

RISKING STIGMATIZATION TO GAIN ACCOMMODATION

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ABSTRACT

Employees and applicants with hidden disabilities often require accommodations to perform the duties of a position safely and effectively. If their disability is not readily apparent to an employer, employees must decide whether to reveal their disability to enable them to access reasonable accommodations available under the Americans with Disabilities Act (ADA). Revelation carries the real or at least the perceived risk of stigmatization, a negative reaction from both supervisors and coworkers, because of the negative characteristics and stereotypes attached to these disabilities. Given this conundrum, this article explores the ADA's requirement that an individual with a disability inform an employer that a requested accommodation is needed because of her disability, often before the employer is even required to engage in an interactive process to determine whether the accommodation would be reasonable. Even more information can be required to make that reasonableness determination. Effective strategies for employers to support requests for accommodation while avoiding potential stigmatization of employees with hidden disabilities will be explored in light of social science research on both the need for accommodations and the potential for stigmatization, as well a review of Fortune 100 Companies and an original survey of additional employers regarding their policies related to the accommodation process.

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INTRODUCTION

“Accessible organizations are ones in which opportunity is available for all those who want to participate and add value to the organization.”¹ Hidden disabilities, such as a psychiatric disability or cognitive impairment, can interfere significantly with a person’s ability to work.² To reduce that interference, the Americans with Disabilities Act (ADA) requires that employers provide reasonable accommodations that do not impose an undue hardship on the employer.³ At the same time, the ADA recognizes that applicants should not be required to reveal their disability during the hiring process, to protect them against discrimination.⁴ In contrast, for an applicant or employee to take advantage of the ADA’s guarantee of reasonable accommodation, he or she must reveal her disability and its accompanying limitations to the employer.⁵ Such a revelation exposes that employee to all of the stigma and stereotypes associated with her disability.⁶ This paper explores both ADA’s stringent

1. Maricel Quintana Baker & Ismael Rivera, Jr., *Redefining Accessibility*, 51 ASS’N MGMT. 57, 57 (1999).

2. Kayla B. Follmer & Kisha S. Jones, *Mental Illness in the Workplace: An Interdisciplinary Review and Organizational Research Agenda*, 44 J. MGMT. 325, 326 (2018).

3. 42 U.S.C. § 12112(b)(5) (2009).

4. See, e.g., *How to Interview Without Violating the ADA*, FINDLAW, <https://practice.findlaw.com/human-resources/how-to-interview-without-violating-the-ada.html> [<https://perma.cc/ES4V-6X58>] (last visited Feb. 5, 2020) (demonstrating the impact of the ADA through an interview guide drafted by lawyers for employers).

5. See *infra* notes 191–316 and accompanying text.

6. See *infra* notes 111–161 and accompanying text.

requirements to reveal one's disability and employer policies surrounding the accommodation process to explain the difficult choices faced by people with hidden disabilities. A review of employer policies provides guidance on solutions to this significant deterrent to taking advantage of the rights provided by the ADA.

Accommodations in the workplace can play an important role in reducing⁷ the high levels of unemployment among people with disabilities.⁸ People with psychiatric and developmental disabilities face significant barriers to employment, including the stigma and stereotypes associated with their impairment.⁹ Because such disabilities typically are hidden, or unknown to supervisors and coworkers, those employees must decide whether, how, when, where and to whom they should conceal, reveal or signal their disabilities.¹⁰ The ADA was adopted in large part to combat the stigma associated with people with disabilities.¹¹ However, the process for seeking an accommodation puts the person with a disability in the position of being forced to reveal their disability to their employer to be eligible for necessary accommodations.

The potential for stigmatization may contribute to the "long-standing challenges" in ensuring that employees and applicants with disabilities are provided with the reasonable accommodations they need to succeed in the workplace.¹² Stringent requirements on people seeking accommodations

7. William A. Erickson et al., *The Employment Environment: Employer Perspectives, Policies, and Practices Regarding the Employment of Persons with Disabilities*, 57 REHABILITATION COUNSELING BULL. 195, 195 (2014); see Lauren B. Gates & Sheila H. Akabas, *Inclusion of People with Mental Disabilities into the Workplace*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 387 (Isabela Z. Schultz & E. Sally Rogers eds., 2011) (explaining that to achieve full inclusion, "many qualified individuals with serious persistent mental health conditions need accommodations").

8. See *Persons with a Disability: Labor Force Characteristics Summary*, U.S. BUREAU LAB. STAT. (Feb. 26, 2020, 10:00 AM), <https://www.bls.gov/news.release/disabl.nr0.htm> [https://perma.cc/JQD6-8D3F] (illustrating the proportion of people with disabilities employed in 2018 was 19.1% (11.1% for those without a high school diploma), compared to a rate of 65.9% for people without disabilities).

9. Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP. POL'Y J. 293, 325 (2005).

10. Kristen P. Jones & Eden B. King, *Managing Concealable Stigmas at Work: A Review and Multilevel Model*, 40 J. MGMT. 1466, 1469 (2014).

11. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 435 (2000).

12. Bradley A. Areheart & Michael Ashley Stein, *The Disability-Employability Divide: Bottlenecks to Equal Opportunity*, 113 MICH. L. REV. 877, 893 (2015); see also Stephen Clayton et al., *Effectiveness of Return-to-Work Interventions for Disabled People: A Systematic Review of Government Initiatives Focused on Changing the Behaviour of Employers*, 22 EUR. J. PUB. HEALTH 434, 436 (2012) (describing similar challenges faced by employees with disabilities in Canada and select European countries).

may have been an intentional compromise when the ADA was adopted.¹³ Others have argued that because workplaces are designed for the able-bodied employees, employers should automatically be required to change the work environment to enable the employee with a disability to be successful.¹⁴ Regardless of one's opinion on those two outlooks, there is no doubt of the need for policies and practices that minimize discrimination to enhance the accessibility of the workplace for people with both physical and mental disabilities.¹⁵

To promote such access, experts continue to focus on disability awareness training and fostering a climate of disability inclusion,¹⁶ even though research shows that discriminatory attitudes and practices are hard to change.¹⁷ Employers have characterized their accommodation-related policies and practices as lacking effectiveness,¹⁸ particularly with respect to "disability-friendly" practices related to accommodation.¹⁹ While these factors may have some influence on employees' confidence in seeking accommodation without suffering the effects of stigmatization, many employees and applicants with disabilities are still reluctant to reveal their disability, even if it means foregoing their right to reasonable

13. Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 715 (2014).

14. MICHAEL OLIVER, UNDERSTANDING DISABILITY 33 (1st ed. 1996); see also Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347, 373–74 (2011) (demonstrating that disability is socially constructed).

15. Susanne M. Bruyère, William A. Erickson & Sara Vanlooy, *HR's Role in Managing Disability in the Workplace*, 27 EMP. REL. TODAY 47, 50 (2000).

16. Sarah Von Schrader, Valerie Malzer & Susanne Bruyère, *Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate*, 26 EMP. RESPONSIBILITIES & RTS. J. 237, 253 (2014); see Terry Krupa, *Employment and Serious Mental Health Disabilities*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 224 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (highlighting employer education to decrease the stigma related to mental illness); see also PETER LINKOW ET AL., LEVELING THE PLAYING FIELD: ATTRACTING, ENGAGING AND ADVANCING PEOPLE WITH DISABILITIES 42 (2013) (providing guidelines to create a workplace where employees with disabilities feel safe to disclose their grievances); see also Izabela Z. Schultz et al., *Employer Attitudes Towards Accommodations in Mental Health Disability*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 326, 337–38 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (displaying the importance of having employers promote anti-discriminatory attitudes and practices and training to improve attitudes about workers with mental health disorders).

17. Lisa Schur et al., *Is Disability Disabling in All Workplaces? Workplace Disparities and Corporate Culture*, 48 INDUS. REL. 381, 386 (2009).

18. William A. Erickson et al., *The Employment Environment: Employer Perspectives, Policies, and Practices Regarding the Employment of Persons with Disabilities*, 57 REHABILITATION COUNSELING BULL. 195, 201 (2014).

19. *Id.* at 205.

accommodations.²⁰

In contrast to these approaches to expand workplace opportunities for people with disabilities, this paper focuses on the process of obtaining accommodations which are so essential to the success of persons with disabilities in the workplace. An emphasis on process flows from the maxim that the effectiveness of the law in achieving positive outcomes can only be improved “by the study of the process through which the outcomes are achieved, including how it influences the knowledge, attitudes, and beliefs of people with disabilities and their employers.”²¹ Because people with hidden disabilities risk stigmatization if they reveal their disability to obtain accommodation, the current process of obtaining accommodations presents a significant bottleneck to the inclusion and success of people with disabilities in the workforce.

The paper begins with an explanation of the conflict between the need to reveal one’s disability to obtain an accommodation and the potential for stigmatization after such a revelation. Accommodations are so important to people with disabilities to be more effective in the workplace, but people with hidden disabilities often decide not to request an accommodation to avoid suffering from the effects of stigma and stereotypes associated with their disabilities.

The second part of this paper explains how the ADA’s interactive process requires employees with hidden disabilities to disclose both their disability diagnosis and the related impairments to obtain any reasonable accommodations. Without a revelation of that information, the employer typically will not be required to interact about, much less provide, any reasonable accommodation. While this sharing of information is important to develop appropriate accommodations and for employers to verify that an accommodation is truly necessary, the ADA offers limited protections against the potential for stigmatization after it is shared.

The third part of the paper summarizes original data from a review of the accommodation practices of Fortune 100 companies and employers responding to an original opportunity survey of 75 employers. Many Fortune 100 companies fail to provide adequate information and assurances of privacy on their websites, which could discourage people with hidden disabilities from even initiating the accommodation process. Both Fortune 100 companies’ online information and employer responses to our survey demonstrate that some employers require medical information from

20. Schultz et al., *supra* note 16, at 358.

21. Scott Burris & Kathryn Moss, *A Road Map for ADA Title I Research*, in *EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT* 19, 21 (Peter D. Blanck ed., 2000).

employees early in the accommodation process, and yet many employers do not adequately limit access to that information. In contrast, some employers use innovative strategies to address the potential stigmatization of employees seeking accommodation, such as assuring that supervisors do not see employees' medical information, while other responding employers acknowledge that they are "not sure" how to do so.

The final part of the paper proposes some solutions for this conflict between the stigma attached to many hidden disabilities and the ADA's requirement to reveal that information to receive reasonable accommodation. One might advocate for limiting the amount of information that is required to be shared, but such a limitation could lead to more stereotyping of the person with a hidden disability who is seeking an accommodation. To ensure that employers can verify the need for accommodation but discourage their reliance on stereotypes, the ADA's requisite interactive process should be reformed to require only the revelation of objective, relevant private information about the person seeking an accommodation. That information should only be shared with those who have a need to know, which would still provide employers with assurance that a requested accommodation is truly needed. A revised process of accommodation approval should ensure that direct supervisors and managers do not have access to private medical information about an applicant or employee, even if that person is seeking an accommodation. Reliance on a neutral third party to verify the person's need for accommodation provides additional protection against stigmatization. By adopting such a process, employees with disabilities should feel more comfortable in initiating the accommodation process without fear that employers will succumb to the all too common tendency of stigmatizing or stereotyping them based on their disabilities.

I. THE REVELATION CONFLICT

An inherent conflict arises for an employee or applicant seeking accommodation. An employer is only required to interact with an employee or applicant seeking accommodation who reveals both her disability and the accompanying limitations or impairments.²² Even more detailed medical information may be required to show that an

22. Claudia Center, *Law and Job Accommodation in Mental Health Disability*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 10 (Izabela Z. Schultz & E. Sally Rogers eds., 2011); Susan G. Goldberg, Mary B. Killeen & Bonnie O'Day, *The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment*, 11 *PSYCHOL. PUB. POL'Y & L.* 463, 465–66 (2005).

accommodation is reasonable, based on a connection between the disability and the requested change.²³ Admittedly, revelation of this information can be important to finding appropriate accommodations.²⁴ Employers also seek verification that an accommodation is truly necessary.²⁵ But this revelation requirement fails to acknowledge the risk taken by people with disabilities by disclosing a disability that carries a significantly negative stigma.²⁶ As described below, both managers and coworkers may treat a person with a hidden disability very differently once that disability is revealed. Even if that stigmatization will not actually occur in a particular workplace, people with hidden disabilities often fear such a reaction.²⁷ Consequently, applicants and employees may choose to forego their right to reasonable accommodations so as to avoid stigmatization.

Resistance to disclosing one's disability because of the associated stigma can create a "considerable barrier" to accommodation.²⁸ The disclosure decision can even be "wrenching" for people with psychiatric disabilities,²⁹ because they must "weigh the personal benefits and risks of [disclosing their psychiatric disability]" in their workplace.³⁰ In reality, individuals considering revelation of their disability need to trust that the information will not be used against them and that the organization will support them.³¹

A failure to disclose one's disability limits access to accommodations, thereby negatively affecting the performance of employees diagnosed with hidden disabilities.³² For example, Canadian research showed that

23. See *infra* notes 275–316 and accompanying text.

24. Marie-Jose Durand et al., *A Review of Best Work-Absence Management and Return-to-Work Practices for Workers with Musculoskeletal or Common Mental Disorders*, 48 *WORK* 579, 583 (2014).

25. See *infra* notes 191–318 and accompanying text for a discussion of the verification process under the ADA.

26. See *infra* notes 116–128 and accompanying text.

27. Goldberg, Killeen & O'Day, *supra* note 22, at 484–85.

28. Schultz et al., *supra* note 16, at 358; Jason Peer & Wendy Tenhula, *Employment Interventions for Persons with Mood and Anxiety Disorders*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 255 (Izabela Z. Schultz & E. Sally Rogers eds., 2011); LINKOW ET AL., *supra* note 16, at 43–44; see also Follmer & Jones, *supra* note 2, at 344 (explaining that disclosure to obtain accommodation exposes employees with mental illnesses "to the risk of stigmatization and discriminatory treatment").

29. Goldberg, Killeen & O'Day, *supra* note 22, at 466.

30. Kim L. MacDonald-Wilson et al., *Disclosure of Mental Health Disabilities in the Workplace*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 191, 206 (Izabela Z. Schultz & E. Sally Rogers eds., 2011).

31. LINKOW ET AL., *supra* note 16, at 41.

32. Kate E. Toth & Carolyn S. Dewa, *Employee Decision-Making About Disclosure of a Mental Disorder at Work*, 24 *J. OCCUPATIONAL REHABILITATION* 732, 735 (2014).

employees with a psychiatric disability “may choose not to disclose for fear of stigmatization and its negative consequences,” including discharge.³³ Similarly, in Hong Kong research showed that applicants with a psychiatric disability were “unwilling to disclose their medical history” to avoid discrimination in hiring.³⁴

Despite the potential benefits of obtaining accommodations, a significant proportion of employees have opted to avoid revelation, thereby forgoing their right to be accommodated.³⁵ These employees have determined that the benefits of revealing one’s disability are “far outweighed by the fear that this expression only turns them into a target for devaluation by others in the workplace.”³⁶ One expert explained that “[t]he fear of resentment, embarrassment, and the potential loss of self-esteem that might be caused by revealing the mental health condition mask the benefits of an accommodation that disclosure might provide.”³⁷

Employees are more likely to disclose their disabilities if they need accommodations to perform their jobs,³⁸ and those who disclosed were more likely to receive needed accommodations.³⁹ Experts have recommended that employees with hidden disabilities get help from counselors or job coaches to identify a “trustworthy workplace ally” to reveal one’s disability.⁴⁰ Employees with psychiatric disabilities may delay the revelation of their disabilities until their need for accommodations forces them to do so.⁴¹ Some may even quit a job or seek a job for which they do not require accommodation to avoid revealing a disability.⁴²

33. *Id.* at 735, 740.

34. Hector W.H. Tsang et al., *Vocational Outcomes of an Integrated Supported Employment Program for Individuals with Persistent and Severe Mental Illness*, 40 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 292, 295–96 (2009).

35. Goldberg, Killeen & O’Day, *supra* note 22, at 481, 483, 487, 490; *see, e.g.*, JianLi Wang et al., *Perceived Needs for and Use of Workplace Accommodations by Individuals with a Depressive and/or Anxiety Disorder*, 53 J. OCCUPATIONAL & ENVTL. MED. 1268, 1271 (2011) (explaining that during an economic recession, employees with mental health problems might be less likely to request accommodations, due to fear of losing their job).

36. Tiffany D. Johnson & Aparna Joshi, *Dark Clouds or Silver Linings? A Stigma Threat Perspective on the Implications of an Autism Diagnosis for Workplace Well-Being*, 101 J. APPLIED PSYCHOL. 430, 437 (2016).

37. Gates & Akabas, *supra* note 7, at 383; *see also* Goldberg, Killeen & O’Day, *supra* note 22, at 490–91 (explaining that beliefs about prejudice and discrimination appeared to influence their disclosure decisions).

38. Toth & Dewa, *supra* note 32, at 739; Von Schrader, Malzer & Bruyère, *supra* note 16, at 246.

39. MacDonald-Wilson et al., *supra* note 30, at 206–07.

40. Johnson & Joshi, *supra* note 36, at 445.

41. Von Schrader, Malzer & Bruyère, *supra* note 16, at 246.

42. Gates & Akabas, *supra* note 7, at 383; Rebecca S. Dalgin & Dennis Gilbride,

Research literature has failed to address adequately the potential negative effects of disclosing a hidden disability for applicants or employees.⁴³ One of the few studies addressing this question tests the hypothesis that employers will respond more favorably to job candidates who disclose “with clear, concise information about the disability and related impacts on employment (i.e., detailed disclosure) than to a candidate who discloses with limited information (i.e., brief disclosure).”⁴⁴ The results indicated that employer reactions to revelation of a psychiatric disability were negative regardless of the level of detail disclosed.⁴⁵

In general, employees with hidden disabilities are more likely to reveal if they expect to be accepted by others and perceive positive organizational and supervisor support, as well as a need for organizational resources dependent on revelation.⁴⁶ Employees with disabilities have higher job satisfaction, loyalty and lower turnover rates in organizations with corporate cultures, i.e., embedded values, attitudes and norms, that are responsive to the needs of all employees.⁴⁷ In line with these findings, experts have recommended assessment of the organizational climate, encouraging people with disabilities to find work cultures which emphasize “cooperation, helpfulness and social justice.”⁴⁸ An employee might look for institutional support for disclosure that is part of the “culture, climate, practices, and policies” of an organization, including both symbolic and instrumental support, which can be enhanced by the presence of others with a similar stigmatized characteristic.⁴⁹ Revelation can be supported by clear diversity and inclusion statements, allowance of flexible work

Perspectives of People with Psychiatric Disabilities on Employment Disclosure, 26 PSYCHIATRIC REHABILITATION J. 306, 307–09 (2003).

43. Connie Sung et al., *Disclose or Not? Effect of Impression Management Tactics on Hireability of Persons with Epilepsy*, 58 EPILEPSIA 128, 129 (2017).

44. Rebecca Spirito Dalgin & James Bellini, *Invisible Disability Disclosure in an Employment Interview: Impact on Employers' Hiring Decisions and Views of Employability*, 52 REHABILITATION COUNSELING BULL. 6, 7 (2008).

45. *Id.* at 12–13.

46. Kristen P. Jones & Eden B. King, *Managing Concealable Stigmas at Work: A Review and Multilevel Model*, 40 J. MGMT. 1466, 1474, 1476, 1478, 1484–85 (2014).

47. Schur et al., *supra* note 17, at 386, 398–400.

48. Bonnie Kirsh & Rebecca Gewurtz, *Organizational Culture and Work Issues for Individuals with Mental Health Disabilities*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 393, 398 (Izabela Z. Schultz & E. Sally Rogers eds., 2011); MacDonald-Wilson et al., *supra* note 30, at 210. *See also* Lisa Schur, Douglas Kruse & Peter Blanck, *Corporate Culture and the Employment of Persons with Disabilities*, 23 BEHAV. SCI. & L. 3, 16 (2005) (explaining that corporate culture affecting employees with disabilities can be improved by management commitment, training programs, and working with unions).

49. Belle R. Ragins, *Disclosure Disconnects: Antecedents and Consequences of Disclosing Invisible Stigmas Across Life Domains*, 33 ACAD. MGMT. REV. 194, 205 (2008).

arrangements, and focus groups for employees with disabilities, as well as training on disability awareness and inclusion of people with disabilities, including the provision of accommodations.⁵⁰

These experts put the burden on job-seekers with disabilities to discover workplaces with less potential for the negative effects of stigma and stereotyping. Similarly, vocational rehabilitation experts have focused on helping people with a hidden disability, such a psychiatric impairment, in deciding “what, to whom, and when to disclose a psychiatric disability,”⁵¹ and that “an honest, direct approach and an emphasis on factual, situation-specific information have been found to be most useful.”⁵² One group of surveyed employees with disabilities explained that having a “disability friendly workplace” and “knowing that the employer was actively recruiting and hiring people with disabilities” were important considerations in deciding whether to disclose their disabilities at work.⁵³ Thus, these experts suggest that employees who would benefit from an accommodation must find a workplace culture where disclosure will not result in the negative consequences of stigma and stereotypes attached to their disability.⁵⁴

This advice assumes that there are workplaces that have effectively addressed the potential for biases against people with hidden disabilities. In reality, experts recognize that “few organizations have formal plans to address mental health and employment equity.”⁵⁵ “Reduction of stigma is challenging because it is often a result of deep-level attitudes.”⁵⁶ Diversity training is common, but may be ineffective because increased knowledge about mental illness “does not necessarily translate to changes in negative attitudes or stigmatizing or discriminating responses.”⁵⁷ Despite the fact that two-thirds of employers in the U.S. already provide this training,⁵⁸

50. LINKOW ET AL., *supra* note 16, at 41, 44–46.

51. Dalgin & Gilbride, *supra* note 42, at 307.

52. Liza M. Conyers & Christine Ahrens, *Using the Americans with Disabilities Act to the Advantage of Persons with Severe and Persistent Mental Illness: What Rehabilitation Counselors Need to Know*, 21 WORK 57, 62 (2003).

53. SARAH VON SCHRADER ET AL., EMERGING EMPLOYMENT ISSUES FOR PEOPLE WITH DISABILITIES 16 (2011), <https://files.eric.ed.gov/fulltext/ED537099.pdf> [<https://perma.cc/ZF3J-EGYK>].

54. Von Schrader, Malzer & Bruyère, *supra* note 16, at 240–41; *see also* MacDonald-Wilson et al., *supra* note 30, at 206 (explaining how employees must weigh the benefits and risks to disclosing).

55. Kirsh & Gewurtz, *supra* note 48, at 401.

56. Toth & Dewa, *supra* note 32, at 744.

57. Toth & Dewa, *supra* note 32, at 744.

58. Susanne M. Bruyère, William A. Erickson & Sara VanLooy, *Comparative Study of Workplace Policy and Practices Contributing to Disability Nondiscrimination*, 49

doubt persists that such efforts are effective in reducing the existence or the effects of such stigma.⁵⁹ Moreover, educational approaches to address the stigma and stereotypes about hidden disabilities can promote “psychological reactance,” e.g., “do not tell me what to think,” and actually worsen attitudes of coworkers and managers.⁶⁰

A strategy of avoiding those who display stigmatizing attitudes and behaviors in the workplace will not positively affect the self-esteem of employees with various psychiatric disabilities, and can negatively affect the availability of social supports in the workplace.⁶¹ Consequently, “attitudes and the behaviors of colleagues and supervisors can have a profound impact on employees’ ability to succeed and advance and on their willingness to disclose their disability.”⁶²

A. Importance of Accommodations

Accommodations, described as various alterations of the work or the environment, often are essential for people with disabilities’ performance of job tasks.⁶³ Without accommodation, discharge often results because the employee cannot effectively perform the essential job duties of his or her

REHABILITATION PSYCHOL. 28, 35 (2004).

59. Compare Jian Li Wang, *Mental Health Literacy and Stigma Associated with Depression in the Working Population*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 341, 344 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (explaining that stigma-reducing strategies are not always effective), and Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012) (stating that the effects of short-term educational interventions on stigma may be limited), and Cindy Malachowski & Bonnie Kirsh, *Workplace Antistigma Initiatives: A Scoping Study*, 64 PSYCHIATRIC SERVICES 694, 696–700 (2013) (noting very few positive results in reducing stigma from workplace intervention methods), with Johannes Hamann et al., *A “Mental-Health-at-the-Workplace” Educational Workshop Reduces Managers’ Stigma Toward Depression*, 204 J. NERVOUS & MENTAL DISEASE 61, 62 (2016) (training reduced stigma related to depression).

60. Patrick W. Corrigan, Amy Kerr & Lissa Knudsen, *The Stigma of Mental Illness: Explanatory Models and Methods for Change*, 11 APPLIED & PREVENTIVE PSYCHOL. 179, 184 (2005).

61. *Id.* at 180–81; Marie Ilic et al., *Protecting Self-Esteem from Stigma: A Test of Different Strategies for Coping with the Stigma of Mental Illness*, 58 INT’L J. SOC. PSYCHIATRY 246, 252, 254 (2012); see also Bruce G. Link et al., *Stigma as a Barrier to Recovery: The Consequences of Stigma for the Self-Esteem of People with Mental Illnesses*, 52 PSYCHIATRIC SERVICES 1621, 1624 (2001) (showing that the stigma associated with people with mental illnesses can be harmful to their self-esteem).

62. LINKOW ET AL., *supra* note 16, at 42.

63. Michael Williams, Dory Sabata & Jesse Zolna, *User Needs Evaluation of Workplace Accommodations*, 27 WORK 355, 361 (2006).

position without it.⁶⁴ The ADA was designed to enable people with disabilities to “enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”⁶⁵ The ADA’s right to reasonable accommodations can “offset the injustices that continue because of structural discrimination against people with mental illness.”⁶⁶ Reasonable accommodations can provide greater flexibility and tolerance in workplaces that are traditionally designed for the able-bodied.⁶⁷

Despite the importance of accommodations for employees with hidden disabilities, those with mental health disabilities have been about half as likely to receive accommodations, compared to employees with other disabilities.⁶⁸ Service providers for people with disabilities often concentrate on vocational preparation and job search strategies, with less attention on accommodations necessary for getting hired or job maintenance.⁶⁹

Workplace accommodations are particularly important for employees with psychiatric disabilities to continue working during or following an episode.⁷⁰ For example, “the availability of ongoing, non-time-limited work supports is considered critical to achieving positive employment

64. Donald C.S. Mak & Hector W.H. Tsang, *Job Termination Among Individuals with Severe Mental Illness Participating in a Supported Employment Program*, 69 *PSYCHIATRY* 239, 240–41, 243, 246 (2006); Deborah R. Becker et al., *Job Termination Among Persons with Severe Mental Illness Participating in Supported Employment*, 34 *COMMUNITY MENTAL HEALTH J.* 71, 73, 78–80 (1998).

65. 29 C.F.R. § 1630.2(o)(1)(iii) (2011); see also U.S. Equal Emp’t Opportunity Comm’n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002)* (“[A] reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.”).

66. Corrigan, Kerr & Knudsen, *supra* note 60, at 187.

67. See Sharon L. Harlan & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation*, 25 *WORK & OCCUPATIONS* 397, 398–99 (1998) (comparing the goals of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964).

68. See Craig Zwerling et al., *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995*, 45 *J. OCCUPATIONAL & ENVTL. MED.* 517, 523 (2003) (“We also found that those with mental health conditions were about 50% less likely to receive accommodations than those with other disabilities.”).

69. Mak & Tsang, *supra* note 64, at 240 (“Current SE programs put emphasis essentially on vocational preparation and job search. Job maintenance has yet to be strengthened.”).

70. Wang et al., *supra* note 35, at 1268 (“Workplace accommodations may allow employees to continue working during or following an episode of illness. This may diminish the extent of career disruption associated with an episode of mental illness and avoid difficulties likely to be encountered with reintegration.”).

outcomes.”⁷¹ Overall, vocational rehabilitation services for people with psychiatric disabilities, including targeted job development and supported employment services, can triple employment outcomes for that group.⁷² The interpersonal difficulties and a lack of social competence among some people with psychiatric disabilities can be addressed through accommodations, including follow-along support in the workplace.⁷³ Employees with mood and anxiety disorders even benefit from simple accommodations such as the provision of concrete work expectations or frequent breaks, as well as more costly programs such as provision of mental health treatment at work.⁷⁴ The success of such accommodations is well-documented, often resulting in a net cost savings⁷⁵ for the employer based on a quicker return to work.⁷⁶

Employees with psychiatric disabilities can benefit from low cost accommodation such as interpersonal supports, including job coaching or job support⁷⁷ and stress management interventions⁷⁸ as well as the

71. Krupa, *supra* note 16, at 220; *see also* Schultz et al., *supra* note 16, at 358 (noting that for employees returning to work, accommodation may continue to be needed to facilitate optimal work performance).

72. *See* E. Sally Rogers & Kim L. MacDonald-Wilson, *Vocational Capacity Among Individuals with Mental Health Disorders*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 73, 74 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (describing how even after tripling employment outcomes, the majority of those with mental health disabilities will be unemployed); *see also* Debra Lerner et al., *Depression and Work Performance: The Work and Health Initiative Study*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 103, 108 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (discussing how performance of employees with serious depression can be improved through modification, coaching, and EAP services).

73. Tsang et al., *supra* note 34, at 293 (describing how “interpersonal difficulties have been found to be the most frequently reported job problem leading to unwanted job terminations” and how these difficulties may be addressed through social skills training).

74. Peer & Tenhula, *supra* note 28, at 256 (offering a list accommodations, varying in aim and level of support); *see also* Jay Wald, *Anxiety Disorders and Work Performance*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 121, 129, 134 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (suggesting job accommodations for various functional limitations).

75. Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 22–32 (2007).

76. Peer & Tenhula, *supra* note 28, at 246–48, 250 (discussing how accommodations lead to faster return to work, earlier return to partial work, and increased hours worked). *See, e.g.*, Judith A. Cook et al., *Effectiveness of Supported Employment for Individuals with Schizophrenia: Results of a Multi-Site, Randomized Trial*, 2 *CLINICAL SCHIZOPHRENIA & RELATED PSYCHOSES* 37, 44 (2008) (discussing how performance of employees with schizophrenia improved in supported employment).

77. *See* Izabela Z. Schultz et al., *Best Practices in Accommodating and Retaining Persons with Mental Health Disabilities at Work: Answered and Unanswered Questions*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 445, 456 (Izabela Z. Schultz

utilization of natural peer supports and feedback-giving by the supervisor, a flexible schedule or job-sharing, and a modified work environment to decrease stressors and triggers.⁷⁹ For example, two studies of Canadian employees with psychiatric disabilities found that the most useful accommodations included 1) “open communication, positive reinforcement and praise, written instructions, and . . . additional time to learn job responsibilities,”⁸⁰ and 2) weekly meetings with their supervisors, exchanging minor work tasks with others, and attending courses that are individualized, as well as reduced hours or work demands.⁸¹ Likewise, employees with depression have benefitted from organizational supports including supportive colleagues and peer support networks after returning to work, as well as increased communication with employees while on leave.⁸² In addition, the performance of employees with psychiatric disabilities may improve from a transfer to a different position or a change in job duties,⁸³ as evidenced by the decrease in both presenteeism and absenteeism among employees with severe depression, by providing them with more control and duties requiring less judgment and decision-making or interpersonal interaction.⁸⁴

Accommodations also address deficits associated with a person’s non-psychiatric hidden disability.⁸⁵ For example, employment support

& E. Sally Rogers eds., 2011) (describing job coaching and when it is appropriate); Samuel B. Harvey et al., *Mental Health and Employment: Much Work Still to be Done*, 194 BRITISH J. PSYCHIATRY 201, 201 (2009) (noting supportive programs can be effective particularly after a first episode).

78. Heribert Limm et al., *Stress Management Interventions in the Workplace Improve Stress Reactivity: A Randomised Controlled Trial*, 68 OCCUPATIONAL & ENVTL. MED. 126, 133 (2011) (discussing how stress management programs can be implemented in the work place with positive psychological effects).

79. Izabela Z. Schultz et al., *Evidentiary Support for Best Practices in Job Accommodation in Mental Health: Employer-Level Interventions*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 409, 416–18 (Izabela Z. Schultz & E. Sally Rogers eds., 2011) (offering a list of best practices related to mental health accommodations).

80. Schultz et al., *supra* note 16, at 330.

81. Wang et al., *supra* note 35, at 1270 (finding that the top three accommodation needs according to an interview-based study of individuals with mental disorders were weekly meetings, exchanging tasks, and individualized courses).

82. Marc Corbière et al., *Union Perceptions of Factors Related to the Return to Work of Employees with Depression*, 25 J. OCCUPATIONAL REHABILITATION 335, 340–41 (2015) (noting the benefit of understanding colleagues to employees returning to work).

83. Schultz et al., *supra* note 79, at 415.

84. Lerner et al., *supra* note 72, at 106.

85. Follmer & Jones, *supra* note 2, at 333–34 (explaining that the effects can include inability to concentrate, restriction in social interactions and decision-making, and decreases in productivity).

specialists can assist employees with cognitive impairments in applying problem solving and other skills to stressful situations at work, and help employees practice skills needed when experiencing interpersonal difficulties at work.⁸⁶ Various accommodations can improve the workplace success of employees with mild cognitive disorders which affect functions such as memory and organizational skills.⁸⁷ Similarly, improved employment outcomes have been associated with the introduction of interventions aimed at remediation and compensation for impairments in cognitive functioning and social skills training to address difficulties with interpersonal relationships which can accompany serious mental illness.⁸⁸

Accommodations can be especially important for employees returning to work after an absence related to a disability, who face barriers to reentering the workforce and may even experience more frequent disciplinary action.⁸⁹ For example, one study found that a group of employees with severe mental illnesses believed that workplace accommodations, such as a better work environment, would lengthen their job tenure.⁹⁰ Likewise, workplace interventions (including lowering workload and job demands, increasing decision latitude) have been shown to reduce time out of work for employees experiencing workplace-related psychological complaints.⁹¹ Workplace accommodations are important to reducing lost time and other costs, even for employees with a mental health issue who have access to service coordination and adequate health services.⁹²

Because of the various positive effects on employee performance, employers also benefit from providing accommodations to persons with disabilities.⁹³ Emphasis on lean production and work intensification may

86. *Id.* at 340–413.

87. Robert T. Fraser, *Employment Interventions for Persons with Mild Cognitive Disorders*, in *WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH* 269–72 (Izabela Z. Schultz & E. Sally Rogers eds., 2011).

88. Krupa, *supra* note 16, at 96.

89. Pauline Dibben, Geoffrey Wood & Rachel O'Hara, *Do Return to Work Interventions for Workers with Disabilities and Health Conditions Achieve Employment Outcomes and Are They Cost Effective? A Systematic Narrative Review*, 40 *EMP. REL.* 999, 1000 (2018).

90. Mak & Tsang, *supra* note 64, at 243.

91. Roland W.B. Blonk et al., *Return to Work: A Comparison of Two Cognitive Behavioural Interventions in Cases of Work-Related Psychological Complaints Among the Self-Employed*, 20 *WORK & STRESS* 129, 131–32, 140 (2006).

92. K.L. Cullen et al., *Effectiveness of Workplace Interventions in Return-to-Work for Musculoskeletal, Pain-Related and Mental Health Conditions: An Update of the Evidence and Messages for Practitioners*, 28 *J. OCCUPATIONAL REHABILITATION* 1, 9–12 (2018).

93. Karen A. Gallie et al., *Company-Level Interventions in Mental Health*, in *WORK*

lead managers to resist the provision of workplace accommodations.⁹⁴ This reluctance fails to recognize that accommodations can address employer concerns that people with hidden disabilities lack the ability to perform the duties of a job they seek.⁹⁵ For example, absenteeism and presenteeism accounts for the majority of costs associated with employees with depression,⁹⁶ the effects of which can be reduced by enhanced health care offered by employers.⁹⁷

Accommodations also benefit employers by reducing presenteeism, increasing work retention, and facilitating work reentry by employees who have missed work due to illness or injury.⁹⁸ Employers have reported significant direct benefits from providing accommodations, including reduced absenteeism and increased productivity.⁹⁹ In addition, the provision of accommodations can increase job tenure, thereby avoiding turnover costs such as job search and training costs.¹⁰⁰ Employers have reported numerous direct benefits from providing accommodations, including retention of qualified employees (86%), increased productivity

ACCOMMODATION AND RETENTION IN MENTAL HEALTH 295–96 (Izabela Z. Schultz & E. Sally Rogers eds., 2011).

94. Ian Cunningham, Philip James & Pauline Dibben, *Bridging the Gap Between Rhetoric and Reality: Line Managers and the Protection of Job Security for Ill Workers in the Modern Workplace*, 15 BRITISH J. MGMT. 273, 288 (2004).

95. Krupa, *supra* note 16, at 202–04; *see also* Schultz et al., *supra* note 16, at 329 (displaying that employers have concerns about, among other things, adjustments to work environment, being reliable, the need for supervision, and interactions and communications with supervisors and coworkers).

96. Paul E. Greenberg et al., *The Economic Burden of Depression in the United States: How Did It Change Between 1990 and 2000?*, 64 J. CLINICAL PSYCHIATRY 1465, 1469 (2003).

97. *See* Philip S. Wang et al., *Making the Business Case for Enhanced Depression Care: The National Institute of Mental Health-Harvard Work Outcomes Research and Cost-Effectiveness Study*, 50 J. OCCUPATIONAL & ENVTL. MED. 468, 468, 472 (2008) (comparing relatively low costs of additional care to value added).

98. Schultz et al., *supra* note 77, at 412.

99. Limm et al., *supra* note 78, at 130, 133; Tatiana I. Solovieva, Denetta L. Dowler & Richard T. Walls, *Employer Benefits from Making Workplace Accommodations*, 4 DISABILITY & HEALTH J. 39, 43–44 (2011).

100. Helen A. Scharzt, D.J. Hendricks & Peter Blanck, *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 346, 349 (2006); *see also* Helen P. Hartnett et al., *Employers' Perceptions of the Benefits of Workplace Accommodations: Reasons to Hire, Retain and Promote People with Disabilities*, 34 J. VOCATIONAL REHABILITATION 17, 21–22 (2011) (stating that employers reported retention of employees and increases in productivity); Kerwin Kofi Charles, *The Extent and Effect of Employer Compliance with Accommodations Mandates of the Americans with Disabilities Act*, 15 J. DISABILITY POL'Y STUD. 86, 94–95 (2004) (showing how accommodations are effective in increasing job attachment).

(72%), avoidance of costs to train new employees (55%), savings on insurance costs (47%) and increased attendance (39%).¹⁰¹ In line with these direct benefits, among employers who contacted the Job Accommodation Network (JAN) before accommodating their employees, 34% reported saving up to \$5,000, 16% saved \$5,000 to \$10,000, 19% saved \$10,000 to \$20,000 and 25% saved between \$20,000 and \$100,000.¹⁰²

In addition to these direct savings, employers derive indirect benefits from the provision of accommodations, including improved employee interaction, as well as increased overall morale and productivity.¹⁰³ For example, one group of employers reported indirect benefits including improved interactions with co-workers (69.3%), increased overall company morale (60.7%), and increased overall company productivity (57.0%), with a median monetary benefit of \$1,000.¹⁰⁴ Similarly, another employer survey noted that accommodations led to increases in overall company morale (61%), overall company productivity (59%), workplace safety (47%), interactions with customers (37%), overall company attendance (27%), and increased profitability (24%).¹⁰⁵ Accommodations may also provide “third-party benefits” to employees without disabilities, by improving working conditions for everyone.¹⁰⁶ Compared to the relatively insignificant costs, more than half of all employers in one study reported a net benefit, and employers who could calculate the monetary benefit reported net benefits from providing accommodations of over \$11,000 on average.¹⁰⁷

Despite these reported savings, “[a] disconnect continues to exist between the benefits and effectiveness of accommodations and the employment rates of individuals with disabilities.”¹⁰⁸ Some employers focus on potential indirect costs, such as increased supervisory time, even though one group of employers reported that only 15.1% of

101. BETH LOY & LINDA CARTER BATISTE, *UNIVERSAL DESIGN AND ASSISTIVE TECHNOLOGY AS WORKPLACE ACCOMMODATIONS* tbl.4 (2007); LINKOW ET AL., *supra* note 16, at 12.

102. Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute*, in *EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT* 56, 56–57 (Peter David Blanck ed., 2000).

103. Solovieva, Dowler & Walls, *supra* note 99, at 43–44.

104. Scharzt, Hendricks & Blanck, *supra* note 100, at 349.

105. LOY & BATISTE, *supra* note 101, at 11.

106. See Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 351 (2009).

107. Scharzt, Hendricks & Blanck, *supra* note 100, at 350.

108. Scharzt, Hendricks & Blanck, *supra* note 100, at 352.

accommodations they provided resulted in increased indirect costs.¹⁰⁹ Even with some increase in costs, employers benefit from accommodations that help to retain engaged, productive employees.¹¹⁰ Employers who have hiring goals for hiring people with disability, including federal contractors, will also benefit from removing barriers or attendant stigma to disclosure of applicants' or employees' disabilities.¹¹¹ Resistance to providing accommodations may be more about resisting challenges to organizational culture and preserving the status quo, rather than direct or indirect costs.¹¹² Requests for such long-term, process-oriented accommodations threaten established workplace norms and could lead to broader employee demands.¹¹³

Clearly, accommodations can be essential for the success of people with disabilities in the workforce, as well as providing tangible benefits for employers.¹¹⁴ Even so, at least some employers are resistant to providing the reasonable accommodations required by the ADA, even if it is not clear that those accommodations would impose an undue hardship.¹¹⁵ The stigmatization that can result from revealing one's disability to obtain an accommodation presents yet another barrier to the provision of accommodations for people with disabilities.¹¹⁶

B. Stigma's Impact on People with Hidden Disabilities

Stigma characterizes people with hidden disabilities as “defective, damaged, debilitated, deformed, distressed, afflicted, anomalous, [and/or] helpless.”¹¹⁷ People with psychiatric and developmental disabilities are well aware of the stigma and stereotypes attached to their impairments, which has often resulted in employers' unwillingness to hire them.¹¹⁸

109. Scharzt, Hendricks & Blanck, *supra* note 100, at 346, 348.

110. Ron Z. Goetzel et al., *The Long-Term Impact of Johnson & Johnson's Health & Wellness Program on Employee Health Risks*, 44 JOEM 417, 418 (2002), [thehealthproject.com/wp-content/uploads/2015/02/johnson_johnson_long_term_impact.pdf](https://perma.cc/RM7J-C5AD) [https://perma.cc/RM7J-C5AD] (showing that management support with scientifically based resources and a business plan promotes a multidisciplinary approach with a focus on good “corporate health”).

111. VON SCHRADER ET AL., *supra* note 53, at 237.

112. Kirsh & Gewurtz, *supra* note 48, at 402.

113. Kirsh & Gewurtz, *supra* note 48, at 403.

114. See *supra* notes 61–104 and accompanying text for a discussion of benefits.

115. Harris, *supra* note 75, at 3–4.

116. See *supra* notes 113–121 and accompanying text for discussion of stigmatization.

117. PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 166 (2003).

118. Harlan & Robert, *supra* note 67, at 401–02.

Despite the attention given to stigma in general, few have given attention to issues of perceived stigma and concerns regarding disclosure of one's disability as "return-to-work barriers."¹¹⁹ The potential barrier to requesting accommodations created by this potential "backlash" makes it important to understand the influence of stigma and stereotypes on employees and applicants with disabilities.

Mental health issues and developmental disabilities can result in both self-stigma and public stigma, which includes stereotypes, prejudice and discrimination.¹²⁰ Both psychiatric and developmental disabilities, including cognitive impairments and autism spectrum disorder, are concealable identities which are often devalued and subject to stigmatization,¹²¹ meaning that individuals are seen as having "undesirable, deviant, or repulsive characteristics that reflect their character, physical body, or group membership."¹²² Stigmatization occurs when people treat certain differences as "socially meaningful" and consequently label members of an "out-group."¹²³ Resulting stereotypes about members of an out group result in assumptions about skills and abilities for work, costs and needs as employees, and "low levels of emotional adjustment."¹²⁴ For example, revelation of a mental health diagnosis can impose stigmatization even when the person's behavior is considered "normal."¹²⁵

Stigmatization of people with psychiatric disabilities may be more profound because negative attitudes about this group may be more socially acceptable, based on a perception that psychiatric disabilities "are more amorphous and culturally constructed than other kinds of impairments."¹²⁶ Employers may rely on stigma and associated stereotypes due to the lack of validated measures of either characteristics or skills that could be could be

119. Wald, *supra* note 74, at 133.

120. Malachowski & Kirsh, *supra* note 59, at 694; Patrick Corrigan et al., *An Attribution Model of Public Discrimination Towards Persons with Mental Illness*, 44 J. HEALTH & SOC. BEHAV. 162, 163–64 (2003).

121. Follmer & Jones, *supra* note 2, at 328–30, 336; Johnson & Joshi, *supra* note 36, at 430.

122. Ragins, *supra* note 49, at 196.

123. John E. Baur et al., *Beyond Banning the Box: A Conceptual Model of the Stigmatization of Ex-Offenders in the Workplace*, 28 HUM. RESOURCE MGMT. REV. 204, 205–06 (2018).

124. Eugene F. Stone-Romero, Dianna L. Stone & Kimberly Lukaszewski, *The Influence of Disability on Role-Taking in Organizations*, in HANDBOOK OF WORKPLACE DIVERSITY 402 (Alison M. Konrad, Pushkala Prasad & Judith K. Pringle eds., 2006).

125. Stephen P. Hinshaw & Andrea Stier, *Stigma as Related to Mental Disorders*, 4 ANN. REV. CLINICAL PSYCHOL. 367, 372 (2008).

126. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 404–06 (2006).

lacking in people with hidden disabilities.¹²⁷ Reliance on such stereotypes continues despite consensus that a disability diagnosis alone, or even its symptoms, “should not be used to judge who is likely to (or unlikely to) work.”¹²⁸ Negative consequences may be compounded if an employee with a disability receives an accommodation which coworkers believe is undeserved.¹²⁹

Unfavorable stereotypes and their related concerns about employing stigmatized individuals lead to discrimination and other negative outcomes.¹³⁰ Employers’ reluctance to hire or retain people with such hidden disabilities arises at least in part from employers’ general negative perceptions about employing people with these disabilities¹³¹ and the stigma attached to certain impairments.¹³² Compared to physical disabilities, hidden disabilities such as mental health impairments consistently generate “some of the strongest negative attitudes.”¹³³ Some have characterized the stigma as “more disabling than the primary condition,”¹³⁴ with the stigma of mental illness called “perhaps the most profound societal barrier to full participation in employment.”¹³⁵ This

127. Rogers & MacDonald-Wilson, *supra* note 72, at 79–83.

128. Krupa, *supra* note 16, at 95.

129. Ramona L. Paetzold et al., *Perceptions of People with Disabilities: When is Accommodation Fair?*, 30 BASIC & APPLIED SOC. PSYCHOL. 27, 28, 32–33 (2008).

130. Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 368–69 (2001).

131. Mark L. Lengnick-Hall, Philip M. Gaunt & Mukta Kulkarni, *Overlooked and Underutilized: People with Disabilities Are an Untapped Human Resource*, 47 HUM. RESOURCE MGMT. REV. 255, 263 (2008); Lily Run Ren, Ramona L. Paetzold & Adrienne Colella, *A Meta-Analysis of Experimental Studies on the Effects of Disability on Human Resource Judgments*, 18 HUM. RESOURCE MGMT. REV. 191, 199–200 (2008). *See also* David C. Baldrige & Michele L. Swift, *Withholding Requests for Disability Accommodation: The Role of Individual Differences and Disability Attributes*, 39 J. MGMT. 743, 746–47 (2013) (explaining that individuals with developmental disabilities may experience ostracism, discrimination, marginalization and isolation after revelation); Schur et al., *supra* note 17, at 386 (stating that negative attitudes toward people with disabilities may be an important barrier to their job satisfaction and career experiences).

132. *See* Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP. POL’Y J. 293, 325 (2005) (explaining that stereotypes and stigmas prevent entry and retention of persons with psychiatric disabilities in the workplace).

133. Marjorie L. Baldwin & Steven C. Marcus, *Stigma, Discrimination, and Employment Outcomes Among Persons with Mental Health Disabilities*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 53–56 (Izabela Z. Schultz & E. Sally Rogers eds., 2011).

134. Schultz et al., *supra* note 16, at 326.

135. Krupa, *supra* note 16, at 97; Izabela Z. Schultz et al., *Systemic Barriers and Facilitators to Job Accommodations in Mental Health: Experts’ Consensus*, in WORK ACCOMMODATION AND RETENTION IN MENTAL HEALTH 366 (Izabela Z. Schultz & E. Sally

stigma affects supervisors' and managers' decisions by influencing how individuals process and recall information about other people.¹³⁶ The impact of this stigma can be explained by attribution theory, under which people make assumptions about the cause and controllability of an individual's psychiatric or intellectual disability that lead to inferences about responsibility, and fear that people with at least some disabilities are dangerous.¹³⁷

Stigma and stereotypes can lead employers to exclude people with psychiatric and developmental disabilities from the workplace based on an assumed lack of ability.¹³⁸ Negative attitudes of coworkers can inhibit the success of people with disabilities in the workplace, including the effectiveness of accommodations.¹³⁹ In addition, employers may be reluctant to hire people with disabilities based on actual or perceived unwillingness of other employees to work with or be assisted by someone with a psychiatric or developmental disability,¹⁴⁰ particularly when employees and customers are assumed to share the decision-maker's preferences about members of certain groups.¹⁴¹

Employers also tend to be "apprehensive and fearful" about hiring or

Rogers eds., 2011); see also Baldwin & Marcus, *supra* note 133, at 56 (stating that persons with serious mental disorders are frequently unable to obtain good jobs because of prejudice).

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

137. Patrick W. Corrigan, Jonathon E. Larson & Sachiko A. Kuwabara, *Mental Illness Stigma and the Fundamental Components of Supported Employment*, 52 REHABILITATION PSYCHOL. 451, 451–55 (2007); E. Brohan et al., *Disclosure of a Mental Health Problem in the Employment Context: Qualitative Study of Beliefs and Experiences*, 23 EPIDEMIOLOGY & PSYCHIATRIC SCI. 289, 294 (2014); Shirli Werner et al., *Stigma and Intellectual Disability: A Review of Related Measures and Future Directions*, 33 RES. DEVELOPMENTAL DISABILITIES 748, 750 (2012).

138. Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1361 (2008); see also Wendy F. Hensel & Gregory T. Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 54 (2005) (showing that 70% of employees believed employers treated them as "less competent").

139. Schultz et al., *supra* note 135, at 357.

140. Bernice A. Pescosolido et al., "A Disease like Any Other"? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence, 167 AM. J. PSYCHIATRY 1321, 1324 (2010) (finding 62% of the general public unwilling to work closely with people diagnosed with schizophrenia, and 47% unwilling for those with depression).

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

retaining individuals with psychiatric disabilities.¹⁴² Stigmatization can result from questions about the legitimacy of a hidden disability such as a psychiatric disability, as well as fluctuations in the impact of a hidden disability at work.¹⁴³ Stigma has a persistent impact because psychiatric conditions are expected to continue over time.¹⁴⁴ In addition, the episodic nature of psychiatric disabilities creates suspicion that periods of being symptom-free do not guarantee future behavior,¹⁴⁵ despite a “solid work history and impressive credentials.”¹⁴⁶

In addition to these assumed negative traits, perceptions of controllability and fault also play a role in employers’ unwillingness to tolerate and accommodate employees with psychiatric disabilities in particular.¹⁴⁷ Society has often viewed psychiatric disabilities as “internally generated” and resulting from poor character and/or an unwillingness to conform.¹⁴⁸ Such assumptions may explain the relatively stronger negativity associated with psychiatric disabilities as compared to people with physical impairments.¹⁴⁹ This notion of fault may also explain the unwillingness of both employers and courts to require broader accommodations for people with psychiatric disabilities.

This stigma is one of the most common reasons for applicants and employees to conceal a disability.¹⁵⁰ Their fears are well-justified, because those who have revealed a hidden disability have experienced significant negative consequences following disclosure.¹⁵¹ Overall, for people with hidden disabilities the decision to disclose their disability “entails

142. Schultz et al., *supra* note 135, at 357.

143. Follmer & Jones, *supra* note 2, at 330.

144. Baldwin & Marcus, *supra* note 133, at 57.

145. Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 214–15 (2016).

146. Ami C. Janda, *Keeping a Productive Labor Market: Crafting Recognition and Rights for Mentally Ill Workers*, 30 HAMLINE J. PUB. L. & POL’Y 403, 426 (2008).

147. Baldwin & Marcus, *supra* note 133, at 56–57; Anna T. Florey & David A. Harrison, *Responses to Informal Accommodation Requests from Employees with Disabilities: Multistudy Evidence on Willingness to Comply*, 43 ACAD. MGMT. J. 224, 230 (2000).

148. Hensel & Jones, *supra* note 138, at 54–55.

149. Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 602 (2003).

150. MacDonald-Wilson et al., *supra* note 30, at 215–17, 22; Toth & Dewa, *supra* note 32, at 733.

151. Von Schrader, Malzer & Bruyère, *supra* note 16, at 249, 251–52; *see also* Wendy Wilkinson & Lex Frieden, *Glass-Ceiling Issues in Employment of People with Disabilities*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 71 (Peter D. Blanck ed., 2000) (arguing that people with disabilities may be reluctant to request accommodations due to the fear of being “singled out” or because of the fear of disclosing the disability).

substantial risk to their careers.”¹⁵² In the hiring process, significant research shows that employers are more likely to consider nondisabled applicants, with even greater discrimination occurring against people with psychiatric and developmental disabilities.¹⁵³ After hire, disclosure of a hidden disability can lead to rejection by coworkers and discrimination by supervisors, resulting in negative consequences for both social interactions and the overall careers of stigmatized employees.¹⁵⁴ Multiple studies have found that more than half of employees who disclosed their psychiatric disabilities experienced at least one unfavorable circumstance following disclosure, and more than one third of them expressed regrets about disclosing.¹⁵⁵ Interestingly, those who were compelled to disclose generally felt more regrets about the disclosure than those who exercised their choice to disclose.¹⁵⁶ Similarly, twenty-three percent of one group of surveyed employers admitted that attitudes or stereotypes presented

152. Harlan & Robert, *supra* note 67, at 411.

153. Stijn Baert, *Wage Subsidies and Hiring Chances for the Disabled: Some Causal Evidence*, 17 EUR. J. HEALTH ECON. 71, 76–77 (2016); KAREN A. DIXON, DOUG KRUSE & CARL E. VAN HORN, RESTRICTED ACCESS: A SURVEY OF EMPLOYERS ABOUT PEOPLE WITH DISABILITIES AND LOWERING BARRIERS TO WORK 13–14 (2003), <https://www.issuelab.org/resources/1570/1570.pdf> [<https://perma.cc/TN6J-RLJ2>]; Mark L. Lengnick-Hall & Philip Gaunt, *Why Employers Don't Hire People with Disabilities*, in HIDDEN TALENT: HOW LEADING COMPANIES HIRE, RETAIN, AND BENEFIT FROM PEOPLE WITH DISABILITIES 27–29 (Mark L. Lengnick-Hall ed., 2007). See also Mukta Kulkarni & Reimara Valk, *Don't Ask, Don't Tell: Two Views on Human Resource Practices for People with Disabilities*, 22 IIMB MGMT. REV. 137, 138 (2010) (explaining that employers are more likely to hire applicants with physical disabilities than applicants with mental disabilities); H. Stephen Kaye, Lita H. Jans & Erica C. Jones, *Why Don't Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUPATIONAL REHABILITATION 526, 531 (2011) (listing fear of unknown and discomfort in presence of people with disabilities as reasons cited by employers to not retain people with disabilities).

154. Kristen P. Jones & Eden B. King, *Managing Concealable Stigmas at Work: A Review and Multilevel Model*, 40 J. MGMT. 1466, 1481 (2014); see also Harlan & Robert, *supra* note 67, at 411 (explaining that employees with hidden disabilities realize that claiming right to reasonable accommodation entails substantial risks to their careers).

155. Marsha L. Ellison et al., *Patterns and Correlates of Workplace Disclosure Among Professionals and Managers with Psychiatric Conditions*, 18 J. VOCATIONAL REHABILITATION 3, 8–9 (2003); see also Otto F. Wahl, *Mental Health Consumers' Experience of Stigma*, 25 SCHIZOPHRENIA BULL. 467, 473, 476 (1999) (reporting rejection or reluctance to apply for jobs, effect on interactions with coworkers); VON SCHRADER ET AL., *supra* note 53, at 19–20 (stating that employees who disclosed their disabilities experienced harsher treatment by supervisors and stigmatization by coworkers); Marjorie L. Baldwin & Steven C. Marcus, *Perceived and Measured Stigma Among Workers with Serious Mental Illness*, 57 PSYCHIATRIC SERVICES 388, 389–90 (2006) (reporting that people with mental illness cited experiences such as refusal of employment, promotion or transfer, lower wages, and discharge).

156. Ellison et al., *supra* note 155, at 8–9.

barriers to employment or advancement for persons with disabilities.¹⁵⁷

Stigma has affected employees who revealed their disabilities in the form of “harsher treatment by supervisors; others felt stigmatized by coworkers or supervisors; some reported receiving uncomfortable attention from others.”¹⁵⁸ Thus, negative behaviors or attributes of a person with a psychiatric or developmental disability may be attributed to that impairment, rather than other situational factors.¹⁵⁹ Because employers assume that both psychiatric and developmental disabilities are “virtually untreatable,”¹⁶⁰ or that such a condition has a “downward deteriorating course” that is inconsistent with employment,¹⁶¹ an applicant or employee will find it difficult to overcome this attribution.¹⁶² An example of such treatment is provided in the claim of an employee who was suspended shortly after she told her managers about her depression.¹⁶³ Stigma attached to disability is compounded for people with psychiatric disabilities, due to “sanism,” an irrational prejudice against anyone diagnosed with a psychiatric disability.¹⁶⁴ One psychologist observed that the behaviors of people with psychiatric disabilities “are commonly disapproved of in our society, and they should be held morally responsible for them.”¹⁶⁵

People with psychiatric disabilities suffer the effects of stereotypes, which are knowledge structures learned by most members of a social group, including dangerousness, incompetence, and character weakness.¹⁶⁶ Like the impact of stigma, stereotyping is negatively correlated with the target group’s representation in the larger group, perception of fit with their occupations, the ambiguity of evaluation criteria, and the fluidity and team-oriented approach in the workplace.¹⁶⁷ Thus, both stigma and stereotypes can lead employers to make negative decisions about both applicants and employees when a psychiatric disability becomes known to a decision

157. Bruyère, Erickson & VanLooy, *supra* note 58, at 34.

158. Goldberg, Killeen & O’Day, *supra* note 22, at 464, 487.

159. Goldberg, Killeen & O’Day, *supra* note 22, at 464, 487.

160. Korn, *supra* note 149, at 605.

161. Courtenay M. Harding, Joseph Zubin & John S. Strauss, *Chronicity in Schizophrenia: Revisited*, 161 BRITISH J. PSYCHIATRY 27, 30 (1992).

162. Krupa, *supra* note 16, at 96.

163. *Keytanjian v. Cty. of Chester*, No. 17-530, 2018 U.S. Dist. LEXIS 23966, at *9–10 (E.D. Pa. Feb. 14, 2018).

164. Waterstone & Stein, *supra* note 138, at 1365.

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

166. Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCHOLOGIST 765, 765 (1999).

167. Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. CIV. RTS.-CIV. LIB. L. REV. 481, 484–86 (2005).

maker. In addition to the very real possibility of suffering from the effects of both stigma and stereotypes associated with a hidden disability, people with such disabilities experience self-stigma that leads to anxiety and concern about the revelation of their disability.¹⁶⁸ In one study, employees with psychiatric disabilities described significant concerns that their revelation of their disabilities would result in changes in supervision, isolation from coworkers, denials of promotion or even discharge.¹⁶⁹ Similarly, employees on the autism spectrum tried to avoid disclosure to avoid the impact of stereotypes about their condition.¹⁷⁰ While revealing a concealable stigma may reduce fear, anxiety, and stress, it can also lead to stereotyping, discrimination, social rejection, and economic disadvantages.¹⁷¹ Stigma can also negatively affect self-esteem and one's ability to integrate into the community, thereby supporting fears of disclosure.¹⁷²

The impact of expected stigmatization against psychiatric and developmental disabilities is well-documented,¹⁷³ even where the stigma results in more subtle forms of discrimination.¹⁷⁴ Mental illness stigma and stereotypes negatively influence self-esteem and the mental health of people with psychiatric disabilities.¹⁷⁵ These potential effects can be overcome with employers' use of certain identification management strategies, including positive in-group stereotyping, humor, and community

168. See Brohan et al., *supra* note 137, at 294 (showing anticipation of discrimination described); Hinshaw & Stier, *supra* note 125, at 375 (explaining that fears about revelation can lead to vigilance, preoccupation, and suspiciousness, which can aggravate original symptoms).

169. Dalgin & Gilbride, *supra* note 42, at 308–09; see also Debbie Peterson, Nandika Currey & Sunny Collings, "You Don't Look like One of Them": Disclosure of Mental Illness in the Workplace as an Ongoing Dilemma, 35 *PSYCHOL. REHABILITATION J.* 145, 145 (2011) (stating that the most common reason for not revealing psychiatric disability was fear of discrimination).

170. Johnson & Joshi, *supra* note 36, at 436.

171. Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 *J. APPLIED PSYCHOL.* 1499–1511 (2007).

172. Goldberg, Killeen & O'Day, *supra* note 22, at 491.

173. Dalgin & Gilbride, *supra* note 42, at 306; Barbara Granger, *The Role of Psychiatric Rehabilitation Practitioners in Assisting People in Understanding How to Best Assert Their ADA Rights and Arrange Job Accommodations*, 23 *PSYCHIATRIC REHABILITATION J.* 215, 218–19 (2000).

174. Kristen P. Jones et al., *Not So Subtle: A Meta-Analytic Investigation of the Correlates of Subtle and Overt Discrimination*, 42 *J. MGMT.* 1588, 1592–93, 1604–05 (2016).

175. Ilic et al., *supra* note 61, at 251–52; Corrigan, Kerr & Knudsen, *supra* note 60, at 180–81.

involvement.¹⁷⁶ In such an environment, revelation can be expected to lead to “enhancing performance, job attitudes, and well-being and fostering more positive and supportive interpersonal relationships.”¹⁷⁷

The negative decisions made based on such stigma can best be addressed by targeting the attitudes behind those actions.¹⁷⁸ Stigma and stereotypes leading to decreased employment opportunities decreases the opportunity for interpersonal contact between people with hidden disabilities and supervisors or coworkers with prejudices against them.¹⁷⁹ This lack of opportunity unfortunately contributes to the persistence of stigma, where contact with people with psychiatric disabilities has been shown to be the most effective means of reducing intergroup prejudice, especially when the stigmatized person disconfirms the prevailing stereotypes.¹⁸⁰

Without challenging this reliance on stereotypes, courts have deferred to an employer’s decisions that make certain assumptions about employees with hidden disabilities. Courts’ interpretations of the ADA can be influenced by the stigma against certain disabilities, such as psychiatric disabilities.¹⁸¹ For example, courts regularly defer to employers’ conclusions that an employee with a psychiatric disability poses a direct threat and can be disciplined or discharged even for misconduct arising because of the person’s disability, without an opportunity to challenge the job-relatedness or necessity of the conduct standard.¹⁸² Courts have long been deferential to employer assumptions regarding an employee’s potential to pose a threat.¹⁸³ As one expert noted, “the scientific approach to risk advanced by the ADA has frequently been subordinated to a less rigorous approach characterized by overgeneralization, stereotyping, and other forms of heuristic thinking.”¹⁸⁴ Because of the potential

176. Ilic et al., *supra* note 61, at 252–54.

177. Kristen P. Jones & Eden B. King, *Managing Concealable Stigmas at Work: A Review and Multilevel Model*, 40 J. MGMT. 1466, 1488 (2014).

178. Corrigan, Kerr & Knudsen, *supra* note 60, at 185.

179. Corrigan, Kerr & Knudsen, *supra* note 60, at 185.

180. Corrigan, Kerr & Knudsen, *supra* note 60, at 185; Rebecca R. Reinke et al., *Examining Two Aspects of Contact on the Stigma of Mental Illness*, 23 J. SOC. & CLINICAL PSYCHOL. 377, 378, 383–85 (2004).

181. Wilkinson & Frieden, *supra* note 151, at 77.

182. Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 189 (2005).

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

184. Vicki A. Laden & Gregory Schwartz, *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*, 21 BERKELEY J. EMP. & LAB. L.

stigmatization documented by research and sometime allowed by the courts, it is important to understand how the ADA forces a person with a disability to reveal their hidden disability to start the interactive process and obtain reasonable accommodations.

II. REVELATION REQUIRED TO TRIGGER DUTY TO ACCOMMODATE

As part of the ADA's requirement that employers provide any employee with a disability with "reasonable accommodations,"¹⁸⁵ an employer must engage in an interactive process.¹⁸⁶ This process should involve communication between the employer and the employee or applicant needing an accommodation regarding what changes are needed in the work environment or the work itself to enable the person with a disability to perform the essential job duties of her position.¹⁸⁷ Once that interaction occurs, an employer still can require that an employee with a disability establish the reasonableness of her request for accommodation through "inquiries into the ability of an employee to perform job-related functions."¹⁸⁸ The goal of the process should be to determine "the extent of the disability and what accommodations are appropriate and available."¹⁸⁹ The employer is required to engage in the interactive process in good faith, the absence of which could support a discrimination claim.¹⁹⁰ The interactive process should be flexible and truly interactive so as to allow the employer and the employee to determine the appropriate reasonable accommodation.¹⁹¹

246, 264 (2000).

185. 42 U.S.C. § 12112(b)(5)(A) (2009); *see, e.g.*, *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 761 (3d Cir. 2004) (stating that an employer discriminates against qualified individuals with disabilities when they fail to provide reasonable accommodations for known disabilities).

186. 29 C.F.R. § 1630.2(o)(3) (2012); John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No"*, 79 CHI.-KENT L. REV. 665, 668 (2004). *See, e.g.*, *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (requiring employer to engage in interactive process); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312–13 (3d Cir. 1999) (requiring employer to engage in interactive process); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999) (requiring employer to engage in interactive process).

187. 29 C.F.R. § 1630.2(o)(3) (2012).

188. 42 U.S.C. § 12112(d)(4)(A) (2018).

189. *Equal Emp. Opportunity Comm'n v. Sears, Roebuck & Co.*, 417 F.3d 789, 804 (7th Cir. 2005).

190. *Taylor*, 184 F.3d at 318.

191. *Rehling v. City of Chi.*, 207 F.3d 1009, 1015–16 (7th Cir. 2000).

A. Revelation to Trigger Employer's Duty to Interact

The duty to interact is triggered by a specific request for accommodation or an employer's knowledge that the employee is in need of an accommodation.¹⁹² The employer only has a duty to interact if it has knowledge of an employee's need for accommodation,¹⁹³ which can require the disclosure of both the employee's disability and the accompanying limitations which require accommodation.¹⁹⁴

In contrast, an employer need not interact with an employee with a disability of which the employer is unaware.¹⁹⁵ If, for example, the employer lacks that knowledge, the employer can make a decision to discharge an employee who may subsequently request an accommodation as an alternative to that discipline.¹⁹⁶ Thus, unless the disability is obvious or otherwise known to the employer, the person with a disability must "inform the employer that an accommodation is needed."¹⁹⁷

The employer's duty to interact in good faith requires a "flexible, interactive process that involves both the employer and the [employee] with a disability."¹⁹⁸ A good faith effort involves "communication and good-faith exploration,"¹⁹⁹ designed to "determine the appropriate accommodation under the circumstances."²⁰⁰ The interactive process can be used to identify the employee's precise limitations and which, if any, accommodations will allow continuation of that employee's employment.²⁰¹ Thus, an employer may violate the ADA if its failure to

192. *Stanciel v. Donahoe*, 570 F. App'x 578, 583 (6th Cir. 2014).

193. *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1315–16 (10th Cir. 2017); *see also* *Feist v. La. Dep't of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 452 (5th Cir. 2013) (stating that employee must establish that "the disability and its consequential limitations were 'known' by the covered employer").

194. *See infra* notes 206–274 and accompanying text.

195. *McFarland v. City & Cty. of Denver*, 744 F. App'x 583, 587 (10th Cir. 2018).

196. *Melange v. City of Ctr. Line*, 482 F. App'x 81, 86 (6th Cir. 2012).

197. *Waggoner v. Carlex Glass Am., LLC*, 682 F. App'x 412, 416 (6th Cir. 2017); *see also* *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 (7th Cir. 2000) (stating that it is the responsibility of individual with disability to inform employer that accommodation is needed).

198. 29 C.F.R. pt. 1630, app. § 1630.9 (2016).

199. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

200. *Equal Emp. Opportunity Comm'n v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005) (quoting *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000)).

201. *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000); *Jackson v. City of Chi.*, 414 F.3d 806, 813 (7th Cir. 2005); *see also* *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) (noting the procedure by which an employer might define the needs associated with an employee's disability).

participate in the interactive process “prevented the identification of an accommodation that was reasonable and available.”²⁰² In the words of one court, the ADA “does not require that the employer know that an accommodation is possible before making reasonable efforts to identify an accommodation.”²⁰³

At least some courts have recognized that if the employer has some reason to know that the person needs an accommodation, the employer should “meet the employee half-way,” if the employee makes it “clear enough that the employer can infer that the purpose of a request for a particular benefit is to accommodate ‘medical restrictions.’”²⁰⁴ Thus, the duty to interact could arise even if the employee does not know how to ask for an accommodation.²⁰⁵ Some courts do not require a request for a specific reasonable accommodation to trigger the employer’s duty to interact, because good faith interaction can reveal accommodations that might enable the person to work.²⁰⁶ An employer is required to interact so that “together,” the employer and the employee “can determine what reasonable accommodations might be available.”²⁰⁷ For example, a school district was required to engage in the interactive process to determine whether a teacher could work under the influence of her pain medication.²⁰⁸ Consistent with this reasoning, an employer was required to fulfill its duty to interact with an employee with dyslexia and memory issues, after the employee asked for continuation of a mentoring relationship, because an employee is “not required to come up with the solution on his own.”²⁰⁹ Thus, the duty to interact can require that an employer gather information about the specific limitations of the employee who needs an

202. *Equal Emp. Opportunity Comm’n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009); *Miller v. Port Auth. of N.Y. & N.J.*, No. 15-cv-6370, 2018 U.S. Dist. LEXIS 193633, at *50 (D.N.J. Nov. 13, 2018); *Wells v. BAE Sys. Norfolk Ship Repair*, 483 F. Supp. 2d 497, 511 (E.D. Va. 2007).

203. *Brown v. Dunbar Armored, Inc.*, No. 08-3286, 2009 U.S. Dist. LEXIS 115572, at *15 (D.N.J. Dec. 10, 2009).

204. *Leeds v. Potter*, 249 F. App’x 442, 449 (6th Cir. 2007).

205. *See id.* (implying that some employees may require special assistance in discerning their need for accommodations).

206. *Brown*, 2009 U.S. Dist. LEXIS 115572 at *5; *Johnson-Braswell v. Cape Henlopen Sch. Dist.*, No. 14-1089-RGA, 2015 U.S. Dist. LEXIS 130706, at *36–37 (D. Del. Sept. 29, 2015).

207. *Equal Emp. Opportunity Comm’n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 622 (5th Cir. 2009).

208. *Nelson v. Hitchcock Ind. Sch. Dist.*, No. 3:11-CV-00311, 2012 U.S. Dist. LEXIS 180859, at *13–14 (S.D. Tex. Dec. 21, 2012).

209. *Reyes v. Tex. Dep’t of Criminal Justice*, No. A-16-CA-00954-SS, 2017 U.S. Dist. LEXIS 179991, at *14–15 (W.D. Tex. Oct. 31, 2017).

accommodation.

The interactive process requirement raises several questions related to the risks associated with revealing one's disability in the workplace. The ADA prohibits employers from asking about an applicant's disability during the selection process, to protect people with disabilities from the stigma associated with their impairment.²¹⁰ At the same time, the ADA allows employers to request medical information related to a request for accommodation.²¹¹ It is this revelation that could expose the requestor of an accommodation to the negative consequences associated with the stigma and stereotypes surrounding psychiatric and developmental disabilities, raising several concerns.

First, certain revelations are required to even trigger the employer's duty to interact with the applicant or employee seeking an accommodation, including putting the employer on notice that an accommodation is needed and linking that need to one's disability. Concerns about the impact of stigma and stereotypes also arise from the ability of an employer to request certain medical information to show that an accommodation is related to or necessitated by the person's disability. Lastly, the duty to interact includes the request for specific medical information that justifies the request for the accommodation sought.

Typically the employer's duty to interact arises when an applicant or employee requests an accommodation to compensate for her disability.²¹² To trigger the duty to interact under the ADA, it must be "clear that the employee wants assistance for his or her disability."²¹³ For example, a victim of harassment triggered the duty to interact by requesting accommodations to allow for a "medically safe return to work."²¹⁴ This requirement to interact once the employer is aware of the person's limitations fulfills the ADA's prohibition against disqualifying applicants and employees based on stereotypes or generalizations about a disability;

210. U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance on the American with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997), <https://www.eeoc.gov/policy/docs/psych.html> [<https://perma.cc/27SQ-EH4R>].

211. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999); *Williamson v. Bon Secours Richmond Health Sys.*, 34 F. Supp. 3d 607, 613 (E.D. Va. 2014); *Booth v. Nissan N. Am., Inc.*, No. 3:17-cv-00755, 2018 U.S. Dist. LEXIS 139882, at *10–11 (M.D. Tenn. Aug. 17, 2018).

212. *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996).

213. *Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000); *see also Conneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 330–31 (3d Cir. 2003) (noting that the employee must have "requested accommodations or assistance for his or her disability").

214. *Allen v. Discovery Commc'ns*, No. PWG-15-1817, 2016 U.S. Dist. LEXIS 133989 (D. Md. Sept. 28, 2016).

instead, the employer should interact to gain information to make decisions “based on the actual disability and the effect that disability has on the particular individual’s ability to perform the job.”²¹⁵

Less specific revelation may be allowed for an employee under special circumstances, such as employees with severe cognitive disability or mental illness,²¹⁶ who may be unaware of their limitations or unable to effectively communicate their needs to an employer.²¹⁷ For an employee with a mental illness, for example, the employer should both initiate the interactive process and “help the [employee] determine what specific accommodations are necessary.”²¹⁸ One court explained that an employer did not fulfill its duty to interact with an employee suffering from bipolar disorder, where it failed to ask for more information about her diagnosis or consult with her doctor about necessary accommodations.²¹⁹

Even if an employee’s disability is hidden, the employer has a duty to interact with that employee if circumstances suggest the employer’s knowledge of the employee’s limitations,²²⁰ e.g., if it “can be fairly said to know of both the disability and desire for an accommodation.”²²¹ For example, after coaching an employee about his interactions with others, the employer could not claim later that it was unaware that his ability to interact with others was impaired.²²² Similarly, if the employer should have known about the disability, the employer has a duty to engage in the interactive process regarding potentially reasonable accommodations.²²³

Some notice of an employee’s disability puts the onus on the employer to “ask follow-up questions.”²²⁴ Thus, an employer’s awareness

215. *Rorrer v. City of Stow*, 743 F.3d 1025, 1040–41 (6th Cir. 2014).

216. *See Cloe v. City of Indianapolis*, 712 F.3d 1171, 1179 (7th Cir. 2013) (detailing how an employee was unable to proofread her own work).

217. *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 736 n.5 (5th Cir. 1999).

218. *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285–86 (7th Cir. 1996); *see also Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (clarifying that both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1113 (9th Cir. 2000) (emphasizing that the interactive process is the “primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working” and is essential to accomplishing the goals of the ADA).

219. *Torres v. Hilton Int’l of P.R., Inc.*, No. 10-1190, 2012 U.S. Dist. LEXIS 91436, at *19–20 (D.P.R. July 2, 2012).

220. *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008).

221. *Taylor*, 184 F.3d at 313.

222. *Glaser v. Gap, Inc.*, 994 F. Supp. 2d 569, 575 (S.D.N.Y. 2014).

223. *Brady*, 531 F.3d at 135–36; *see also Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 603 (6th Cir. 2018) (highlighting that the duty arises if employer had reason to know about disability).

224. *Suvada v. Gordon Flesch Co.*, No. 11C07892, 2013 U.S. Dist. LEXIS 131505, at

that the employee seeking an accommodation is suffering from a mental illness can trigger its duty to interact.²²⁵ Similarly, the duty to interact may be triggered by a request for an exception or adjustment to an employer's practices that is sufficiently linked to the employee's disability.²²⁶ For example, the duty to interact could be triggered by an employee telling the employer about her general diagnosis, even without revelation of her treatment plan or restrictions.²²⁷

In contrast, vague or conclusory statements revealing an employee's unspecified incapacity may be insufficient to trigger an employer's duty to interact.²²⁸ Claims are commonly dismissed because an employer is not required to speculate "as to the extent of the employee's disability or the employee's need or desire for an accommodation."²²⁹ For example, when a manager with bipolar disorder requested a shortened work schedule but failed to disclose his condition, his employer had no duty to interact with him because it would be too demanding for the employer to make an inference of disability.²³⁰ Courts have explained, in fact, that employers should not speculate, because employers should not assume that an employee is disabled or needs accommodation.²³¹

Knowledge of an employee's limitations alone will not trigger the duty to interact.²³² For example, an employer was not required to interact with an employee known to have a reading problem who had mentioned a potential learning disability, because the employer lacked actual knowledge

*18 (N.D. Ill. Sept. 13, 2013).

225. *Taylor*, 184 F.3d at 314.

226. *Equal Emp. Opportunity Comm'n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621–22 (5th Cir. 2009). *See also* *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 40 (3d Cir. 2018) (finding doctor's note to employer sufficient to put employer on notice of need for accommodation); *Woodruff v. Lahood*, 777 F. Supp. 2d 33, 40 (D.D.C. 2011) (holding that doctor's notes regarding medical condition linked to need for flexible schedule triggered duty to interact).

227. *Suvada*, 2013 U.S. Dist. LEXIS 131505, at *12, *17–18.

228. *See, e.g., Morisky v. Broward Cty.*, 80 F.3d 445, 448 (11th Cir. 1996) (referencing employee's inability to read and take special education courses did not put employer on notice that applicant had a disability requiring interaction regarding any accommodation).

229. *Waggoner v. Carlex Glass Am., LLC*, 682 F. App'x 412, 416 (6th Cir. 2017).

230. *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 165 (5th Cir. 1996). *See also* *Jones v. Blue Cross Blue Shield of La.*, No. 16-340-JWD-RLB, 2018 U.S. Dist. LEXIS 13544, at *23–24 (M.D. La. Jan. 29, 2018) (informing employer of symptoms was insufficient to constitute a request for accommodation linked to a specific disability); *Reifer v. Colonial Intermediate Unit 20*, 462 F. Supp. 2d 621, 635–36 (M.D. Pa. 2006) (finding doctor's note saying employee would not return to work was insufficient to trigger duty to interact).

231. *Waggoner*, 682 F. App'x at 416.

232. *Morisky*, 80 F.3d at 448.

of her disability.²³³ The dismissal of this claim was based on precedence that “[v]ague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the ADA.”²³⁴ In addition, an employee’s aberrant behavior alone will not place the employer on notice of a mental impairment, unless the behavior is “sufficiently drastic to send a message that the employee needs help.”²³⁵

Conduct unrelated to a specific disability, such as calling in sick or using family and medical leave for an unspecific medical condition, is insufficient to trigger the employer’s duty to consider that time off as an accommodation.²³⁶ In contrast, an employee who requested to telecommute triggered that employer’s duty to engage in the interactive process, where the employer admitted that it had notice of his disability.²³⁷ Even sharing information about one’s limitations without referencing a specific disability may be insufficient to trigger the duty to interact, because the employee must show that her limitations are the result of her disability.²³⁸ For example, a pilot failed to establish knowledge sufficient to trigger an airline’s duty to accommodate his anxiety disorder, despite his admission regarding his loss of confidence, because he never linked that limitation to his disability.²³⁹ Just as an employer should not assume that an employee has an impairment, an “employer is not required to speculate as to the extent of the employee’s disability or the employee’s need or desire for an accommodation.”²⁴⁰

233. *Scott v. Shoe Show, Inc.*, 38 F. Supp. 3d 1343, 1361 (N.D. Ga. 2014).

234. *Morisky*, 80 F.3d at 448.

235. Polly Beth Proctor, *Determining ‘Reasonable Accommodation’ Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 Sw. U. L. REV. 51, 62 (2003).

236. *Torres v. Cty. of Berks*, No. 5:17-cv-01890, 2018 U.S. Dist. LEXIS 12823, at *14–17 (E.D. Pa. Jan. 26, 2018); *Chapman v. UPMC Health Sys.*, 516 F. Supp. 2d 506, 532–33 (W.D. Pa. 2007).

237. *Goonan v. Fed. Reserve Bank of N.Y.*, No. 12-CV-3859, 2014 U.S. Dist. LEXIS 99922, at *21–22 (S.D.N.Y. July 22, 2014); *see also Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 799 (9th Cir. 2017) (holding employer had sufficient knowledge of disability to trigger duty to interact based on medical notes and releases describing her restrictions, requests for modifications to workspace).

238. *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 164 (5th Cir. 1996); *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 450 (6th Cir. 1999).

239. *Brown v. BKW Drywall Supply, Inc.*, 305 F. Supp. 2d 814, 829 (S.D. Ohio 2004) (holding employer’s knowledge that employee has health problems not the same as knowing about disability).

240. *Hammon*, 165 F.3d at 449–50. *See also Van Compernelle v. City of Zeeland*, No. 1:05-CV-133, 2006 U.S. Dist. LEXIS 32963, at *40 (W.D. Mich. May 24, 2006) (finding employer not required to retain plaintiff “on the chance that his . . . errors were caused by a disability” when diagnosis occurred after discharge); *Patton v. Jacobs Eng’g Grp., Inc.*, 874

A person seeking to trigger the duty to interact must provide fairly specific information about her disability. For example, an employer's duty to interact was not triggered by an employee's reference to a panic attack two years prior, in addition to doctor's notes lacking reasons for the employee's absences, and a statement to her supervisor that she was "stressed."²⁴¹ That court reasoned that "without a diagnosis from a doctor or more specific information" about the employee's disability, the employer "could not have been expected to determine that stress, even severe stress, amounts to clinical anxiety."²⁴² Likewise, an employer was not required to interact about accommodating an employee's PTSD despite its manager's knowledge that he had problems sleeping, noise at work made him "uncomfortable and uptight," and he took two different weeks off due to stress after negative events at work, the second of which he submitted a doctor's note with a diagnosis of "acute stress adjustment reaction."²⁴³ Similarly, requiring EAP counseling or psychiatric treatment, or even placing an employee on short term disability, did not establish that their employers should have known they had a disability.²⁴⁴

While this requirement to reveal specific medical information to

F.3d 437, 444–45 (5th Cir. 2017) (determining accommodation request not connected to disability despite telling recruiter that stuttering and anxiety problems "all go together" and that he was sensitive to noise); *Keith v. Ashland, Inc.*, No. 98-4539, 2000 U.S. App. LEXIS 1940, at *10 (6th Cir. Feb. 8, 2000) (holding employer's knowledge that employee was acting erratically, was depressed or was seeking counseling did not show employer's knowledge that employee's depression was disability).

241. *Parker v. Comcast Cable Commc'ns Mgmt., LLC*, No. 15-cv-05673-THE, 2017 U.S. Dist. LEXIS 80637 (N.D. Cal. May 25, 2017), *aff'd*, 747 F. App'x 565 (9th Cir. 2018). *See also* *Leeds v. Potter*, 249 F. App'x 442, 449–50 (6th Cir. 2007) (informing supervisors that work was "kicking his ass" insufficient to find a specific request for accommodation); *Miller v. Nat'l Cas. Co.*, 61 F.3d 627, 629–30 (8th Cir. 1995) (finding the employer unaware of plaintiff's disability even when she told employer she could not handle the stress of job and the nurse practitioner told the employer that she had "situational stress reaction" and the plaintiff's sister told employer on two different occasions that plaintiff was "mentally falling apart").

242. *Parker*, 2017 U.S. Dist. LEXIS 80637, at *12.

243. *Long v. Thomson Indus.*, No. 99-CV-1693, 2000 U.S. Dist. LEXIS 15511, at *23 (E.D. Pa. Oct. 25, 2000). *See also* *Sever v. Henderson*, 381 F. Supp. 2d 405, 419–20 (M.D. Pa. 2005) (holding employer not obligated to interact where employee shared PTSD diagnosis but not specific limitations for which employee seeks accommodations); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 300 (5th Cir. 1999) (determining employee failed to provide employer with information about limitations after returning to work following leave due to bipolar disorder).

244. *Bonieskie v. Mukasey*, 540 F. Supp. 2d 190, 202–03 (D.D.C. 2008); *Goonewardena v. New York*, No. 05Civ8554, 2008 U.S. Dist. LEXIS 67468, at *27 (S.D.N.Y. Aug. 26, 2008); *Summers v. Middleton & Reutlinger, P.S.C.*, 214 F. Supp. 2d 751, 756 (W.D. Ky. 2002).

trigger the employer's duty to interact may prevent inappropriate or burdensome speculation by an employer, it also creates a dilemma for people with hidden disabilities who need accommodations but fear stigmatization based on their disability. These decisions demonstrate, at a minimum, that employees seeking accommodation must ensure that their employer is aware that they have a disability that requires accommodation. Simply making an employer aware of one's limitations, for example, will not even trigger the employer's duty to interact. The next section discusses how some courts go much farther, requiring more detailed information or even medical documentation about the extent of the employee's impairment.

1. Revelation of Medical Information

To trigger the employer's duty to interact, a person with a disability may be required to reveal specific medical information to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."²⁴⁵ This revelation of detailed medical information has been justified by the ADA's emphasis on accommodating limitations, not disabilities.²⁴⁶ This requirement may be logical because the limitations associated with a disability vary among individuals, and even common limitations may only impact the employee's ability to perform certain jobs. Therefore, employees seeking accommodations have been required to provide "the reason that [her] disability requires an accommodation," if that reason is not obvious, to enable the employer to "identify potential effective accommodations."²⁴⁷

Requiring detailed medical information to trigger a duty to interact regarding a potential accommodation raises concerns about stigma. As one court explained, an employee may have good reason to resist revealing detailed medical information which "could be embarrassing, and might actually exacerbate workplace prejudice."²⁴⁸ Following this reasoning, some courts have held that an employer does not need to know the intimate details of an employee's personal life to identify or justify

245. 29 C.F.R. § 1630.2(o)(3) (2012); *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1045 (8th Cir. 2005).

246. 29 C.F.R. pt. 1630, app. § 1630.2(j) (2016).

247. *Equal Emp't Opportunity Comm'n v. Convergys Customer Mgmt. Grp., Inc.*, 491 F.3d 790, 795 (8th Cir. 2007). *See also* *Dortch v. Mem'l Herman Healthcare Sys.-Sw.*, 525 F. Supp. 2d 849, 873 (S.D. Tex. 2007) (requesting opportunity to walk and stretch insufficient to put employer on notice of arthritis requiring accommodation).

248. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999).

an accommodation in the workplace.²⁴⁹ Likewise, some experts have argued that sharing information about one's disability alone should be sufficient to trigger the duty to interact; that process can then be used to explore the extent of the employee's limitations and how those limitations can be accommodated.²⁵⁰

Despite these concerns about the effects of revealing one's disability, some courts will not force an employer to interact if the employee or applicant fails to provide "relevant details" about the impairments connected to their disability.²⁵¹ For example, an employee who informed his employer about his bipolar and anxiety disorders failed to trigger his employer's duty to interact because he did not inform his employer of the specific limitations caused by his disability, even though the employer knew that his disability affected his productivity.²⁵² Similarly, two different employers were not required to interact about possible accommodations for employees who submitted doctors' notes stating that the employees had dyslexia and major depression, respectively, without information regarding the employees' specific limitations requiring accommodation.²⁵³

249. *Id.* at 315.

250. Alysa M. Barancik, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process"*, 30 *LOY. U. CHI. L.J.* 513, 544 (1999).

251. 29 C.F.R. pt. 1630, app. (2016); *Convergys*, 491 F.3d at 795. *See, e.g.*, *Gammage v. W. Jasper Sch. Bd. of Educ.*, 179 F.3d 952, 954-55 (5th Cir. 1999) (finding physician's letter stating that teacher with kidney failure had to undergo dialysis without mentioning any work restrictions did not trigger school district's duty to accommodate); *Chapman v. UPMC Health Sys.*, 516 F. Supp. 2d 506, 532 (W.D. Pa. 2007) (determining employer's knowledge of employee's "physical ailments" in connection with her request for part time work was insufficient to trigger duty to interact); *Feist v. La. Dep't of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 452 (5th Cir. 2013) (holding that employer must be aware of disability and how it impacts job performance, but that a reasonable accommodation need not facilitate the employee's essential job function); *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 164 (5th Cir. 1996) (finding no duty to interact where employee mentioned that he suffered from mental illnesses, yet never stated that this prevented him from doing his job); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (stating public transportation authority did not fail to accommodate bus driver with high blood pressure by failing to identify medications that would not cause drowsiness).

252. *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 165 (5th Cir. 1996).

253. *Pittman v. Am. Airlines, Inc.*, 692 F. App'x 549, 555 (10th Cir. 2017); *Gruber v. Entergy Corp.*, No. 96-1409, 1997 U.S. Dist. LEXIS 3591, at *10-12 (E.D. La. Mar. 24, 1997). *See also* *Howard v. Steris Corp.*, 886 F. Supp. 2d 1279, 1294 (M.D. Ala. 2012), *aff'd*, 550 F. App'x 748 (11th Cir. 2013) (holding employer's knowledge of employee's Graves' Disease insufficient to put them on notice that he had disability requiring accommodation); *Mishak v. Serazin*, No. 1:17CV1543, 2018 U.S. Dist. LEXIS 185625, at *57-60 (N.D. Ohio Oct. 30, 2018) (determining knowledge of ADHD insufficient to require

In stark contrast to this approach, other courts have been less stringent in their revelation requirements to trigger the interactive process. Once the employer has some information about the employee's disability, some courts have placed the burden on the employer to request additional information regarding an employee's need for accommodation.²⁵⁴ If an employer is aware of an employee's impairments it could "initiate a conversation with her about how to support her" as part of its duty to interact in good faith.²⁵⁵ Going one step farther, an employer could contact the employee's doctor to gain more information regarding the need for a potential accommodation.²⁵⁶ The employer may have a greater obligation to seek out medical information where the person seeking the accommodation suffers from a psychiatric disability,²⁵⁷ or arguably any other impairment that limits her ability to communicate with her employer.

Under this line of reasoning, notice of an employee's disability without specific medical information could trigger the interactive process, during which the employer can seek additional information.²⁵⁸ In fact, one purpose of the interactive process is to allow the employer "to identify the precise limitations resulting from a disability and potential reasonable accommodations that could overcome those limitations."²⁵⁹ Under this requirement, one employer had the duty to interact with an employee who made his supervisor aware of his anxiety disorder, which had affected his past interactions with his supervisor.²⁶⁰ However, it should be noted that an employer cannot require medical information if, for example, the employer was creating "artificial hoops" for the employee to jump through "to avoid an actual discussion of reasonable accommodations."²⁶¹

accommodation without evidence that employer knew of limitations and negative impact on performance).

254. *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 438 F.3d 240, 247 (3d Cir. 2006).

255. *Munoz v. Nutrisystem, Inc.*, No. 13-4416, 2014 U.S. Dist. LEXIS 104465, at *19-20 (E.D. Pa. July 30, 2014).

256. *Id.*

257. Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 298 (1998). See, e.g., *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (holding employer had duty to continue interactive process with employee with psychiatric disability by inquiring about conditions at work that were stressful, what changes were needed).

258. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 314-17 (3d Cir. 1999).

259. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 605-06 (6th Cir. 2018); *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014).

260. *Wilkie v. Luzerne Cty.*, 207 F. Supp. 3d 433, 437-38 (M.D. Pa. 2016).

261. *Yanoski v. Silgan White Cap Ams., LLC*, 179 F. Supp. 3d 413, 433 (M.D. Pa. 2016).

These decisions demonstrate the level of detail that an employee may be required in some jurisdictions to provide regarding both her disability and the accompanying limitations before her employer is even required to interact regarding the reasonableness of the accommodation she seeks. Requiring such detailed information may enhance a person's fears that requesting an accommodation will result in their stigmatization in the workplace.²⁶²

2. Revelation of Connection between Accommodation & Disability

In addition to detailed medical information, an employer need only interact about an accommodation that is connected with or because of the requestor's disability,²⁶³ i.e., "for a medical condition-related reason."²⁶⁴ Establishing a connection between the employee's limitations and a disability has been deemed "particularly important" for people with a psychiatric disability,²⁶⁵ the symptoms of which can be confused with aberrant behavior not tied to a disability. For example, an employee's rudeness was not a clear indication of bi-polar disorder that may have triggered the duty to interact.²⁶⁶ Relying on this same reasoning, an

262. See *supra* notes 50–52 and accompanying text.

263. *Waggoner v. Carlex Glass Am., LLC*, 682 F. App'x 412, 416 (6th Cir. 2017); *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 307 (6th Cir. 2016). See also *Nunez v. Lifetime Prods., Inc.*, 725 F. App'x 628, 632 (10th Cir. 2018) (stating that an employee's notice or request for accommodation must specify that the employee wants assistance for his or her disability); *Judge v. Landscape Forms, Inc.*, 592 F. App'x 403, 407 (6th Cir. 2014) ("[The employee] must make it clear that the request is being made because of the employee's disability.") (citation omitted).

264. *Equal Emp. Opportunity Comm'n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009).

265. *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 445 (5th Cir. 2017). See also *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 165 (5th Cir. 1996) ("Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations.").

266. *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894, 898 (D.C. Cir. 1998). See also *aliso Grunberg v. Quest Diagnostics, Inc.*, No. 3:05-cv-1201(VLB), 2008 U.S. Dist. LEXIS 8205, at *13 (D. Conn. Feb. 5, 2008) (holding that an employee's appearing "stressed" was insufficient to put her employer on notice that she suffered from depression); *Brown v. Pension Bds.*, 488 F. Supp. 2d 395, 406 (S.D.N.Y. 2007) ("[Employee's] mother's comment that [he] was in a 'breakdown condition,' without any reference to hospitalization or any medical attention he was receiving, did not put [his employer] on notice that [he] had a diagnosed mental condition constituting a disability."); *Santiago v. N.Y.C. Police Dep't*, No. 05Civ.3035(PAC)(MHD), 2007 U.S. Dist. LEXIS 91880, at *20 (S.D.N.Y. Dec. 14, 2007) (holding that an employee's aberrant behavior and self-diagnosis without a formal medical

employer had no duty to accommodate an employee with known PTSD and known performance issues, even though his supervisor was aware that he suffered from anxiety, which prevented him from performing some of his duties.²⁶⁷ That employer had no duty to interact because these facts would not allow a jury to infer the supervisor's knowledge of the "limitations experienced by the employee *as a result of* [his] disability."²⁶⁸

Without sufficient information connecting a request for accommodation with an impairment, the employer can avoid the interaction requirement.²⁶⁹ For example, an employer was not required to interact with an employee with bipolar disorder because he applied to work on a particular job where the employee did not indicate that the request was to avoid triggering his symptoms, and other reasons could have explained that request.²⁷⁰ Likewise, a court expressed doubt that a Ford employee provided sufficiently specific information to constitute a request for accommodation when he told a manager and a supervisor that he was diagnosed with PTSD, he "had to take a medical leave because of it," and the workplace "could cause [him] anxiety or flashbacks."²⁷¹ This court relied heavily on the employee's failure to establish that the requested presence of a support dog would alleviate his stress in the workplace, even though the employer had refused to allow him to bring the dog to work.²⁷²

Similarly, the employee who notified her supervisor about her anxiety failed to make a sufficient connection between her disability and her request for leave as an accommodation when she told her supervisor that she needed time off because she was being evicted.²⁷³ The employer's

diagnosis were insufficient to put his employer on notice that he was suffering from depression).

267. *Abshire v. La. Dep't of Wildlife & Fisheries*, No. 16-00669-BAJ-RLB, 2018 U.S. Dist. LEXIS 68727, at *32-33 (M.D. La. Apr. 23, 2018).

268. *Id.* at *33.

269. *See, e.g., Wolfgram v. G4S Secure Sols. (USA), Inc.*, No. 1:18cv198, 2018 U.S. Dist. LEXIS 177201, at *4-5 (N.D. Ind. Oct. 15, 2018) (finding that an employee failed to sufficiently allege how wearing uniform pants related to his foot-related disability); *Felix v. N.Y.C. Transit Auth.*, 154 F. Supp. 2d 640, 660 (S.D.N.Y. 2001) (holding that an employee failed to show "nexus or causal connection" between his limitation and the reasonable accommodation sought).

270. *Waggoner v. Carlex Glass Am., LLC*, 682 F. App'x 412, 416 (6th Cir. 2017).

271. *Arndt v. Ford Motor Co.*, 716 F. App'x 519, 528 (6th Cir. 2017). *See also McLean v. Abington Mem'l Hosp.*, No. 15-671, 2015 U.S. Dist. LEXIS 122495, at *24-25 (E.D. Pa. Sept. 15, 2015) (finding no connection between an employee's request for accommodation to transfer and her sleep apnea disability).

272. *Arndt v. Ford Motor Co.*, 247 F. Supp. 3d 832, 852-56 (E.D. Mich. 2017).

273. *Parker v. Comcast Cable Commc'ns Mgmt., LLC*, No. 15-cv-05673-THE, 2017 U.S. Dist. LEXIS 80637, at *13 (N.D. Cal. May 25, 2017). *See also Nunez v. Lifetime Prods., Inc.*, 725 F. App'x 628, 632 (10th Cir. 2018) (holding that a request to sit to improve

knowledge that the employee was “stressed” and had absences excused by a doctor for “unspecified reasons” was insufficient to put the employer on notice that the employee had a disability or was in need of an accommodation, because “observations of stress” and doctors’ notes without any reason for the time off of work did not provide the employer with knowledge of a disability.²⁷⁴ These decisions demonstrate that without revelation of significant details about the employee’s limitations associated with her disability and the requested accommodation, the employer can refuse to interact, and instead assume that the requested accommodation is not required by the ADA.

An employee’s failure to provide clarifying medical information, even out of fear of stigmatization, can end the employer’s duty to interact.²⁷⁵ For example, an employer was not obligated to accommodate or even continue with the interactive process after an employee’s physician refused to respond to the employer’s request for clarification of the employee’s medical restrictions.²⁷⁶ Similarly, an employee at a chemical plant failed to continue the interactive process, and thereby lost her right to be accommodated, when she failed to provide sufficient information from her health care provider to clarify an earlier statement that she could not be

efficiency with only vague reference to a back impairment was an insufficient request for accommodation); *Dantzler v. Ga. Ports Auth.*, No. CV417-062, 2018 U.S. Dist. LEXIS 219030, at *13–14 (S.D. Ga. Nov. 29, 2018), *rep. adopted*, 2019 U.S. Dist. LEXIS 4897, at *4–5 (S.D. Ga. Jan. 10, 2019) (finding that an employee’s request for a private work space and additional training was not connected to her ADHD diagnosis); *Joyce v. Cleveland Clinic Found.*, No. 1:13CV01224, 2014 U.S. Dist. LEXIS 137477, at *27–29 (N.D. Ohio Sept. 29, 2014) (stating that an employee’s anxiety and PTSD was not sufficiently linked to her request to work separately from a coworker who had stalked her).

274. *Parker*, 2017 U.S. Dist. LEXIS 80637, at *11–12. *See also Morisky v. Broward Cty.*, 80 F.3d 445, 448 (11th Cir. 1996) (determining that information revealing an employee’s illiteracy and history of special education classes was insufficient to put her employer on notice of her developmental disability); *Bellerose v. SAU #39*, No. 13-cv-404-PB, 2014 U.S. Dist. LEXIS 177718, at *13 (D.N.H. Dec. 29, 2014) (holding that an employee failed to link his Asberger’s Disorder to discipline he received for communication issues associated with his disability); *Staniel v. Donahoe*, No. 11-11512, 2013 U.S. Dist. LEXIS 65251, at *17–18 (E.D. Mich. May 8, 2013) (finding no connection between an employee’s tardiness and absences and a disability where the employee told his employer that they were caused by transportation issues).

275. *See generally Steffes v. Stepan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) (stating that an employee who submitted an incomplete doctor’s note was obligated “to explain the nature of the job to her doctor and to obtain a more comprehensive release letter”).

276. *Vawser v. Fred Meyer, Inc.*, 19 F. App’x 722, 724 (9th Cir. 2001). *See also Heard v. United Parcel Serv., Inc.*, No. 09-1950, 2012 U.S. Dist. LEXIS 14771, at *33 (W.D. La. Feb. 7, 2012) (holding that an employee failed to participate in the interactive process when neither he nor his physician gave his employer notice of the limitations he was experiencing).

exposed to chemicals.²⁷⁷ The employee had an obligation “to update or further clarify the kinds of work she could do and the level of chemical exposure, if any, she could tolerate.”²⁷⁸

Without sufficient documentation that substantiates the employee’s need for an accommodation, an employer is not required to provide that accommodation or even continue its interaction with the employee or applicant.²⁷⁹ An employee’s failure to provide requested medical information is commonly used to justify either an employer’s termination of the interactive process and/or the employee’s discharge.²⁸⁰ An employee may be responsible for the breakdown of the interactive process if she fails to provide information “of the type that can only be provided by one of the parties.”²⁸¹ Such a breakdown of the interactive process prevents an employer from determining whether a reasonable accommodation could be provided.²⁸²

In contrast to these strict requirements, some courts have required an employer to interact based on knowledge of at least some relationship between the employee’s impairment and the requested accommodation. For example, an employer had a duty to interact with an employee who told her supervisor that her work performance would improve “if it were not for the stress” caused by the conditions in a performance improvement plan.²⁸³

277. *Steffes*, 144 F.3d at 1072–73.

278. *Id.* at 1072. *See also* *Brown v. Milwaukee Bd. of Sch. Dirs.*, 855 F.3d 818, 824 (7th Cir. 2017) (holding that a school was not liable for failing to accommodate a transfer request where an assistant principal did not provide requested clarification as to why she could not be near “unruly students”); *Youngman v. Kouri*, No. 16-cv-1005, 2018 U.S. Dist. LEXIS 108027, at *40–43 (C.D. Ill. June 28, 2018) (finding that an employee was responsible for a breakdown in the interactive process by failing to provide clarification of his doctor’s restrictions); *Salmon v. W. Clark Cmty. Sch.*, 64 F. Supp. 2d 850, 863 (S.D. Ind. 1999) (maintaining that an employer was not responsible for obstructing the interactive process based on the employee’s refusal to provide a copy of her medical charts).

279. *Lenkiewicz v. Castro*, 146 F. Supp. 3d 46, 51 (D.D.C. 2015).

280. *See, e.g., Steffes*, 144 F.3d at 1073 (noting that where an employee “fails to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [her employer] cannot be held liable for failing to provide reasonable accommodations”); *Equal Emp’t Opportunity Comm’n v. Prevo’s Family Mkt., Inc.*, 135 F.3d 1089, 1096 (6th Cir. 1998) (finding that no discrimination occurred where an employee failed to provide medical information from his personal physician and refused to submit to a company-paid examination).

281. *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996). *See also* *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (holding that an employee’s failure to provide a requested physician’s certification defeated her claim that her employer failed to reasonably accommodate her disability).

282. *Templeton*, 162 F.3d at 619.

283. *Emmell v. Phoenixville Hosp. Co.*, 303 F. Supp. 3d 314, 321 (E.D. Pa. 2018). *See also* *Boice v. SEPTA*, No. 05-4772, 2007 U.S. Dist. LEXIS 74566, at *46–48 (E.D. Pa. Oct.

Similarly, a victim of harassment triggered the duty to engage in the interactive process by providing a request for “a medically safe return to work” based on her “physical and emotional anguish.”²⁸⁴ Likewise, an employee with a compromised immune system, susceptible to stress and anxiety, triggered his employer’s duty to interact by making his symptoms known and requesting certain accommodations to reduce his stress.²⁸⁵ Similarly, a school was required to interact regarding an accommodation request for a transfer for a teacher whose doctor had made it clear that a transfer was warranted because of her PTSD, and where her decline in performance put the district “on notice” that the accommodation was needed.²⁸⁶ This court also noted that if there was any question about whether a transfer was still desired as an accommodation, the employer should have requested a clarification from the employee.²⁸⁷ These employees all provided some detailed information about their impairment to establish its connection to the requested accommodation so as to trigger the employer’s duty to interact.

These decisions demonstrate that to even trigger an employer’s duty to interact, the employee seeking an accommodation must reveal not only her disability, but information connecting that disability to the accommodation she seeks. This places a heavy burden on the employee or applicant to reveal detailed information about her impairment and to establish the connection between that impairment and the accommodation she seeks.

5, 2007) (finding that an employer had a duty to interact with a diabetic employee who asked for a shift change and handicapped parking spot).

284. *Allen v. Discovery Commc’ns, LLC*, No. PWG-15-1817, 2016 U.S. Dist. LEXIS 133989, at *20, *22 (D. Md. Sept. 28, 2016).

285. *Hutcherson v. Siemens Indus.*, No. 3:17CV907TSL-RHW, 2018 U.S. Dist. LEXIS 162873, at *21–22 (S.D. Miss. Sept. 24, 2018). *See also* *Kowitz v. Trinity Health*, 839 F.3d 742, 745, 747 (8th Cir. 2016) (requiring an employer to interact with an employee returning from surgery who listed her limitations on her Return to Work Form and informed her employer that she would not be able to complete the requisite certification until after physical therapy); *Smith v. Henderson*, 376 F.3d 529, 535 (6th Cir. 2004) (maintaining that an employer’s duty to interact was triggered where the employer knew about the employee’s disability and prior need to work restricted hours).

286. *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779, 783, 786–87 (7th Cir. 2016).

287. *Id.* at 787–88. *See also* *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1061–62 (7th Cir. 2014) (holding that an employer had a duty to collaborate with an employee or her physician to find a reasonable accommodation once the employer received notice of the employee’s disability in her submitted medical evaluation).

B. Revelation to Justify the Accommodation

Even if the employee or applicant reveals enough information about her disability and its connection to her need for accommodation to trigger the employer's duty to interact, an employer can require that an employee with a disability submit even more extensive information to support the reasonableness of her request for accommodation. The ADA allows employers to "make inquiries into the ability of an employee to perform job-related functions."²⁸⁸ Moreover, courts have suggested that seeking information about the employee's condition and her limitations is part of the duty to interact in good faith.²⁸⁹ In fact, an employer may fail to fulfill that duty to interact by "choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark."²⁹⁰ An opportunity to provide objective evidence of the need for accommodation may be beneficial to employees or applicants who would otherwise be assumed to be unqualified, with or without accommodation.

The ADA restricts requests for medical information during the application process,²⁹¹ and an employer cannot require current employees to undergo a medical examination, or otherwise inquire as to the nature or severity of an employee's disability "unless such examination or inquiry is shown to be job-related and consistent with business necessity."²⁹² Likewise, in response to a request for accommodation, an employer should only seek documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation.²⁹³ A request for medical information typically will be appropriate where the employee can limit the information disclosed by type

288. 42 U.S.C. § 12112(d)(4)(B) (2018).

289. See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) ("Employers can show their good faith in a number of ways, such as . . . request[ing] information about the condition and what limitations the employee has."). See also *Booth v. Nissan N. Am., Inc.*, No. 3:17-cv-00755, 2018 U.S. Dist. LEXIS 139882, at *10–11 (M.D. Tenn. Aug. 17, 2018) (noting that employers' ability to request medical information related to an employee's qualifying condition is consistent with their requirement to engage in an "interactive process"); *Williamson v. Bon Secours Richmond Health Sys.*, 34 F. Supp. 3d 607, 613 (E.D. Va. 2014) (holding that an employer's demand for a doctor's note supporting an employee's request for a schedule change accommodation fell in line with the ADA's expectations for employers).

290. *Equal Emp. Opportunity Comm'n v. Sears, Roebuck & Co.*, 417 F.3d 789, 804 (7th Cir. 2005).

291. 42 U.S.C. § 12112(d)(4)(A) (2009).

292. *Id.*

293. See U.S. Equal Emp't Opportunity Comm'n, *supra* note 210, at Question 6.

of condition and time period,²⁹⁴ and information which relates to the person's ability to perform the job.²⁹⁵

The need for the employee to establish a need for accommodation raises the question of how much information the employee must reveal. An employer can request "enough information" "to know of both the disability and desire for an accommodation."²⁹⁶ Even so, a health care provider can confirm the existence of a disability and the employee's need for accommodation "without revealing intimate or potentially embarrassing psychiatric traits or symptoms."²⁹⁷ Medical inquiries can exceed the scope of their business necessity justification when the inquiry is based on curiosity as to the underlying medical cause of an employee's behavior.²⁹⁸

If an employer questions the medical evidence provided by the employee seeking an accommodation, the employer should give the employee an "opportunity to address the employer's concerns about the employee's supported medical diagnoses" as part of the duty to interact in good faith.²⁹⁹ An employer should not discount information from an employee's health professional regarding the existence of a disability or the need for accommodation "without giving the employee the opportunity to address the employer's concerns" about that information.³⁰⁰ In fact, the interactive process could include the employer paying for the employee's health care provider to complete a thorough medical assessment of her abilities to perform the work duties of her position.³⁰¹ Similarly, when an employer receives medical information calling into question the employee's ability to perform the essential job duties of the position in question, the employer should still contact the employee to continue the interactive process to discuss the impact of the medical information and to ascertain whether the employee still seeks an accommodation.³⁰²

294. *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 98 (2d Cir. 2003); *Turcotte v. Comcast Cable Commc'ns Mgmt., LLC*, No. 17-cv-150-PB, 2019 U.S. Dist. LEXIS 24018, at *31–32 (D.N.H. Feb. 14, 2019).

295. *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J.*, 283 F. Supp. 3d 72, 84 (S.D.N.Y. 2017).

296. *Kowitz v. Trinity Health*, 839 F.3d 742, 745, 748 (8th Cir. 2016). *See also* Proctor, *supra* note 235, at 71 (stating that an employer can require enough information to allow understanding of the employee's needs and limitations).

297. Center, *supra* note 22, at 12.

298. *Whitt v. Baldwin Cty. Mental Health Ctr.*, No. 12-0698-WS-M, 2013 U.S. Dist. LEXIS 173654, at *46–47 (S.D. Ala. Dec. 12, 2013).

299. *Luckett v. Dart*, No. 14-CV-6089, 2017 U.S. Dist. LEXIS 124311, at *33, *45–46 (N.D. Ill. Aug. 7, 2017).

300. *Id.* at *46.

301. Silverman, *supra* note 257, at 299.

302. *Kottke v. Petsmart, Inc.*, No. 16C8849, 2018 U.S. Dist. LEXIS 112433, at * 7 (N.D.

Requirements to disclose medical information during the accommodation process should be guided by the ADA's privacy protections for current employees. An employer's requirement that current employees disclose medical information must "genuinely serve[] the asserted business necessity" and be "no broader or more intrusive than necessary."³⁰³ Such a business necessity can be based on an employer's "genuine reason to doubt" that the employee requesting an accommodation can perform job-related functions,³⁰⁴ or some evidence of a lack of characteristics related to the position.³⁰⁵

Because the request for medical information about current employees relies on the job-relatedness and business necessity standard,³⁰⁶ judicial review of such requests provides guidance for the scope of information an employer should seek to justify an accommodation. Employers typically have been able to establish job-relatedness of a medical examination of a current employee based on some "level of medical and psychological fitness commensurate with the essential functions of their positions."³⁰⁷ For example, a medical examination can be justified under the job-relatedness standard based on an employee's erratic or unusual behavior³⁰⁸ or the use of leave related to diagnoses of some impairment.³⁰⁹ However, not all unusual behavior by a current employee has been sufficient to establish the job-

Ill. July 6, 2018).

303. *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 98 (2d Cir. 2003).

304. *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999).

305. *See Pesterfield v. Tenn. Valley Auth.*, 941 F.2d 437, 441–42 (6th Cir. 1991) (explaining that an exam is warranted based on signs of continuing anxiety after leave); *Weigert v. Georgetown Univ.*, 120 F. Supp. 2d 1, 14 (D.D.C. 2000) (stating that an exam can be required to measure stability and ability to interact with co-workers).

306. 42 U.S.C. § 12112(d)(4)(A) (2018).

307. *Scott v. Napolitano*, 717 F. Supp. 2d 1071, 1079 n.3 (S.D. Cal. 2010).

308. *Mickens v. Polk Cty. Sch. Bd.*, 430 F. Supp. 2d 1265, 1279 (M.D. Fla. 2006). *See also Brownfield v. City of Yakima*, 612 F.3d 1140, 1145–46 (9th Cir. 2010) (highlighting that an officer's highly emotional responses showed need for fitness for duty examination); *Wisbey v. City of Lincoln*, 612 F.3d 667, 673–74 (8th Cir. 2010) (finding that it is a valid suspicion that depression prevented emergency dispatcher from performing duties when the job required alertness at all times); *Coursey v. Univ. of Md. E. Shore*, 577 F. App'x 167, 173 (4th Cir. 2014) (holding that a health examination was justified when a college professor made inappropriate comments and exhibited other erratic and unprofessional behavior, based on a duty to instruct, supervise, and interact with students and faculty in a professional and non-threatening manner); *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007) (holding that anxiety shown by juvenile facility employee justified psychological examination).

309. *See, e.g., Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 844 (9th Cir. 2000) (finding that a leave for physical impairment combined with a request for an accommodation prior to the leave justified medical examination before the employee was permitted to return to work).

relatedness of a medical examination.³¹⁰ For example, a medical examination was not necessarily justified for a professor who yelled at students.³¹¹

In addition to being job related, requests for medical information must fulfill a business necessity.³¹² To avoid basing requests for medical information on stereotypical assumptions about applicants with disabilities,³¹³ the ADA requires “objective evidence” to support an employer’s request for medical information.³¹⁴ An employer can show a business necessity for requiring a medical examination based on “good reason to be doubtful of [the employee’s] abilities,”³¹⁵ or “significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.”³¹⁶ This same justification should be applied to requests for information to justify a request for accommodation, because the same privacy interests are at stake.

In addition to requiring some justification for a request, an employee seeking accommodation should not be required to disclose medical information to “more persons than those necessarily involved in the evaluation of the application.”³¹⁷ The EEOC’s Enforcement Guidance recognizes that employers may need medical information to make decisions about reasonable accommodations for the individual, but the information must be kept confidential.³¹⁸ To that point, the EEOC suggests that such

310. *See, e.g.*, *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 621–22 (6th Cir. 2014) (holding that an affair with a coworker did not justify the need for a medical examination of a current employee).

311. *Appel v. Spiridon*, 463 F. Supp. 2d 255, 259 (D. Conn. 2006).

312. *Conroy v. N.Y. State Dep’t of Corr. Servs.*, 333 F.3d 88, 97–98 (2d Cir. 2003).

313. *Bosket v. Long Island R.R.*, No. CV00-7352(RJD)(JMA), 2004 U.S. Dist. LEXIS 10851, at *23 (E.D.N.Y. June 4, 2004) (featuring an applicant that was rejected based on a hearing impairment); *Equal Emp’t Opportunity Comm’n v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) (featuring a refusal to rehire employees who participated in a substance abuse program).

314. *Kroll*, 763 F.3d at 623; *Equal Emp’t Opportunity Comm’n v. U.S. Steel Corp.*, No. 10-1284, 2013 U.S. Dist. LEXIS 22748, at *36 (W.D. Pa. Feb. 20, 2013).

315. *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 519 (3d Cir. 2001).

316. *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999). *See also* *Terry v. City of Greensboro*, No. 1:02CV00221, 2003 U.S. Dist. LEXIS 869, at *4 (M.D. N.C. Jan. 17, 2003) (stating that mental and physical examinations relate to essential functions of the job and are preconditions to returning to work if supported by reasonable belief about plaintiff’s capabilities); *Nichols v. City of Mitchell*, 914 F. Supp. 2d 1052, 1061–62 (D.S.D. 2012) (holding that the city needed to show that a reasonable person would have cause to require more extensive medical examination of bus drivers).

317. *Turcotte v. Comcast Cable Commc’ns Mgmt., LLC*, No. 17-cv-150-PB, 2019 U.S. Dist. LEXIS 24018, at *32 (D.N.H. Feb. 14, 2019).

318. U.S. Equal Emp’t Opportunity Comm’n, *supra* note 210.

medical information should only be shared with “individuals involved in the hiring process . . . who need to know the information.”³¹⁹ Thus, an employer should not require release of medical information to “any affiliate or representative of [the employer] or persons performing business or legal services on its behalf” unless the employer can show that such a broad disclosure constitutes a business necessity.³²⁰ Instead, medical information should only be released to those persons “necessarily involved in the evaluation” of the information related to the business purpose for requesting it.³²¹

An employer can avoid ADA liability by limiting an inquiry to an independent health professional to the question of whether the employee being tested could perform the duties of her position.³²² Similarly, an employer should only require that a doctor certify that an employee who has used sick leave “was incapable, due to illness, of performing his duties during a specific period, and that the employee is now fit to resume his duties;”³²³ the employer should not have required the doctor to describe the specific nature of the illness or treatment.³²⁴ Likewise, the limitation of a medical background to a specific, relevant period of time helps to establish its business necessity in determining whether an employee can perform his job duties.³²⁵

In contrast to these decisions limiting the requisite disclosure of medical information, other courts have refused to find a violation of the ADA based on policies requiring some disclosure. Courts have allowed employer policies that employees provide a note explaining the nature of their illness from their attending physician to their immediate supervisor, reasoning that the ADA permits any agent of the employer, including a supervisor, to make medical inquiries and receive medical information, at least where those supervisors were prohibited from sharing or disseminating any of that confidential information.³²⁶

319. U.S. Equal Emp’t Opportunity Comm’n, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995), <https://www.eeoc.gov/policy/docs/preemp.html> [<https://perma.cc/3RK5-G4BL>].

320. *Fraser v. Avaya Inc.*, No. 10-cv-00800-RPM, 2013 U.S. Dist. LEXIS 126034, at *4 (D. Colo. Sept. 4, 2013).

321. *Id.* at *6.

322. *Conrad v. Bd. of Johnson Cty. Comm’rs*, 237 F. Supp. 2d 1204, 1235 (D. Kan. 2002).

323. *Transp. Workers Union of Am., Local 100 v. N.Y.C. Transit Auth.*, 341 F. Supp. 2d 432, 451 (S.D.N.Y. 2004)

324. *Id.* at 451–52.

325. *Allen v. Balt. Cty.*, 91 F. Supp. 3d 722, 738 (D. Md. 2015).

326. *Lee v. City of Columbus*, 636 F.3d 245, 258 (6th Cir. 2011). See also *Dillon v. Norfolk S. Ry.*, 35 F. Supp. 3d 896, 906–07 (E.D. Mich. 2014) (allowing supervisor access

These ADA decisions place a heavy burden on the employee seeking accommodation to reveal both the existence of her disability, even if it is otherwise hidden, as well as the limitations associated with that disability that affect her ability to work. Without such a revelation, the employer has no duty to even interact about possible accommodations. In addition, the employee must demonstrate, through additional details about her disability, that the requested accommodation is connected or related to the limitations of her disability. To verify that the employee truly needs the requested accommodation, the employer can then require medical information from the employee's health care provider. Despite the ADA's requirement that requests for medical information be job-related and a business necessity, courts reviewing requests for accommodation have paid little attention to the employee's interest in limiting how much medical and other personal information is required and with whom it is shared.

III. EMPLOYERS' PRACTICES AFFECTING STIGMATIZATION

Well-meaning employers sometimes adopt practices or policies that aggravate the conflict between the potential stigmatization if an employee or applicant reveals a hidden disability and the ADA's requirement that people seeking accommodations reveal extensive information about their disability. Our review of the publicly-available accommodation policies of the Fortune 100 companies in the United States and an opportunity survey of a varied group of seventy-five employers reveals some such policies and practices. First, many employers fail to encourage requests for accommodations by applicants and employees because of the process adopted to initiate the request for accommodations. Secondly, employers sometimes fail to control the sharing of the medical information of people with disabilities during the accommodation process or fail to assure people with disabilities that such controls are in place. These findings present opportunities to both encourage requests for accommodation and reduce the potential stigmatization of people seeking accommodations for hidden disabilities.

Our review of Fortune 100 companies in the United States was conducted by searching the websites of those companies for any information about the accommodation process for applicants, employees, or both. We recognize that additional information may be provided to employees with disabilities after their hire, but would encourage employers

to medical information from employee entrance examinations when relevant to employee's failure to reveal prior injury).

to make that information available to any potential applicant to encourage applications from people with disabilities who may need accommodations to succeed.

Our survey was sent to employers from across the United States with some prior affiliation with Michigan State University, including alumni and participants in human resources continuing education. While recognizing that this survey may not be representative of all employers in the United States, the responses from seventy-five employers provides some insight into the accommodation policies and practices of those employers.

A. Encouraging Requests for Accommodation

We conducted a thorough search for the accommodation-related notifications and policies of Fortune 100 companies in the U.S by reviewing their websites which are accessible to the public. We considered the process of initiating the accommodation with respect to guidance provided to applicants or employees, the point of contact for the person with a disability, and the amount of information required. We also considered the request for medical information as part of the accommodation process, including who has access to that information and whether employees are provided with any assurances as to its confidentiality.

1. Initiating the Accommodation Process

Of the 100 publicly available sites of Fortune 100 companies, twenty-two did not provide any information on how to begin requesting or obtaining an accommodation with that employer, and an additional twenty-seven employers provided online information on accommodations for the application process only. While more detailed information may be available to current employees, the employers' failure to include such information on the employer site available to applicants could easily deter people with disabilities from applying.

With respect to initiation of the accommodation process, we analyzed in more depth the Fortune 100 companies which provided some information on how to initiate the process. Of those seventy-eight employers, eight employers provided only an email address and three provided only a telephone number to use to request an accommodation. Twelve employers provided both means of contact; three of those employers also provided an online form. Nine employers required people seeking an accommodation to complete an online form to initiate their

request, without indicating the identity of the recipient of that form, and five of those nine forms required identification of the person's diagnosis and/or other medical information. Some Fortune 100 employers use other processes to initiate the accommodation process. Two employers required initial contact with human resources; three allowed the person to contact human resources or a supervisor/manager, whereas three employers required a direct request for accommodation to a supervisor or manager.

Next steps to obtain an accommodation, after the initial contact described above, also varied across the fifteen employers which provided that information. Four of the employers providing an email and/or phone contact and three employers providing an online form indicated that the next step would be contact from the employer's human resources department. Contact with a supervisor or manager was the next step for one employer, and one employer that required initial contact with one's supervisor or manager or human resources indicated that the next step would be contact by human resources with the person seeking accommodation. The remainder of the sixty-seven employers who identified a first step gave no indication of the next step to obtain an accommodation after the indicated first step was taken.

Our survey responses from seventy-five employers provide a somewhat different picture of the initiation of the accommodation process, in response to the question "How does an employee initiate your accommodation process?" Seven of the seventy-five employers require initiation of the accommodation process through human resources during the hiring process, whereas three indicated that initiation should take place during employees' onboarding process. Of the seventy-five employer respondents, thirty-one indicated that their policies called for beginning the accommodation process through an employee's contact with a supervisor or manager. Given the significant amount of information required to trigger the interaction process, as described above, these employees face the choice of revealing that information to their supervisor or going without accommodation. Eleven employers indicated that an applicant or employee can initiate the accommodation process by communicating with human resources or a supervisor/manager, with two of them indicating that the employee can also contact a third party absence company with a request, and another providing the option of requesting an on-site medical center staff member. One employer directs requests to their compliance manager. Thirteen of the seventy-five responding employers indicated that their organizations had no specific policy.

We asked employers in our survey to indicate what medical information (if any) they require *before* initiating an accommodation

process. Other than the seven employers which indicated “none,” nineteen employers indicated that they require a recommendation from physician, nine require proof of only the impairment requiring accommodation, and nine require only the employee’s medical history including diagnosis and limitations.

Among Fortune 100 employers, most did not provide specific information about the provision of medical information in support of a request for accommodation. With respect to the seven employers providing guidance regarding the timing of requests for the medical information from people seeking accommodations, five employers indicated that the information would be required after the interaction process began, whereas two indicated that the information would be required prior to the interactive process. The other ninety-three employers did not indicate when or if they would require the person’s medical information.

This review of policies and survey results indicate a wide variety of policies and practices, or a significant lack thereof, regarding the initiation of the accommodation process. Beyond a general lack of guidance, these policies sometimes require submission of personal information to an unknown recipient or to a supervisor or manager. Such requirements raise serious concerns about the prevention of stigmatization for employees or applicants seeking accommodations, as well as potential discouragement of people with disabilities from even applying.

2. The Accommodation Approval Process

Both the review of Fortune 100 policies and the survey results also provided information about what information must be revealed once the accommodation process has been initiated. Regarding the determination as to whether a requested accommodation is reasonable, eighty-four of the Fortune 100 employers gave no indication of how that determination would be made. Fifteen employers stated that the reasonableness of the accommodation request would be made on a case-by-case basis, with four of those employers also providing specific examples of reasonable accommodations on their web site; one employer indicated that the determination would be based on the person’s job duties.

The employer survey also asked about the process of determining whether a requested accommodation is reasonable. Two responding employers consider the employee’s limitations only, seventeen consider only the duties of the position, and sixteen consider both. Only two consider only the recommendation of a manager or supervisor, but twenty-one consider that recommendation along with the limitations and duties.

Three consider a list of accommodations deemed reasonable along with those other factors. Two employers mentioned consideration of costs along with other factors.

The survey asked employers to identify their resources for employees with disabilities. Twenty-four employers indicated adoption of inclusive policies as well as the availability of support groups and a diversity and inclusion coordinator. Nineteen indicated that the employer had inclusive policies, and three indicated inclusive policies and support groups. Nine employers indicated that their employees had access to a diversity and inclusion coordinator, with one of them also having inclusive policies, and one also having a support group. Two employers indicated that EAP was available as a resource.

3. Preventing Stigmatization

To gain greater insight into employer practices and policies, the survey completed by seventy-five employers asked an open-ended question asking how their organization ensures that information gathered in connection with requests for accommodation does not negatively affect the employee with a disability. Responses fell into two broad categories: limits on the sharing of information about the people seeking accommodations, and broader training, coaching and policies.

Ten of the survey respondents indicated that they prevent the sharing of medical information with a supervisor or manager, while one employer mentioned limiting the medical information obtained from medical professionals to that which is job-related. An additional three employers mentioned confidentiality more generally, including one employer stating that “information is kept on a need to know basis.” One employer explained that the employee seeking an accommodation works with a medical professional to complete the required forms related to a request for accommodation, which are only shared with HR; only the subsequent notice of the requested accommodation is sent to the supervisor or manager, and “no medical information is ever shared.” In contrast, one employer responded by saying that the information “is limited to HR and the supervisor,” failing to recognize the potential damage from sharing medical information with a supervisor. Two employers noted that they use a third party to house medical information, with one explaining that “data is housed with a vendor, and only HR has access to the full medical data,” and the other explaining that “the third party company is extremely important for maintaining those records, filtering it through a medical professional for validity and establishing a boundary between the decision

makers in our company and the medical records in an effort to eliminate current or future bias.”

Training and coaching were also mentioned by ten employers. One employer explained that in cases where the manager needs to have knowledge of a disability, “we coach managers on what they can/can’t do.” Two employers noted providing “training to our HR professionals & managers on ADA,” and trying to educate supervisors “on their responsibilities under ADA.” The HR representative for a small company similarly noted that she provides “coaching to leadership to ensure that the request doesn’t negatively impact the employee.” Along the same lines, one employer mentioned that supervisors are informed of “federal, state and employer policy requirements.” More broadly, one employer stated that its manager training includes diversity sensitivity, which touches on disability.

The role of human resources (HR) and policy also appears to be important among surveyed employers. Four employers specifically noted that HR acts as advocate for the employee in dealing with her supervisor, including one employer that assures the employee that “HR is a resource for them if they have questions or concerns,” and another that stated that “HR ensures all laws are followed and retaliation is avoided at all times.” Two employers also pointed out that an employee could file a complaint with its ADA coordinator or employee relations/HR regarding discrimination due to a disability, and a third employer mentioned their processes/procedures to raise concerns. Ten different employers mentioned their policies, including “strong compliance with HIPAA,” “Zero tolerance retaliation and discrimination/ harassment policies,” a “non-retaliation policy,” and “anti-harassment and anti-discrimination policies,” as protections for the employee with a disability. One employer pointed out more specifically that under its anti-retaliation policy, the “supervisor does not have final say – each case reviewed by multiple parties, union environment/protection.” Three employers specifically mentioned their diversity policies, with one explaining that its priority of diversity and inclusion “holds everyone accountable both in terms of what and how they perform their duties.”

Among the Fortune 100 policies reviewed, very few outlined policies to protect people with disabilities against stigmatization during the accommodation process, and few provided any assurance that such stigmatization would occur. Some rare best practices are highlighted in the recommendations section to follow.

B. *Protecting Privacy of Medical Information*

The Fortune 100 Companies' online information regarding requesting accommodations was reviewed to determine how well employers assure people with disabilities that their medical information will be kept confidential. Of the Fortune 100 sites review, only four referenced any policy regarding maintaining the privacy of the request for accommodation, and only one provided that policy on the web site. Three of those required initiation of the process by phone and/or email, and one required an initial request to one's supervisor or manager. Similarly, only four employers provided assurance that the medical information of the person seeking accommodation would be kept confidential. Three of those four employers required revelation of one's medical information after the interaction process begins.

Exemplifying best practice to protect privacy and encourage requests for accommodation, CVS Health makes clear in its accommodation policy that "information provided by the colleague . . . in connection with an accommodation request is often very sensitive, and the company will treat all information received with appropriate discretion and care in accordance with company policy and applicable privacy laws."³²⁷ Limiting the access of supervisor and managers to individual health information can further protect employees with disabilities against stigmatization. For example, Michigan State University's Resources Center for Persons with Disabilities verifies the disability and an employee's need for accommodation.³²⁸ That determination is shared with the employee's direct supervisor without any specific information regarding the employee's disability.

Five of the Fortune 100 companies (Chevron, Pfizer, Freddie Mac, Costco, and Merck) indicated the use of a third party in the accommodation process.³²⁹ If established appropriately, keeping medical information in the

327. CVS, CVS HEALTH COLLEAGUE HANDBOOK 17–18 (2016), <https://tettra.co/wp-content/decks/cvs-handbook.pdf> [<https://perma.cc/2L8X-4FWA>].

328. MICH. STATE UNIV., MICHIGAN STATE UNIVERSITY SUPPORT STAFF DISABILITY/REASONABLE ACCOMMODATIONS POLICY & PROCEDURE 1, <https://www.hr.msu.edu/policies-procedures/support-staff/support-staff-policies-procedures/disability.html> [<https://perma.cc/8L9J-R7EQ>].

329. *Disability Management Program*, CHEVRON, <http://hr2.chevron.com/timeaway/disability-management-program> [<https://perma.cc/4NWC-4NMC>]; PFIZER, WWHR US/PR POLICY: AMERICANS WITH DISABILITIES ACT ACCOMMODATION POLICY, http://pfizer.com/careers/files/ada_act_accommodation_policy.pdf [<https://perma.cc/3QWS-CY8U>]; FREDDIE MAC, CORPORATE POLICY: EQUAL EMPLOYMENT OPPORTUNITY, ANTI-HARASSMENT, AND REASONABLE ACCOMMODATION, https://cdn-static.findly.com/wp-content/uploads/sites/344/2017/05/Freddie_Mac_EEO_Policy_03_201.pdf [<https://perma.cc/CDC5-8TWS>]; CAROLYN HORTON, COSTCO'S RETURN TO WORK PROGRAMS, <https://www.wsiasn.org/documents/134>

hands of a third party could provide additional protection against the disclosure of medical information within the workplace of a person seeking an accommodation. Four of those employers indicated that the third party collects the medical information and determines both the person's eligibility and the reasonableness of the accommodation request.

Of the employers surveyed, we asked about access to the medical information gathered in connection with a request for accommodation. Of the seventy-five responding employers, twenty-nine employers indicated that a human resources professional has access, with twenty additional employers indicating that both HR and the employee's supervisor or manager had access to medical information related to an accommodation request. Six employers indicated that internal medical staff had access to medical information, and one employer indicated that its leave of absence vendor also had access to medical information, along with HR. Responding employers indicated challenges in maintaining confidentiality of medical information, as with one small employer that indicated that although a manager is only given information about the accommodation needed, in its small plant, "Many times, information about the employees disability is shared very openly by the employee or his/her relatives."

IV. RESOLVING THE REVELATION CONFLICT

Employees must reveal their disability to trigger their employer's duty under the ADA to interact and provide an accommodation. In fact, employers would like applicants to disclose any mental health problem during the application stage.³³⁰ Similarly, many professionals in the public mental health and vocational rehabilitation fields promote disclosure by their clients with hidden disabilities,³³¹ with some treating revelation of one's disability as part of a "strengths-based approach."³³² Others theorize that revelation will lead to targeted support for the member of a stigmatized group, at least in some organizations,³³³ and suggest that coworkers will be less likely to discriminate against those who received accommodation if they know about that person's reduced capabilities that justify the

6/Costco.pdf [https://perma.cc/L648-KDTA]; *Employee Diversity*, MERCK, https://www.merck.com/about/how-we-operate/diversity/employee-diversity.html [https://perma.cc/6DBV-C4ZJ] (last visited Feb. 25, 2020).

330. Brohan et al., *supra* note 137, at 289.

331. Goldberg, Killeen & O'Day, *supra* note 22, at 463–64, 466, 487.

332. Gates & Akabas, *supra* note 7, at 383.

333. Johnson & Joshi, *supra* note 36, at 431; Ragins, *supra* note 49, at 200–01.

accommodation.³³⁴

Our survey reveals that some employers have attempted to address this conflict by training employees to appreciate the skills and potential contribution of people with disabilities. The effectiveness of this approach is unproven.³³⁵ Some success has been shown by designating a specific person or office for accommodation and a grievance procedure for reasonable accommodation as part of a formalized decision-making process for individual decisions regarding accommodations, as well as a centralized accommodation fund.³³⁶ Even with these supports, the employee or applicant with a disability must still reveal their impairment to obtain an accommodation.

The expectation of revelation from the courts, employers, and counselors puts the burden on people with disabilities to find stigma-free workplaces, which may not exist or be available to them. Instead, the process of obtaining accommodations can be reformulated to reduce the potential for the harmful effects of stigma and stereotypes arising from the revelation of one's hidden disability. Both the courts and individual employers can help to resolve the conflict between the potential stigma of revelation and the need to reveal one's disability to obtain an accommodation. By controlling the amount of information that must be revealed and who receives that information, the potential for negative consequences can be reduced.

Courts should not allow employers to require full disclosure of an employee's entire medical record to obtain an accommodation. Likewise, employers should be sensitive to an employee's reluctance to reveal a disability, especially one carrying a heavy stigma. Instead, both courts and employers should apply the ADA guidance requiring job-relatedness and business necessity to the interactive process that precedes accommodation of employees with disabilities. That standard would ensure that employees are only required to share information that is directly relevant to their request for a reasonable accommodation,³³⁷ meaning information that is necessary to establish the legitimacy of the employee's request and its connection to an actual impairment. That relevant medical information should only be shared with the employer representatives who are directly involved in the interactive process.

While only relevant information should be requested, an employer should not be allowed to make negative assumptions about an employee

334. Durand, *supra* note 24, at 583.

335. Von Schrader, Malzer & Bruyère, *supra* note 16, at 253.

336. Erickson et al., *supra* note 7, at 205.

337. Schultz et al., *supra* note 77, at 458.

based on a diagnosis alone to decide whether a reasonable accommodation would render the employee qualified to perform her essential job duties. Instead, the employer should be required to engage in an individualized process to determine the extent of the employee's limitations.³³⁸ Thus, the employer should not assume that all people with psychiatric disabilities exhibit the limitations associated with their diagnoses,³³⁹ particularly where treatment or accommodations can address those limitations.³⁴⁰ To make a reasoned determination as to whether the employee can perform the essential job duties or work without posing a direct threat in the workplace,³⁴¹ the employer should request and evaluate objective, relevant evidence from both the employee and her health care provider.³⁴² Because stigmatization is more prevalent among smaller employers,³⁴³ it is particularly important for them to adopt practices that include such an individualized process, even if it imposes a greater burden on them.

In gathering and considering such objective evidence, employers should be sure to maintain its confidentiality, because control of such information is important to limiting stigmatization.³⁴⁴ Line supervisors are important to the process of providing accommodations, given their knowledge of work processes and workers' abilities.³⁴⁵ However, those supervisors need not have access to detailed medical information supporting the need for an accommodation to determine which accommodations are reasonable, as long as the supervisor understands the extent of the employee's limitations. Allowing direct supervisors to have access to sensitive medical information, as observed in Walmart's

338. 42 U.S.C. § 12111(8) (2018) and 29 C.F.R. § 1630.2(m) (2012) define a qualified individual as a person with a disability who "with or without reasonable accommodation, can perform the essential functions" of the position. See, e.g., *Marble v. Tennessee*, No. 18-5697, 2019 U.S. App. LEXIS 9306, at *7 (6th Cir. Mar. 29, 2019) (stating that the ADA requires individualized inquiry in response to a request for accommodation).

339. Sheila H. Akabas & Lauren B. Gates, *A Social Work Role: Promoting Employment Equity for People with Serious and Persistent Mental Illness*, 23 ADMIN. SOC. WORK 163, 174 (2000).

340. *Mental Health Medications*, NAMI, <https://www.nami.org/Learn-More/Treatment/Mental-Health-Medications> [<https://perma.cc/LM98-JWMQ>]. See also Lerner et al., *supra* note 72, at 105 (finding that studies show subgroups of adults with depression who receive high quality diagnosis and treatment have better employment outcomes).

341. 42 U.S.C. §§ 12111(3); 12113(b) (2018).

342. See Silverman, *supra* note 257, at 299 (stating employers can ask employee's health care provider to conduct thorough medical assessment of her abilities to perform work duties).

343. Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior*, 71 INDUS. & LAB. REL. REV. 329, 338–39 (2018).

344. Brohan et al., *supra* note 137, at 296.

345. Cunningham, James & Dibben, *supra* note 94, at 275.

accommodation process,³⁴⁶ opens the door for supervisors to act based on negative biases. By preventing supervisors' direct access to such sensitive information, the potential for stigmatization among both direct supervisors and coworkers can be avoided. Instead, using a neutral third party (e.g., a university or consultant) to gather the information can greatly enhance the potential for confidentiality.³⁴⁷

Employers should only access information that is related and necessary to a determination of whether a person with a disability needs and would be enabled by an accommodation to perform the essential duties of a particular job. At the same time, employers should still engage in an individualized analysis of that employee, relying on that objective information, rather than making assumptions based on the stigma and stereotypes associated with her diagnosis. Moreover, that private information should only be available to those employer representatives who are directly involved in the interactive process, preferably excluding supervisors and managers who could be negatively influenced in their perceptions about that employee by that information. With these controls in place, people with disabilities will no longer be in the position of searching for the perfect workplace where stigma and stereotypes do not exist. Maybe then they will no longer face the difficult choice of either revealing a disability to obtain an accommodation or going without.

346. Returning from Leave – Managers and HR Representatives, WALMARTONE, <https://smartguide.walmartone.com/smartpages/returning-leave-jet> [<https://perma.cc/HRK4-CBW E>].

347. LINKOW ET AL., *supra* note 16, at 40.