

WHAT HAPPENS WHEN THE SERVICE DOG EATS THE COMFORT HAMSTER:

MANAGING MENTAL ILLNESS IN THE WORKPLACE

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SCENARIO



- ➔ Employee has regular bouts of uncontrolled weeping at work
- ➔ Employee's PCP takes them off work for two weeks
- ➔ A mental health professional extends the leave for another two weeks
- ➔ Employee's rheumatologist signs a return to work form with no restrictions for the employee when the employee has 4 hours of PTO remaining
- ➔ What should the employer do, if anything?

DISABILITY DISCRIMINATION IN THE WORKPLACE

The ADA and the FEHA require employers to provide reasonable accommodations to qualified employees with disabilities

These statutes prohibit discrimination against individuals with physical or mental impairments that substantially limit one or more major life activities

“Major life activities” is defined to include seeing, hearing, eating, speaking, learning, thinking and working

The definition of “disability” is interpreted broad expand the coverage for workers with disabilities

Mental health conditions are treated no differently than physical disability

MY ROLE IS TO MAKE SURE EVERYONE GOES HOME THE SAME WAY THEY CAME IN THE MORNING



INCREASE IN CLAIMS



Number of claims filed with the EEOC involving mental health conditions have increased



23.3% of all disability-based charges filed in 2016, as compared with 15.4% in 1997



In 2017 - 1,177 complaints of discrimination for PTSD were filed with the EEOC, as compared to none in 2002



In 2017 - 2,196 complaints of discrimination due to anxiety were filed with the EEOC, as compared to 649 in 2002



CHALLENGES UNIQUE TO MENTAL HEALTH ACCOMMODATION

Unlike physical disabilities, the need for a mental health accommodation can be difficult to detect

No one-size-fits-all approach

Employee may not realize the need for accommodation

The employee's prognosis can be less predictable

Employee may be reluctant to ask for accommodation

Employee's condition may affect interaction with other employees and/or customers

WHAT CONDITIONS TO ACCOMMODATE

- Anxiety disorders
- Panic disorders
- Bipolar disorder
- Depression
- PTSD
- Schizophrenia
- Adjustment disorders



Disorders that do not require accommodation are those that manifest as illegal conduct, such as kleptomania, certain sexual disorders, illegal drug use

SCENARIO



- ➔ Employee shows up to work late, falls asleep at her desk, and at times lies down on the couch in the lobby to sleep.
- ➔ She cannot complete her tasks, and what she does complete is filled with errors.
- ➔ She is often emotional at work, cries during the day.
- ➔ She is counseled on this behavior. She claims she is experiencing insomnia during the night and cannot get enough sleep.
- ➔ She is granted a later start time temporarily. The problem persists.
- ➔ In order to stay awake, the employee goes into the bathroom and puts her head under the faucet, and returns to her desk with her hair dripping well. She repeats this several times a day, causing distraction to staff and customers.

WHAT CONSTITUTES REASONABLE ACCOMMODATION

An additional leave of absence

A reduced schedule to accommodate therapy appointments

Transferring employee to a comparable position that is vacant, for which the employee is qualified

Providing a quieter space, allowing use of headphones, modifying supervisory approaches (e.g. written instruction versus verbal)

LIMITS TO REASONABLE ACCOMMODATION

- Employer is not required to provide the employee's preferred or ideal accommodation.
- Employer is not required to extend an accommodation that imposes an undue hardship—so costly and extensive that it would fundamentally alter the nature of employer operations.
- Employer is not required to retain an employee who poses a direct threat to health and safety of co-workers



SCENARIO



- ➔ Employee receives a poor performance evaluation followed by a 90-day PIP.
- ➔ He presents a note from his physician stating that he is disabled from working for 30 days.
- ➔ At the end of 30 days, employee presents a note from his physician stating that he can return to work with the following restrictions:
 - No emotionally stressful activity
 - No reporting to his direct supervisor
 - No working in the same building as his direct supervisor

INTERACTIVE PROCESS

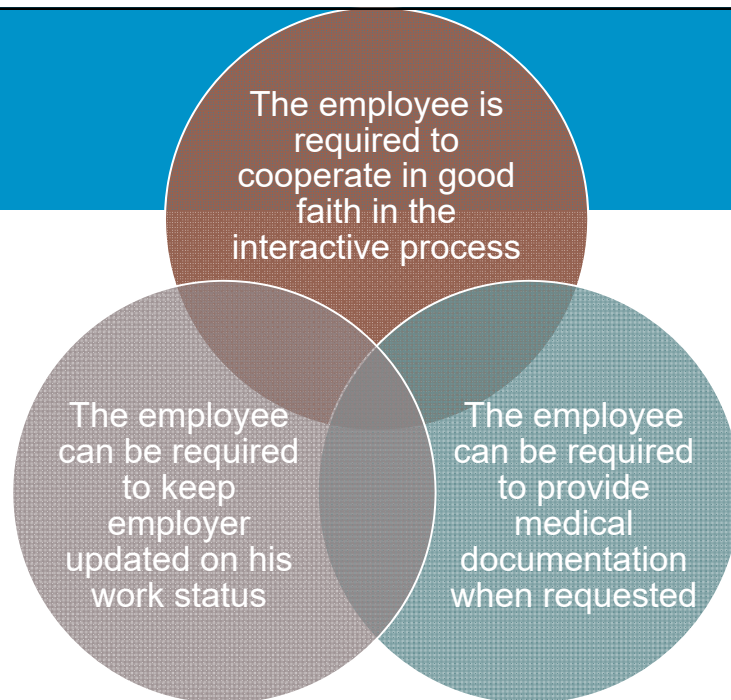
- A timely, good faith, interactive communication to identify a reasonable accommodation for an employee disabled by an industrial or non-industrial injury or illness
- Both the employer and the employee have an obligation to exchange information
- At a minimum, the interaction process can include:
 - Face to face meetings with the employee
 - Written communication
 - Verbal communication

EMPLOYER OBLIGATIONS

- Employer must initiate the interactive process when:
 - A disabled employee requests an accommodation
 - The employer becomes aware of a need for accommodation through another party or by observation
 - An employee is returning to work with restrictions following a leave of absence due to a medical condition or industrial incident
- Employer may require medical documentation supporting the need for accommodation or the nature of the accommodation sought
 - Cannot require information regarding the nature of the medical condition or diagnosis
- The aim is to determine whether with reasonable accommodation the employee can discharge the essential functions of his/her job



EMPLOYEE OBLIGATIONS



SCENARIO



- Employee shows up to work low on energy.
- They have made comments about hurting themselves in the past. Very sporadic.
- Now the comments are more frequent and more specific.
- Several co-workers have asked the employee if they are “ok”. The employee says they’re fine.
- What should the employer do, if anything?

SERVICE ANIMALS & COMFORT ANIMALS



SERVICE OR EMOTIONAL SUPPORT ANIMAL



SCENARIO



- ➔ Employee shows up to work with their small dog.
- ➔ Employee says that they have been having some tough times at home and just need to have their dog with them for a couple of days.
- ➔ What happens next?

NOMENCLATURE

Service Animal: Dogs and miniature horses that are individually trained to do work or perform tasks for people with disabilities (e.g. guiding the blind, alerting the deaf, pulling a wheelchair, alerting and protecting a person having a seizure, reminding a person with mental illness to take medications, calming a person with PTSD during an anxiety attack)

- Must be housebroken and under the owner's control
- Its sole function cannot be comfort or emotional support

Assistance Animal: Defined under the FEHA as an animal that works, provides assistance or emotional support that alleviates one of more symptoms of a person's disability (e.g. dog that soothes person with PTSD)

- Other types of animals can qualify – such as cats, ponies, hamsters, snakes, etc.
- Does not require any training

Emotional Support Animal: Is a subset of Assistance Animal and provides companionship, relieves loneliness, helps with depression and anxiety

AMERICANS WITH DISABILITIES ACT

Title III concerns public accommodations (e.g. stores, restaurants, museums, schools, medical offices)

- Only trained dogs and miniature horses may qualify as "service animals" that must be accommodated
- Excludes emotional support animals because they are not necessarily trained to perform a task for the patron that relates to his or her disability

Title I concerns employments.

- Does not define the term "service animal".
- No administrative guidance on permitting the use of either service or emotional support animals
- It requires employers to provide *reasonable accommodation* to qualified employees with disabilities, except when the accommodation would cause the employer undue hardship
- Permitting animals in the workplace is a form of accommodation

CALIFORNIA LAW

California law expressly requires employers to consider emotional support pets as possible reasonable accommodations

The regulations interpreting the FEHA define "support animals" as those that provide "emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression"

Support animals "may constitute a reasonable accommodation in certain circumstances"

DFEH GUIDANCE

- Employers may require that an assistance animal in the workplace:
 - Is free from offensive odors and displays habits appropriate to the work environment (housebroken); and
 - Does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace
- DFEH has taken the position that an Internet certification demonstrating a need for a support animal is not a sufficient "medical certification" for interactive process purposes
- An employee should be prepared to present a note from medical provider documenting the employee's restrictions and need for accommodation in the same way he or she would for any other accommodation requests.

WHAT CAN YOU ASK WHEN REQUEST IS MADE TO HAVE AN ANIMAL AT WORK

- Employer has the right to request documentation or demonstration that the service animal is trained, will behave appropriately, is housebroken, and will not disrupt the workplace.
- Employer who is concerned about the breed of dog may inquire:
 - Has the dog ever exhibited aggressive behavior?
 - Has the dog been known to injure anyone?
 - Does the dog bark aggressively when approached by strangers?
- Describe how the dog behaves around groups of people, around children (if applicable), in small spaces, in noisy environments, around equipment, etc.



SCENARIO



- ➔ Employee brings a note from a mental health professional recommending an emotional support animal.
- ➔ Employee works in the field, alone with no one else in the vehicle.
- ➔ Policy strictly forbids animals of any kind in agency vehicles.
- ➔ What happens next?

BALANCING ANALYSIS

- Reasonableness: Is the requested accommodation reasonable?
- Effectiveness: Is the request effective? Will this requested accommodation effectively allow the employee to perform his or her job functions?
- Undue hardship: Does the request pose an undue hardship?
 - Are other employees or customers affected by fears of the animal, allergies or other issues.



TIPS FOR SUPERVISORS

- Treat requests for support animals as they do other requests for reasonable accommodations.
- Use the analysis:
 - Is the accommodation request accompanied by requisite medical information?
 - Is it reasonable?
 - Will it effectively enable the employee to perform his or her job?
 - Will it cause an undue hardship?
- Engage in the interactive process to determine whether to grant the request.



SCENARIO



- ➔ Employee brings a note from a mental health professional recommending an emotional support animal.
- ➔ Employer follows its policy and allows the Employee to bring in the emotional support animal to work.
- ➔ Over the next 3-4 days, three other employees bring in doctor's notes indicating an allergy to dogs.
- ➔ In addition, two more employees now bring in notes from the first employee's doctor recommending emotional support animals.
- ➔ There are 27 employees at the workplace.
- ➔ What happens next?

HAVE A POLICY!!

- Key elements of a written policy
- Animal is
 - Free from offensive odors and displays habits appropriate to the work environment.
 - Does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace
 - Is trained to provide assistance for the employee's disability

