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EMPLOYMENT PRACTICES HOTLINE

## How Can Firms Best Accommodate Employees With A Mental Impairment?

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**A**n owner of a retail store in Denver, Colo., with more than 100 employees recently learned that a janitor she hired several years ago has developed a mental impairment that is impacting her performance.

This employee has asked the employer to help her with some of her tasks so that she may continue working. The employee said she has "mild psychological" issues and was told by her doctor that she has a bipolar disorder. The owner wants to work with the employee and keep her working.

The employee's impairment prevents her from completing some of the required paperwork and disarming and setting the store's alarm. She also is unable to heed written instructions.

In calling the EPL Hotline, the owner wanted to know:

- If the Americans With Disabilities Act applies to individuals with a mental impairment?
- What constitutes a reasonable accommodation?
- If this employee's requests were reasonable?

The hotline's response to the employer's first question was, yes, the ADA does apply to individuals with mental impairments in businesses with 15 or more employees. In this case, it is likely that the worker has a covered impairment under the ADA. A bipolar disorder is the type of disability that numerous courts have found to fall within the scope of the law's protections.

The answers to the second and third questions are more complex, however.

The ADA prohibits any form of discrimination against "qualified individuals" with a "disability" (or a record of an impairment, or who is "regarded" as impaired) in an employment context.

A "disability" is described as any physical or mental impairment that presents a substantial limitation to an individual's ability to perform major life activities such as talking, seeing and working.

A person is considered to be a "qualified individual" if he or she has the requisite skill, experience and education, and is able to perform the essential functions of the job, either with or without

a "reasonable accommodation." A reasonable accommodation is described as any act on the part of the employer that enables an employee with a disability to perform the essential functions of the job.

If an employee is both "qualified" and "disabled" under the ADA, the employer must provide the employee with a reasonable accommodation, unless doing so would create an undue financial burden or present a direct threat to the safety and health of the employee or others.

The law in Colorado, which is known as the Colorado Anti-Discrimination Act of 1957, and most other states imposes similar legal obligations on employers. In this instance, therefore, the employer is required to accommodate the employee unless doing so would present an undue financial burden or a

significant health or safety issue to the employee or others.

What is a reasonable accommodation? Any act on the part of an employer that helps an employee with a disability overcome physical barriers or other problems in the workplace—problems that prevent the employee from performing the essential functions of the job.

Employees with disabilities often face many types of barriers in the workplace. Some are physical, which make it difficult to get around certain areas of the work site or to use equipment. In the case of mental impairments, the barriers may be more difficult to discern.

The process of determining when and in what manner to provide a reasonable accommodation is one fraught with difficulty and legal exposure. It also is a process that does not readily lend itself to quantification or absolute, objective standards. Just what is reasonable depends on the specific employee, the nature of the disability, and the job at issue.



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In essence, a reasonable accommodation offers an employee with a disability the opportunity to compete on a level playing field with other employees.

In practice, the process requires an employer to make an individualized assessment of the employee making a request for a reasonable accommodation. The employer must tailor the accommodation to the employee taking the facts and circumstances into consideration.

To avoid costly lawsuits and allegations of discrimination, a prudent employer should follow a step-by-step process to demonstrate good faith in attempting to follow ADA requirements for providing a reasonable accommodation.

Types of reasonable accommodations are limited only by the imagination,

flexibility, and know-how of an employer and its decision-makers.

Reasonable accommodations encompass any change in the work environment that allows an individual with a disability to perform his or her job. This can be accomplished with modifications to the workplace, job restructuring, changes to work schedules or leave policies, exceptions to certain personnel policies, and acquisition of special equipment.

At the same time, the ADA does not require an employer to hire or keep unqualified workers on its payroll. The law also does not require a business to lower performance standards that are expected of all employees. In this respect, the "qualified individual" language of the

ADA is interrelated to the reasonable accommodation obligation.

Being qualified is determined by the essential functions of a job. Reasonable accommodation does not require elimination of an essential function of the job. Conversely, an employee's inability to perform a non-essential job function does not prevent the employee from being qualified. The reasonable accommodation duty may be met by eliminating a non-essential job function.

To help determine what is an appropriate, proper and reasonable accommodation, the ADA specifies that a reasonable accommodation needs to be only that—one that is reasonable. It doesn't need to be the best, most expensive, or most desirable. 