

Accommodations for returning veterans suffering from PTSD: A guide for employers

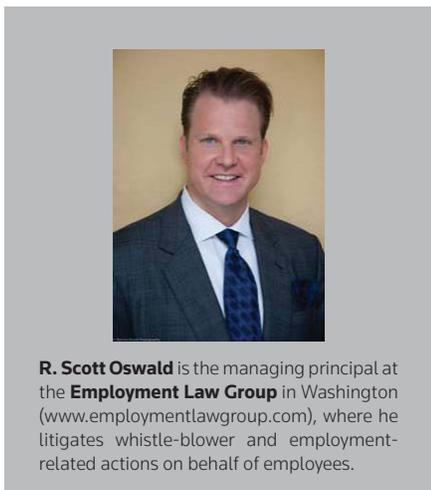
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Post-traumatic stress disorder is a condition that occurs after a traumatic event, such as combat exposure, during which grave physical harm occurred or was threatened. According to the U.S. Department of Veterans Affairs' National Center for PTSD, the symptoms of PTSD fall into four categories:

- Reliving or re-experiencing the event, including disturbing memories, flashbacks and nightmares.
- Avoiding situations that remind the sufferer of the triggering traumatic event.
- Feeling numb, unable to express feelings or enjoy usual activities.
- Feeling tense, alert, on guard, and easily startled or irritable, also known as hyper-arousal.¹

PTSD symptoms usually start soon after the traumatic triggering event. In some cases, however, they may not appear until months or years later. They also may appear intermittently over many years.

At work, an employee suffering from PTSD may have issues with memory, concentration and organization. He or she may have trouble coping with stress or working effectively with supervisors and co-workers. The employee may also suffer from physical symptoms such as panic attacks or headaches.



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IS PTSD A DISABILITY?

The Americans with Disabilities Act defines the term "disability" as:

- A physical or mental impairment that substantially limits one or more major life activities of such individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.²

The "regarded as" provision would protect a qualified individual with a disability from being denied employment because an employer feared the "negative reactions" of customers or co-workers.

The regulations implementing the 2011 amendments to the ADA identify examples of specific impairments that courts should easily conclude to be disabilities. PTSD is on this list.³ The Equal Employment Opportunity Commission suggests that a decision-maker need not make any inquiry further than the diagnosis of PTSD to identify that it substantially limits one or more life activities.

Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working.⁴

The 2011 amendments to the remove the effects of mitigating measures in determining whether an individual has a disability, so any treatment that an employee is receiving for his or her PTSD is irrelevant.

WHAT DOES THE ADA PROHIBIT?

The ADA applies to employers with 15 or more employees and states, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees,



REUTERS/Dan Riedlhuber

A soldier returns home after fighting in Afghanistan. According to the U.S. Department of Veterans Affairs, symptoms of post-traumatic stress disorder usually start soon after the traumatic triggering event. In some cases, however, they may not appear until months or years later.

employee compensation, job training, and other terms, conditions, and privileges of employment."⁵ This includes applicants for employment and employees. The ADA protects "qualified individuals," *i.e.*, employees who can perform the essential functions of a job with or without reasonable accommodations.

Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."⁶

WHAT ARE SOME REASONABLE ACCOMMODATIONS?

The ADA permits a qualified individual with a disability to seek an accommodation from his employer that would permit him to continue working. Although an employee suffering from PTSD is not required to disclose his diagnosis, he must do so if he requires an accommodation.

Some reasonable accommodations might include:

- Job restructuring and schedule modification, including allowing more frequent work breaks.
- Allowing the employee the ability to sleep during work breaks.
- Allowing the employee to work from home full- or part-time.
- Assigning work in written task lists to assist with memory issues.
- Additional training.
- Allowing the employee to contact his medical health professional or life coach during work hours if needed and providing privacy to do so.
- Allowing the employee to communicate in his preferred method (e.g., by email rather than by phone).
- Allowing the employee to listen to soft music or bring a support animal to work.
- Allowing the employee to work a consistent schedule to minimize sleep disturbance.
- Eliminating non-essential travel.

In *Mecca v. School Board of Broward County*, 2012 WL 2735066 (S.D. Fla. July 9, 2012), a teacher suffering from PTSD suffered from severe insomnia, fatigue, nervousness, anxiety, shaking and withdrawal from student conflict situations. The teacher requested as ADA accommodations that the school district allow him to sleep during breaks and that the school remove a particular student from his classes. The court found that the plaintiff had stated a claim for ADA discrimination when the school district refused to accommodate his reasonable requests.

What does the ADA require when deciding on reasonable accommodations?

The ADA contemplates an interactive process through which both the employer and the employee seek to identify a reasonable accommodation of the employee's disability. Once an employer learns that an employee requires an accommodation to continue performing his or her job, the employer must engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.

The ADA regulations describe the process as follows: "To determine the appropriate

reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."⁷

An employee suffering from PTSD may have issues with memory, concentration and organization.

Similarly, the EEOC's interpretive guidelines provide: "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."⁸

An employer should immediately acknowledge an employee's request for an accommodation in writing and should inform the employee of what steps the employer will take to address the employee's request. The employer should be sure to meet with the employee to discuss his needs even if the employee has already submitted a detailed written request.

FIT-FOR-DUTY EXAMS OR REQUESTS FOR MEDICAL DOCUMENTATION: WHAT IS ACCEPTABLE UNDER THE ADA?

The EEOC offers the following guidance regarding medical examinations and requests for medical documentation:

- Before a job offer: An employer is prohibited from requiring a job applicant to take a medical examination or requesting medical documentation before extending a job offer. However, the employer may ask questions about the candidate's ability to perform essential job functions.
- After a job offer: An employer may extend a job offer conditional on a post-offer medical examination or documentation only if it requires the

same examination of all employees who perform the same job. If the employer declines to hire the applicant because of the medical examination, the reason for not hiring must be consistent with a business necessity. The employer must also show that it could not offer a reasonable accommodation or that the accommodation would pose an undue hardship. The employer may not decline to hire the individual because of speculative "risk of future injury."

- After the employee starts work: At this stage, the employer may require a medical examination in the following circumstances: "where there is evidence of a job performance or safety problem, examinations required by other federal laws, examinations to determine current fitness to perform a particular job, and voluntary examinations that are part of employee health programs."

Employers must keep all information related to medical examinations separate from general personnel files, confidential and available under limited conditions.⁹

An employer should immediately acknowledge an employee's request for an accommodation in writing.

In the case of *Forgione v. City of New York*, 2012 WL 4049832 (E.D.N.Y. Sept. 13, 2012), the defendant erroneously believed that the plaintiff, a police captain with 20 years of experience, was suffering from PTSD. His superior officer ordered him to see a psychiatrist because he perceived the plaintiff as having PTSD. The court found that the plaintiff was disabled under the ADA because of his perceived disability, *i.e.*, that his employer "regarded him as disabled" although he was not. The court then found that the referral for psychiatric evaluation was not an adverse action under the ADA, dismissing the plaintiff's claim. However, the lesson from this case is to avoid creating a potential disability claim where one does not exist.

WHAT ARE AN EMPLOYEE'S RIGHTS UNDER FMLA?

The ADA is not the only federal employment law implicated by workers who have PTSD.

RESOURCES

The Employment Law Group's disability discrimination page includes additional information about your rights under the ADA. <http://www.employmentlawgroup.net/PracticeAreas/DisabilityDiscrimination.asp>

The firm also handles other veteran-specific issues. <http://www.employmentlawgroup.net/PracticeAreas/USERRAVeterans.asp>

The U.S. Department of Veterans Affairs runs the National Center for PTSD. <http://www.ptsd.va.gov/>

Employers should also be aware of the Family and Medical Leave Act, which entitles certain workers to 12 weeks of unpaid leave every 12 months.

If a person with PTSD has an ADA disability, he will probably also be eligible for FMLA leave. When an employee with PTSD requests leave to treat the condition, both laws may apply. The FMLA applies when an employee's serious medical condition prevents an employee from performing essential duties.

This does not mean that the two laws always apply together. They have important differences. For instance, a temporary illness may be a serious medical condition but not an ADA disability.

Moreover, an employer may deny an otherwise entitled employee's accommodation request for leave if the request is unreasonable. For example, if the leave would not enable the employee to then perform his essential job duties, the employer can refuse the leave. Similarly, if the leave would impose an undue burden on the employer, the employer can deny the request.

In contrast, if the employee is eligible under the FMLA, the employer must permit the leave. An employer can request reasonable notice and verification of the serious medical condition (similar to ADA verification requests). But the entitlement itself is unequivocal, unless an exception applies.

Employers must make leave determinations on a case-by-case basis. However, PTSD often qualifies as a serious medical condition. Though the ADA and FMLA differ, an employer should be cautious about denying an employee coverage under one law if it has already determined that the other applies.

An employee is eligible to take FMLA leave if the employee:

- Works for the employer for at least 12 months.
- Works for the employer for at least 1,250 hours during the previous 12-month period before the leave.
- Works at a location with at least 50 employees who are employed by the employer within 75 miles of that location.

In addition to providing covered employees up to 12 weeks of unpaid (qualified) medical leave annually, the FMLA protects employees from retaliation for exercising their rights to request or use that leave.¹⁰ An employer's termination of an employee who is currently using FMLA leave can be direct evidence of FMLA retaliation. **WJ**

NOTES

¹ See <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp>

² 42 U.S.C.A. § 12102(1).

³ 29 C.F.R. § 1630.2.

⁴ *Id.*

⁵ 42 U.S.C.A. § 12112(a).

⁶ 42 U.S.C.A. § 12112(b)(5)(A).

⁷ 29 C.F.R. § 1630.2.

⁸ 29 C.F.R. Pt. 1630, App. § 1630.9 at 359.

⁹ See <http://www.ada.gov/qandaeng.htm>; <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

¹⁰ 29 U.S.C. § 2615.

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