals court affirmed the trial court's decision dismissing the employee's lawsuit.

https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-reverse-bias-claims-fail.aspx

How Workplace Investigations Can Uncover Current Employee Harassment Or Discrimination?

When a workplace investigation is conducted, it can help uncover current employee harassment or discrimination. This is an important step in protecting the rights of all involved, including the accused and the victim. This blog post will explore some of the key aspects of workplace investigations, such as when they should be conducted and what information they can reveal. We will also discuss some of the consequences that can result from an investigation, such as retaliation and a loss of job security.

What is Workplace Harassment or Discrimination?

When an employee experiences workplace harassment or discrimination, it can be a difficult and frustrating experience. The consequences of such treatment can be long-term and include decreased productivity, stress, and anxiety. In order to address the issue and prevent it from continuing, a company may need to conduct an investigation into the situation.

Workplace investigations can uncover current employee harassment or discrimination. By interviewing all involved parties and reviewing any available documents, the investigation can help identify any patterns or behaviors that may constitute unlawful behavior. If there is evidence of unlawful behavior, then the company may be able to take appropriate action to address the problem and prevent future occurrences.

How Does an Investigation Work?

When an employee raises concerns of harassment or discrimination in the workplace, an investigation is typically conducted to determine whether or not these claims are valid. Typically, investigations involve interviews with both the employee who made the complaint and any other employees who may have information relevant to the claim. Additionally, typically evidence such as emails, chat logs, and other documents will be gathered and reviewed in order to determine if there is enough evidence to support a claim of harassment or discrimination.

If it is determined that there is evidence of harassment or discrimination, then steps may need to be taken in order to prevent further incidents from happening. Depending on the severity of

the situation, corrective action may need to be taken such as training for employees or firing those responsible for the harassment or discrimination.

What are the Benefits of an Investigation?

An investigation can provide the groundwork for correcting or preventing workplace harassment or discrimination. Investigations can uncover violations of company policies and regulations, illegal behavior, and any unlawful retaliation. In some cases, an investigation may result in the perpetrator admitting their wrongdoing and being held accountable.

The benefits of an investigation go beyond correcting past wrongs. An effective investigation can also help prevent future misconduct by identifying problem employees and providing training to prevent them from engaging in similar behavior. Additionally, investigations can create a climate of trust and confidence that encourages all employees to come forward and report any incidents of harassment or discrimination.

Types of Investigations an Employer Can Conduct

There are a variety of types of investigations an employer can conduct in order to uncover any potential violations:

1. Initial investigation: In the initial investigation stage, an employer will review any allegations made and attempt to identify patterns or possible violations. This phase may include interviews with witnesses and/or employees involved in the situation.
2. Investigative follow-up: If there are indications that a violation has occurred, an employer will likely continue investigating the situation further. This could involve gathering additional evidence and interviewing more witnesses. Depending on the nature of the allegation, this phase could also include conducting background checks on employees or reviewing company policies and procedures.
3. Disciplinary action: If investigators find evidence of wrongdoing, they may take disciplinary action against those involved. This might range from counseling to termination from employment. Depending on the severity of the violation and any applicable laws, penalties could be severe.

The Steps to Conducting an Investigation

When conducting an investigation, it is important to take into account all relevant information. This includes investigating the severity of the alleged harassment or discrimination, whether it has taken place regularly or only once, and whether any employees were aware of the behavior. Additionally, investigators should consider whether any witnesses exist and how they might be able to provide information about the alleged behavior.

Once investigators have gathered all the necessary information, they can begin formulating a plan for how to proceed. This includes deciding which employees will be interviewed, what questions will be asked, and where and when those interviews will take place. Investigators should also make sure to keep track of any evidence that is discovered during their investigation. This evidence can be used to support or refute allegations made by either side in a workplace dispute.

What to Do If You're the Victim of Harassment or Discrimination?

If you are the victim of harassment or discrimination in the workplace, there are several things you can do to protect yourself and your rights.

– First, talk to your supervisor or human resources representative about the situation and request an investigation into the allegations. This will allow you to have a neutral party investigate what is happening and ensure that your rights are being protected. If you don't feel comfortable speaking with your supervisor or HR representative, you can also contact an outside consultant such as an employment law attorney.

– Once an investigation is underway, be sure to keep all records of communication relating to the harassment or discrimination, including any written or electronic documentation. In cases where retaliation is suspected, document any changes in work conditions that may have occurred as a result of making a complaint.

– Finally, if you experience harassment or discrimination at work, speak up immediately! It's important to take action as soon as possible so that you can start resolving the issue and moving forward with your career.

Conclusion

When an employer becomes aware of potential workplace harassment or discrimination, they have a responsibility to take action. This can involve investigating the situation, and if appropriate, taking disciplinary or legal action against the perpetrator. In order to do this effectively, it is important for the employer to have a clear understanding of their rights and responsibilities when it comes to workplace investigations. By following these steps, employers can ensure that they are fulfilling their duty of care both to the victim of harassment or discrimination and to themselves as an organization.

https://foreignpolicyi.org/workplace-investigations-uncover-employee-harassment-or-discrimination/

The Damaging Effects of Workplace Racism

How to protect workers of color from racial trauma

Two Black men who worked at a paper plant in McClellan, Calif., experienced racial harassment from co-workers and a supervisor. The company must now pay up.

Paper manufacturers Packaging Corporation of America Central California Corrugated LLC (PCA) and Schwarz Partners LP, which owned the manufacturing plant, will pay $385,000 and implement preventive measures to settle the racial harassment lawsuit.

The U.S. Equal Employment Opportunity Commission (EEOC) filed the lawsuit.

"This case should be a strong reminder that all employers have a duty to act quickly to stop harassment and hate speech in the workplace," EEOC San Francisco District Director Nancy Sienko said in a statement.

According to the EEOC's suit:

- Co-workers and a shift supervisor commonly broadcasted racial slurs over the facility's radio system.
- Black employees were taunted with graffiti of swastikas and a makeshift noose.
- A shift leader drew a Confederate flag inscribed with the phrase "long live the Confederacy" on a workstation.

The company's HR department closed the investigation due to insufficient evidence without interviewing the alleged harassers, the EEOC stated.

Per the settlement, the defendants are required to:

- Pay $385,000 in lost wages and emotional distress damages to the two former employees.
- Revamp company policies and train employees on preventing and reporting racial harassment.
- Implement policies and procedures to facilitate the prompt and thorough investigation of any future complaints of discrimination or harassment.

"As our nation continues to [deal] with lingering racial discrimination, we appreciate that these employers agreed to promptly settle this matter and to provide significant relief," Sienko added.

How Can Racism Influence Workplace Productivity?

Peter Spanos, an attorney with Taylor English Duma LLP in Atlanta, said the lawsuit against PCA and Schwarz illustrates the serious consequences that can occur if employers do not investigate and act upon harassment in the workplace.

"It dramatizes why it is important for companies to provide preventive education and training for its supervisory and management personnel," Spanos explained. "It also illustrates how unnecessary comments and other talk in the workplace can be unlawful harassment."

A 2021 survey by the Society for Human Resource Management (SHRM) revealed that more than 2 in 5 Black workers (42 percent) feel they faced race- or ethnicity-based unfair treatment at work in the past five years.

[SHRM resource hub page: Overcoming Workplace Bias]

Nika White, a Greenville, S.C.-based anti-racist activist who runs her own diversity and inclusion consulting company, explained that racial microaggressions are particularly problematic in workplaces.

"Numerous workers are encountering subtle microaggressions that leave them feeling confused, hurt, angry and deflated without anyone to talk to because the 'aggression' seems small," she said. "Those seemingly small interactions that come from stereotyping and assumptions have a lasting physical and mental impact but are harder to identify and recognize, especially when workplaces exhibit institutional racism by not having policies and processes to prohibit and punish racism."

Racial trauma can result in symptoms similar to post-traumatic stress disorder. It can lead to mental health issues such as anxiety and depression as well as physical problems including stomachaches, headaches and a rapid heartbeat.

Racial inequities at work can also result in decreased workplace productivity.

"Not only are those directly harassed demotivated, but others who differ from the general demographic makeup of the workgroup can feel threatened, leaving them disengaged from the workplace," said Francine Gordon, a lecturer at Santa Clara University's Leavey School of Business. "In cases where problem-solving or innovation are involved, harassment can silence the targeted individual, who may have the most to offer."

Tips for Preventing Workplace Racism

Spanos said employers can take several steps to reduce or eliminate unlawful racial harassment and discrimination. He explained that companies should:

- Adopt clear and meaningful anti-harassment and anti-discrimination policies.
- Periodically provide anti-harassment training to the workforce.
- Train appropriate HR personnel in how to investigate and handle discrimination complaints.
- Issue and update mission statements that emphasize the company's commitment to a workplace free from unlawful harassment and discrimination.
- Offer readily available avenues for employees to complain about alleged harassment or discriminatory treatment, including an open-door policy.

- Train supervisors to alert responsible HR personnel of harassment, even if no formal complaint is received.
- Host employee forums periodically to explore whether any discrimination or harassment is occurring.
- Take prompt and remedial action if an investigation reveals any unlawful conduct or conduct that violates company policies or mission statements.

"Both formal and informal complaints should be taken seriously," Spanos added. "Prompt and reasonably thorough investigation should be done in each instance."

https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/the-damaging-effects-of-workplace-racism.aspx

Federal Contractors And Disparate Impact Discrimination. What Workers Should Know

By and large, employers are prohibited from discriminating against job applicants and employees based on certain traits. Differences exist concerning individual characteristics that enjoy legal protection from discrimination. But another key variable in how workplace prohibitions on discrimination work is whether a given employer is covered by a particular anti-discrimination law.

For example, certain federal contractors have special legal obligations when it comes to combating workplace discrimination. A notable example includes the steps the contractor must take to prevent disparate impact discrimination, such as implementing an affirmative action program.

What is Disparate Impact Discrimination?

When most people think of discrimination at work, they think of disparate treatment. For example, a boss tells an older employee, “We need some youthful workers to take our company to the next level. Because you’re old, I’m letting you go.”

But unlawful discrimination can sometimes occur as a consequence of a seemingly nondiscriminatory rule or policy. For instance, imagine a company had a rule that said any employee who doesn’t have 20/20 vision will be fired.

face, it seems like this policy is legal because it discriminates based on someone not having 20/20 vision, which isn’t a protected class. However, this policy could potentially be illegal under the Age Discrimination in Employment Act of 1967 (ADEA) because it will likely have a disparate impact on older workers.

The Office of Federal Contract Compliance Programs (OFCCP) is the agency primarily tasked with ensuring that contractors that do business with the federal government take reasonable steps to avoid disparate treatment and disparate impact discrimination.

An Overview of the OFCCP

The OFCCP focuses its enforcement efforts on the following three laws:

- Executive Order 11246 (EO 11246)
- Section 503 of the Rehabilitation Act of 1973 (Section 503)
- Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)

Together, these laws prohibit covered contractors and subcontractors that enter into contracts with the federal government from discriminating on the basis of:

- Race, Color, National origin, Religion, Sex, Sexual orientation, Gender identity, Disability, or Veteran status

In carrying out its enforcement mandate, the OFCCP will often examine statistical data about an employer's hiring practices of protected groups. After reviewing the data, the OFCCP might believe that disparate impact discrimination exists.

The employer accused of disparate discrimination will then have had an opportunity to explain that improper discrimination is not taking place, despite what the statistical data shows. If it fails to do so, the employer could be in violation of EO 11246, Section 503 and/or VEVRAA. A recently settled case involving Cooper Health System and the OFCCP demonstrates how this process can work.

Cooper Health System's Alleged Discrimination

The OFCCP conducted a review of Cooper Health System's (CHS) hiring data and found that from July 1, 2016 to December 31, 2017, there were hiring disparities against Blacks, females and Hispanics for certain nurse associate positions. And from July 1, 2016 to July 1, 2017, there were pay disparities against females for certain registered nurse, management and clerical positions. There were at least 400 employees found to be affected by this potential disparate treatment discrimination.

On February 9, 2021, the OFCCP issued a Pre-Determination Notice (PDN) to CHS outlining the OFCCP's preliminary conclusion of unlawful discrimination in violation of EO 11246 and related regulations. However, before further investigations and legal actions could take place, CHS and OFCCP settled the matter and entered into a conciliation agreement.

Per the terms of the agreement, CHS agreed to pay $514,463.62 in back pay and $110,536.38 in interest to the affected individuals. CHS also agreed to take steps to adjust its hiring and workplace policies to prevent future cases of disparate treatment from taking place.

What Workers Can Learn From the Cooper Health System Case

The above case is an example of how disparate treatment of members of a protected class of workers could result in a finding of discrimination, even without discriminatory intent. If CHS and OFCCP didn't settle the matter, what would have happened next is that CHS would have an opportunity to respond to the accusations in the PDN.

In other words, if CHS was to successfully counter allegations of disparate treatment discrimination, it would have needed to show that it was aware of the disparity and was taking active steps to remedy the disparity, such as operating an affirmative action program, or AAP.

CHS could have also explained why the statistical disparity was justified for legitimate, nondiscriminatory reasons. If CHS couldn't do either of these things, then OFCCP would have issued a Notice of Violation, or NOV.

Once the NOV was issued, it would be up to CHS and OFCCP to reach some sort of settlement (which they did, although it came before the issuance of an NOV). And if no settlement could be reached, OFCCP could take further enforcement actions against the employer.

Another takeaway from this case is that monetary damages are recoverable by the affected employees and/or job applicants, although the types of damages will be relatively modest. For example, if an employee sued an employer under Title VII of the Civil Rights Act of 1964, they could potentially recover punitive damages in addition to back pay, if the employer's actions were especially egregious. But in an OFCCP enforcement action, punitive damages are not likely recoverable.

Finally, any affirmative action requirements enforced by the OFCCP are different from affirmative action policies used by schools to enhance the diversity of their student bodies. For example, a college or university might use race as a factor in deciding whether or not to admit an applicant. But employers subject to OFCCP jurisdiction and oversight can't do that.

Instead, eligible employers (which typically refers to contractors with 50 or more employees and at least one federal contract worth $50,000 or more) would need to see if there are any underrepresented groups in their workforce and if so, develop a plan and set of goals to increase the diversity of its workforce. For example, an employer might change its hiring policies by expanding its recruitment efforts to include schools with traditionally large numbers of minority graduates.

Bottom Line

The OFCCP doesn't exist to ensure that employers give individuals from a protected group a special advantage. But the OFCCP does want to make sure that the employer takes steps to identify policies that may have an unintended impact on minority groups and if so, make appropriate changes so that everyone has a fair chance in the workplace.

https://www.forbes.com/sites/tomspiggle/2022/12/09/federal-contractors-and-disparate-impact-discrimination-what-workers-should-know/?sh=76c0411636f7