Mediating Psychiatric Disability Accommodations for Workers in Violent Times

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Most workers in the United States are unhappy. Manifestations of that dissatisfaction can result in many workplace dilemmas when confronted with the situation of an employee dealing with mental illness. Fears of violence in our society have become prevalent with the increasing ferocity of high-profile and mass attacks in and out of the workplace. In believing mental illness contributes to some of these incidents, employers and co-workers have become extremely sensitive when a co-worker with a psychiatric disability has exhibited harassing or threatening behavior.

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The Americans with Disabilities Act (ADA) was amended by the ADA Amendments Act of 2008 (ADAAA), which became effective in 2009. That amendment intended to change the legal landscape when analyzing disability discrimination claims regulated by the ADA. The analysis after the ADAAA has shifted from the question of whether an individual meets the statutory definition of being disabled to the question of whether a reasonable accommodation exists that allows a disabled employee to perform the essential functions of the job. Although the ADAAA became effective in 2009, many of its implications are starting to become a reality a decade later.

A pressing question created by the ADAAA relates to the increased need to determine the nature of a reasonable accommodation for employees, including those with psychiatric disabilities. Employers must now face the reality that the ADAAA could compel them to explore reasonable accommodations more regularly for employees coping with mental illness. When the possibility of violent or harassing behavior ensues, employers and co-workers could rely on stigma and stereotyping out of expediency rather than acting on sound medical judgment required by the ADA in assessing an accommodation for an employee's psychiatric disability. This Article proposes the use of mediation as a more significant tool in resolving the balance of concerns presented in these situations. By employing experienced mediators with skills in understanding workplace dispute resolution as well as mental health issues, employers and employees can identify a reasonable accommodation in a fair manner that works for all the interested parties.

I. INTRODUCTION: PSYCHIATRIC DISABILITY VERSUS FEARS OF WORKPLACE VIOLENCE

In 2018, approximately 19.1% of United States adults (47.6 million people) experienced mental illness.[1] At least one commentator has asserted that "approximately six out of 10" adults with mental illness can succeed at work with "appropriate supports."[2] Unfortunately, unsubstantiated claims that an employee's mental illness can be a predictor of workplace violence add to the stigma these employees face in attempting to achieve successful employment opportunities.[3] After a few high-profile workplace shootings,[4]

[1] *See Mental Health by the Numbers*, NAT'L ALL. ON MENTAL HEALTH, https://www.nami.org/learn-more/mental-health-by-the-numbers (last visited Jan. 20, 2020) (citing *Substance Abuse and Mental Health Services Administration, Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health*, SUBSTANCE ABUSE & MENTAL HEALTH HUM. SERV. ADMIN. 2 (Aug. 2019), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf).

[2] *See Road to Recovery: Employment and Mental Illness*, NAT'L ALL. ON MENTAL ILLNESS 4 n.8 (July 2014), https://www.nami.org/about-nami/publications-reports/public-policy-reports/roadtorecovery.pdf (citing T. Marshall et al., *Supported Employment: Assessing the Evidence*, PSYCHIATRIC SERV. (2014), http://ps.psychiatryonline.org/article.aspx?articleID=1778882).

[3] *See* Robert Priedt, *Mental Illness Not a Driving Force Behind Crime: Study*, U.S. NEWS (Apr. 22, 2014), https://health.usnews.com/health-news/articles/2014/04/22/mental-illness-not-a-driving-force-behind-crime-study (reviewing a study where "researchers analyzed 429 crimes committed by 143 people in Minnesota who suffered from depression, schizophrenia or bipolar disorder" and finding: "[t]he vast majority of people with mental illness are not violent, not criminal and not dangerous"). When the president connected mental illness to mass shootings in the United States by saying "mental illness and hatred pulls the trigger, not the gun," leaders of mental health organizations criticized this statement. *See* Kristen Jordan Shamus, *Trump Said 'Mental Illness Pulls the Trigger' in Mass Shootings. Experts Beg to Differ*, DETROIT FREE NEWS (Aug. 10, 2019),

any unfounded fears of workplace violence can create major frustration for employers navigating the perils presented by the Americans with Disabilities Act of 1990 (ADA).[5] The ADA prohibits employment discrimination based on psychiatric disability. In a 2015 case, U.S. Federal District Court Judge Gerald A. McHugh explained this workplace dilemma as follows: "This case tests the outer bounds of the Americans with Disabilities Act [ADA] in the context of workplace violence. I am confronted with two competing but equally valid public policy interests—the need for a safe workplace, as weighed against the need to accommodate and treat mental illness."[6]

The ADA requires that an employer must provide a reasonable accommodation to an employee who is a qualified individual with a psychiatric disability.[7] But when an employee's psychiatric disability contributes to conduct resulting in threatening or harassing behavior toward other employees, the employer must also respond to protect the employees being threatened or harassed. Taking disciplinary action against a worker with a psychiatric disability may violate the ADA as a form of disparate treatment.[8] Similarly, an employer's failure to accommodate an employee's psychiatric disability could also constitute another basis for employment discrimination under the ADA.[9] On the other hand,

https://www.usatoday.com/story/news/2019/08/10/mass-shootings-not-caused-mental-illness-experts/1964731001/ (describing mental health experts' responses to the president's comment that mass shooters are "mentally ill monsters" and need "involuntary confinement" as being "off the mark" because "there is little correlation between mental illness and violent killings" and "[s]tudy after study has shown us that is simply not true" and "people living with mental illness are far more likely to be victims of violence than the perpetrators"). Arthur Evans, the CEO of the American Psychiatric Association, agreed with a statement by another mental health expert that the president's statement was "dangerous because it further stigmatizes people with real mental illness, and unfortunately continues to perpetuate the idea that people with mental illness are dangerous" when "1 in 4 people will experience a mental health challenge in their lifetime, and the vast majority are nonviolent." *Id*.

[4] *See, e.g.*, Barbara Goldberg, *Factbox: Virginia Beach Massacre Among Deadliest U.S. Workplace Shootings*, REUTERS (June 3, 2019), https://www.reuters.com/article/us-virginia-shooting-workplace-factbox/factbox-virginia-beach-massacre-among-deadliest-us-workplace-shootings-idUSKCN1T42EI (identifying the deadliest workplace shootings in the United States including a 2019 incident in Virginia Beach); *see* Jana Kasperkevic, *Is Your Office Prepared for a Workplace Shooting?* MARKETPLACE (June 26, 2019), https://www.marketplace.org/2019/06/26/workplace-violence-how-to-prepare-shooting/.

[5] *See* American with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 336 (Title I, codified at 42 U.S.C. §§ 12101–12217 (2018)).

[6] Walton v. Spherion Staffing, LLC, 152 F. Supp. 3d 403, 404 (E.D. Pa. 2015).

[7] *See* 42 U.S.C. §§ 12102(a), 12111(8), and 12112(b)(5)(A) (2018).

[8] *See, e.g.*, Scheidler v. Indiana, 914 F.3d 535, 539–40 (7th Cir. 2019) (describing a claim of alleged disparate treatment under the ADA that warranted trial for employee with depression, bipolar disorder, and post-traumatic stress disorder).

[9] *See id.* at 540–41 (describing a failure to accommodate claim as a separate

employers and their other employees have legitimate concerns about workplace violence. Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act),[10] the general duty clause,[11] warrants appropriate action by employers to safeguard the workplace as a matter of federal law enforcement by the Occupational Safety and Health Administration (OSHA).[12]

Unfortunately, many of the high-profile acts of mass violence in our society have not only occurred in public places and schools, but also occasionally in the workplace.[13] An ongoing commentary has noted that a violent attack against multiple people occurred so frequently in 2019 that Americans could expect an act of violence in a public setting on a daily basis.[14] Some of these violent acts were committed by workers attacking their co-workers.[15] Did mental illness play a role? "[W]hile there is some

discrimination claim under the ADA and different from a disparate treatment claim); *see also* Poe v. Waste Connections US, Inc., 371 F. Supp. 3d 901, 909–11 (W.D. Wash. 2019) (discussing failure to accommodate as a possible ADA discrimination claim brought by an employee with major depressive disorder).

[10] Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat 1590 (codified at 29 U.S.C. §§ 651–678 (2018)).

[11] 29 U.S.C. § 654 (2018).

[12] *See Occupational Safety and Health Administration Workplace Violence Enforcement*, U.S. DEPT. OF LAB., https://www.osha.gov/SLTC/workplaceviolence/standards.html (last visited Apr. 10, 2020).

[13] *See* Christal Hayes & Paul Brinkmann, *Orlando Shooting Is Latest in Growing Trend of Workplace Violence, Expert Says*, ORLANDO SENTINEL (June 5, 2017), https://www.orlandosentinel.com/news/orlando-workplace-shooting/os-orlando-workplace-shooting-violence-uptick-20170605-story.html (suggesting that "about 2 million people are victims of workplace violence each year"); *see also* Charles Montaldo, *It's Official: Going Postal Is Epidemic*, THOUGHTCO (June 30, 2017), https://www.thoughtco.com/going-postal-epidemic-972216 (describing incidents of workplace violence).

[14] Courtland Jeffery, *Mass Shootings in the U.S.: When and Where They Have Occurred in 2019*, ABC NEWS (Nov. 14, 2019), https://www.abc15.com/news/data/mass-shootings-in-the-united-states-when-where-they-have-occurred-in-2019 (366 mass shootings in 2019 through November 14, 2019); *see* Lisa Marie Pane, *US Mass Killings Hit New High in 2019, Most Were Shootings*, SEATTLE TIMES (Dec. 29, 2019), https://www.seattletimes.com/nation-world/nation/ap-exclusive-mass-killings-spiked-to-new-high-in-2019/ (referring to 41 mass killings in 2019 of 4 or more people at one time, resulting in 211 killings overall, with 33 of the killings being mass shootings, and the other 8 were fires or other weapons).

[15] *See* Rose Miller, *Be Prepared to Deal with Workplace Violence*, ALBANY TIMES UNION (July 4, 2017), https://www.timesunion.com/tuplus-business/article/Be-prepared-to-deal-with-workplace-violence-11266124.php (showing Department of Labor statistics "reveal 15 percent of workplace violence victims are killed by co-workers"). Although there were 500 workplace homicides in the United States in 2016, only a small percentage of those homicides involved actions by co-workers, as most involved robberies. *There Were 500 Workplace Homicides in the United States in 2016*, TED: THE ECONOMICS DAILY (Jan. 23, 2018), https://www.bls.gov/opub/ted/2018/there-were-500-workplace-homicides-in-the-united-states-in-2016.htm; *see also* Barbara Hoey, *How to Lawfully Prevent Workplace Violence*, LAW360 (Oct. 5, 2009), https://www.law360.com/articles/123979/how-to-lawfully-prevent-workplace-violence.

debate in the psychiatric community as to the degree to which a diagnosis of mental illness is related to an increased risk of violent behavior, research has shown that individuals suffering from a mental disorder, if properly treated, may have no greater propensity to commit violent acts as compared to non-mentally ill individuals."[16] The reality is that mass shootings in the workplace are rare.[17] These shootings occur at such an infrequent rate that "criminologists who study gun violence caution that the number of workplace shootings is too small to draw reliable conclusions."[18]

Many people in the workplace, however, do not understand the nature of mental illness. Based upon heightened fears of violence and a lack of understanding about the challenges facing workers dealing with mental illness, co-workers tend to respond to these developments by employing stigma[19] and stereotyping, actions intended to be regulated and banned as

[16] Ham v. Haley, No. 6:13-CV-03077-JMC, 2015 WL 5437153, at *9 (D.S.C. 2015) (citing Walton v. Spherion Staffing, LLC, 152 F. Supp. 3d 403, 410–11 n.16 (E.D. Pa. 2015) (describing studies)); *see also* Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection*, 26 HEALTH MATRIX 205, 219 (2016) ("While the research is somewhat mixed as to whether mentally ill individuals are more violent than the general population, any correlation that exists is both small and overly exaggerated in the public's mind. Some studies have found that mentally ill individuals are not more likely to be violent. Other studies have found that while there is a small correlation between violence and mental illness, this correlation is primarily caused by other comorbid factors. The author of one meta-analysis explained that 'mental disorders are neither necessary nor sufficient causes of violence . . . . Mentally ill individuals are far more likely to be the victim of violence than they are to engage in violent behavior."); Adam Lamparello, *Why Wait Until the Crime Happens? Providing for the Involuntary Commitment of Dangerous Individuals Without Requiring a Showing of Mental Illness*, 41 SETON HALL L. REV. 875, 891 (2011) ("Based upon numerous empirical studies, mental illness, in and of itself, does not bear a significant causal relationship to violent behavior.").

[17] *See* Lisa Marie Pane, *Mass Shootings in the Workplace Are Rare and Puzzling*, AP NEWS (June 6, 2019), https://apnews.com/9909cc2fe55e4f29a76f1d84583f9d90.

[18] *Id.* (also discussing the comments of Susan Sorenson, a professor from the University of Pennsylvania Ortner Center on Violence and Abuse in Relationship, stating "[t]here are so many questions we don't have any answers to").

[19] *See* Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill"*, 34 U.C. DAVIS L. REV. 849, 850–51 (2001) (referring to stigmatizing, stereotypical notions, misunderstanding, and baseless fears of violence from individuals with mental illness); Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans With Disabilities Act*, 17 GEO. MASON U. C.R.L.J. 79, 89 (2006) (describing the lowering of the threshold for finding a psychiatric disorder as a process to label and shun those behaviors we do not like in our society by classifying people as ill); *see also* Jessica Glenza, *Blaming Mass Shootings on Mental Illness Leads to Stigma, Experts Warn*, GUARDIAN (Aug. 6, 2019), https://www.theguardian.com/us-news/2019/aug/06/mass-shootings-blame-mental-illness-stigma (describing comments from mental health experts about the stigma that the mentally ill face because of wrong statements attempting to connect mass shooting violence with mental health issues). Also, it is not unusual for employers to place more heightened concern on violence in the workplace than the data suggests. *See* Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for*

evidence of employment discrimination by the ADA.[20] Although enacted in 1990 to address discrimination based upon disability, Congress found that amendments to the ADA became necessary in 2008 because of the limited scope of what was found to be a disability as interpreted by the Supreme Court.[21] The Court in many instances had determined that employees were not statutorily disabled because they were not that limited in their capacities to perform various tasks, or they could adopt mitigating measures to perform within a modicum of independence in our society.[22] The responsive amendments to the Court's limited interpretation of the ADA, the ADA Amendments Act of 2008 (ADAAA),[23] expanded the statutory definition of disability. Now, the analysis starts with the suggestion that an employee is statutorily disabled in most situations, and will then focus on whether an employer must provide a reasonable accommodation for the employee to perform the essential functions of the job.[24]

a Comprehensive Strategy, 35 FLA. ST. U. L. REV. 669, 686–87 (2008) (identifying how employers were more willing to be concerned about workplace violence and the liability for it as purportedly committed by a domestic partner of an employee in contrast to any strong evidence about such incidents occurring that often while not spending much time focusing on protecting the employee victims).

[20] *See* Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 409–17 (2006); *see also* Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1133–34 (10th Cir. 2003) (finding an employer's refusal to consider a treating physician's assessment of the abilities of an employee with bipolar disorder to perform job duties raised a jury question as to whether it could be inferred that the employer took the disciplinary action "based on myth, fear, and stereotype, rather than an individualized evaluation").

[21] *See* Nicole Buonocore Porter, *Cumulative Hardship*, 25 GEO. MASON L. REV. 753, 759–63 (2018) (describing trilogy of cases involving narrow reading of statutory definition of disability under the ADA that the ADAAA sought to overturn); Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 384 (2019); *see also* Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 532–36 (2011) (explaining all the reasons and ways the ADAAA "dramatically expanded coverage" for the statutory disability definition compared to the ADA).

[22] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002) (narrowly defining ADA standard for disability by only looking at impairments to "performing tasks that are of central importance to most people's daily lives"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 488–89 (1999) (narrowly limiting disability definition to only those matters not correctable by the application of mitigating measures).

[23] *See* ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. §§ 12101–12114 (2018)).

[24] *See* Jeannette Cox, *Reasonable Accommodations and the ADA Amendments' Overlooked Potential*, 24 GEO. MASON L. REV. 147, 148 (2016) (referring to how the expansion of the ADA's protected class through disability definitional changes now will lead to the courts having to resolve many unanswered questions about the scope of reasonable accommodation analysis); *see also* Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?* 26 J.L. & POL'Y 1, 61 (2018) (reviewing empirically a list

Employees dealing with mental illness may exhibit behavior that generates fears of violence from co-workers and leads to disciplinary actions.[25] Identifying a reasonable accommodation that allows an employee with mental illness to perform the essential functions of the job may require some creativity, especially when balancing concerns about workplace safety.[26] In 2016, the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the ADA, issued regulations after the passage of the ADAAA to highlight the importance of establishing reasonable accommodations for employees confronting challenges due to mental illness.[27] With potential liability looming under the ADA after the ADAAA amendments, employers must now face the dilemma of adopting mental illness accommodations while also considering the safety effects on other workers in determining the proper disciplinary balance.[28]

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of 219 cases decided since the ADAAA and concluding that "the ADAAA has managed to push the conflict in at least some ADA cases away from the issue of whether a plaintiff meets the arcane and complex definition of disability, and toward the question of whether the plaintiff actually experienced discrimination").

[25] *See* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 188, 259–65 (2005) (describing several incidents where courts found that an employee's mental illness led to conduct warranting disciplinary action, and no violation of the ADA in cases where acts suggested violence).

[26] *See* Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees with Psychiatric Disabilities*, 55 AM. BUS. L.J. 537, 548–66 (2018) (suggesting several options as reasonable accommodations for employees dealing with mental illness); Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP. POL'Y J. 293, 340 (2005); Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 967, 973 (1997).

[27] *See Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Dec. 12, 2016), https://www.eeoc.gov/eeoc/publications/mental_health.cfm.

[28] *See* Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP POL'Y J. 35, 77–89 (2013) (describing employer fears about employee misconduct resulting from mental illness and the inability to address these concerns under ADAAA amendments and regulations being considered to enforce those provisions); Wendy F. Hensel, *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*, 52 HARV. C.R.-C.L. L. REV. 73, 98–101 (2017) (describing challenges in establishing reasonable accommodations for employees with mental illness when those employees are charged with disciplinary violations). Unfortunately, there are also some early indications that courts are starting to shift their focus from denying employee claims under the ADA's statutory definition of disability before the ADAAA to now finding that employee claims under the ADA should be denied because the employees cannot perform the essential functions of their job. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Ac*t, 70 WASH. & LEE L. REV. 2027, 2032 (2013); *see also* Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 67 (2014) (noting that early indications from cases since the ADAAA suggest that courts might now be focusing on restricting application of reasonable accommodation analysis to prevent

This Article asserts that employers and employees should employ private and outside neutral mediators to work with them in determining a reasonable accommodation when mental illness and fears of workplace violence are at issue.[29] Mediators with specialized training in dealing with mental illness can help facilitate communication between the employer and employee.[30] This mediation could operate consistently with the ADA's understanding that "the duty to accommodate will begin with an interaction wherein the employee requests an accommodation and the employer reciprocates with communication to reach an understanding about what changes are needed in the workplace and whether those changes would be unduly disruptive to the employer's operations."[31] Thus, "an employer should engage in an 'interactive process'" in deciding the reasonable accommodation needed.[32] A mediator can engage the assistance of those

employee recovery as occurred previously with the limited approach to the statutory definition of disability, but then finding the "number [of cases] is [not] high enough" to provide "compelling evidence of that now").

[29] *See* Mark C. Travis, *A Change in Focus—Mediation of Claims Under the ADA Amendments Act*, 18 DISP. RESOL. MAG. 33, 35 (2012) (arguing that summary judgment will be less likely with ADAAA changes and mediators will focus the parties on the task of "whether the disabled individual can perform the essential functions of the job with or without a reasonable accommodation"); *see also* Ryan Ballard & Chris Henry, *Mediation and Mental Health Claims Under the ADA*, 44 CAP. U. L. REV. 31, 54–61 (2016) (suggesting and describing mediation of mental health claims under the ADA).

[30] *See* Judith Cohen, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 1 (2001) (discussing comments from a program convened by CUNY Professor Maria Volpe, describing how twelve experienced mediators prepared special guidelines for an accessible ADA mediation process that guarantees informed consent while ensuring mediators have the capacity and training to address special needs of disabled participants); *see also* Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 445–46, 467–68, 485–86 (1996) (describing program providing training sponsored by the EEOC and the Department of Justice to twenty-five individuals to be certified as trained mediators even though this program did not include reasonable accommodation mediations but suggested that reasonable accommodations would be an important issue to consider in mediation).

[31] Hickox & Hall, *supra* note 26, at 573, n.209 (citing 29 C.F.R. § 1630.2(o)(3) (2019)); *see also* Stacy A. Hickox & Angela T. Hall, *Arbitration of Claims for Accommodations: A Fair Resolution?*, 52 U. S.F. L. REV. 31, 60–62 (2018) (describing benefits of having an internal dispute resolution system to address an employee's request for a reasonable accommodation under the ADA with a focus on labor arbitration provided under a collective bargaining agreement); Travis, *supra* note 29, at 35 (describing how the mediator can "begin to brainstorm potential reasonable accommodations that might enable the employee to perform" and offer "restructuring the job . . . part-time or modified work schedules, reassignment to a vacant position, as well as acquisition or modification of equipment, among other things" that might be helpful in the "'interactive process' to determine the appropriate reasonable accommodation for an individual with a disability").

[32] Hickox & Hall, *supra* note 26, at 573–74, n. 210 (citing Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)); *see also* Poe v. Waste Connections US, Inc., 371 F. Supp. 3d 901, 910 (W.D. Wash. 2019) ("[N]otifying an employer of a need for an accommodation triggers a duty to engage in an 'interactive process' through which the

with additional expertise in addressing the mental illness at issue including mental health service providers[33] while establishing appropriate norms that will govern the mediation process in determining and negotiating a reasonable accommodation.[34]

The historic preferences and motivations of employers to litigate liability issues either with the EEOC or in the courts tended to preclude the possibility of mediating ADA claims.[35] Now with the changes in potential liability from the ADAAA[36] and the focus on reasonable accommodations, these actions have created an opening for more use of mediation.[37] Using

employer and employee can come to understand the employee's abilities and limitations, the employer's needs for various positions, and a possible middle ground for accommodating the employee.") (citation omitted). Note that a single letdown may be a "one-off" and not proof of an overall breakdown in the interactive process. Scheidler v. Indiana, 914 F.3d 535, 542 (7th Cir. 2019) (explaining that a '"[r]easonable accommodation under the ADA is a process, not a one-off event'") (citation omitted).

[33] *See The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (May 1, 2013), https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm.

[34] *See* Jacqueline Rau, Note, *No Fault Discrimination? Using the Americans with Disabilities Act as a Model for "Norm Advocating" Mediation in Title VII Disputes*, 27 OHIO ST. J. ON DISP. RESOL. 241, 244 (2012) (referring to the benefits of using mediation and its collaborative approach as an effective "norm advocating" tool to resolve ADA claims including accommodation disputes by focusing on non-perpetrator objectives while not attaching moral stigma); *see also* Stacy A. Hickox, *Bargaining for Accommodations*, 19 U. PA. J. BUS. L. 147, 203–07 (2016) (describing benefits for disabled employees if a union negotiates reasonable accommodations with an employer in a collective bargaining agreement).

[35] *See* Andrew Hsieh, Comment, *The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities*, 44 MCGEORGE L. REV. 989, 1015–17 (2013) (describing how a survey of employers showed that they rarely mediated EEOC disability charges and especially psychiatric disability charges because they believed they had little motive to do so given that they clearly found most of the claims to be without merit and unlikely to succeed in litigation and there also appeared to be some bias by the EEOC in not offering such claims for mediation because the claimants were difficult to work with in the negotiation process). *But see* Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC's Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 21–31 (2008) (suggesting how mediation can reduce unique transaction costs involved in negotiating workplace disabilities accommodations even if employers believe that employees should not prevail in pursuing a discrimination claim).

[36] *See* Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments of 2008*, 62 OKLA. L. REV. 667, 670 (2010) (arguing that the win rate for plaintiffs in ADA cases will increase due to the ADAAA amendments). *But see* Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 713–15, 721–26 (2014) (discussing difficulties in establishing accommodations even after the ADAAA changes).

[37] *See* Travis, *supra* note 29, at 35; *see also* Hsieh, *supra* note 35, at 1002, 1016 (asserting that "the ADAAA increased the likelihood that a disability discrimination case could proceed beyond the initial stages" and explaining that employers would be more likely to mediate "after receiving some indication that the employee is seriously considering a private lawsuit"). In general, several commentators have advocated for the benefits of

mediation can provide a crucial factor in finding the best approach to resolve ADA accommodation proposals.[38] The concerns about accommodating employees with mental illnesses can be handled to provide a win-win opportunity for all involved through process-based and remedial-focused mediations that foster a positive and ongoing employment relationship.[39] The employees suffering from mental illness, as well as employers and co-workers worried about dealing with misconduct, will have all their interests addressed.[40]

This Article proceeds as follows. In Part II, this Article examines the full scope of legal protections regarding workplace accommodation for mental illness after the ADAAA amendments both from the approach of the EEOC and in court decisions. Part II also highlights the liability and

mediation in resolving workplace disputes. *See, e.g.*, Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 284–91 (2003) (asserting that mediation, despite its faults, is better for resolving employment discrimination disputes than litigation); Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 209–10 (2004) (arguing that private caucus is an essential procedural element to be used in mediation of workplace discrimination claims because it allows the mediator to cultivate unique group identities involved in the dispute); Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases Is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261, 262–65 (1998) (asserting that mediation is helpful to resolving employment discrimination claims but it is being pursued too late after a charge of discrimination is filed or a lawsuit begins); Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 353–57 (2005) (explaining that fair processes, if employed, would help parties resolve employment disputes through mediation).

[38] *See* Kathryn E. Miller, *Mediating the Interactive Process*, 46 COLO. LAW 35, 35–37 (2017), https://www.ladrmediation.com/wp-content/uploads/2017/06/May2017_LaborEmployment Law-1.pdf (describing how reasonable accommodation determination requires an "interactive process" and because the employer and human resource personnel may not have training to navigate the mental health issues, using mediation for the interactive process may help).

[39] *See* Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV 1351, 1374–77 (2008) (discussing the "benefits that accrue to employers, nondisabled employees, and the workplace environment" when opening up opportunities for employees with mental disabilities); *see also* Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 335–36, 350–53 (2009) (describing the benefits that co-workers reap from the positive treatment of those protected by the ADA including the use of accommodations provided); Rau, *supra* note 34, at 242–43 (describing benefits of using mediation rather than other dispute resolution processes for resolving ADA disputes).

[40] *See* Ami C. Janda, Comment, *Keeping a Productive Labor Market: Crafting Recognition and Rights for Mentally Ill Workers*, 30 HAMLINE J. PUB. L. & POL'Y 403, 435 (2008) (describing employer benefits in accommodating workers with mental illness); Rau, *supra* note 34, at 244 (discussing ongoing employment relationships as a benefit to use mediation).

policy challenges employers must confront when addressing accommodations for workers' mental illness. Part III establishes a framework for employers and employees to mediate reasonable accommodations based upon mental illness when juxtaposed with concerns about workplace violence and mistreatment of co-workers. In Part IV, the Article concludes that under a balanced framework with competent and trained mediators included, employers and their employees with psychiatric disabilities and other workers without disabilities will all benefit from the use of mediation to address mental illness accommodations while also balancing concerns about workplace violence.

II. EEOC AND COURT REASONABLE ACCOMMODATION FOR MENTAL ILLNESS AFTER THE ADAAA

During the EEOC's fiscal year 2016, it "resolved almost 5,000 charges of discrimination based on mental health conditions, obtaining approximately $20 million for individuals with mental health conditions who were unlawfully denied employment and reasonable accommodations."[41] As a result, the EEOC's position on addressing reasonable accommodation for psychiatric disabilities plays a key role in understanding the legal obligations at issue. Because Congress expressly delegated rulemaking authority to the EEOC under Title I of the ADA,[42] the EEOC's regulations and its guidance regarding these regulations are entitled to deference.[43] The EEOC explicitly recognizes that it has the authorization from Congress to develop "legislative regulations" that courts must defer to so long as they are reasonable.[44]

The EEOC has issued regulations to implement the equal employment provisions of the ADA including the following regulation that identifies types of possible accommodations to consider:

> [m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or

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[41] *See* Press Release, Equal Employment Opportunity Commission, EEOC Issues Publication on the Rights of Job Applicants and Employees with Mental Health Conditions (Dec. 12, 2016), https://www.eeoc.gov/eeoc/newsroom/release/12-12-16a.cfm; Linda B. Dwoskin & Melissa Bergman Squire, *The Latest on Managing Workplace Mental Health Issues*, LAW360 (Feb. 10, 2017), https://www.law360.com/articles/888296/the-latest-on-managing-workplace-mental-health-issues.

[42] 42 U.S.C. § 12116 (2018).

[43] *See* Federal Exp. Corp. v. Holowecki, 552 U.S. 389, 397 (2008); Auer v. Robbins, 519 U.S. 452, 462–63 (1997); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[44] *See What You Should Know About EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, EQUAL EMP. OPPORTUNITY COMM'N (May 5, 2016), https://www1.eeoc.gov//eeoc/newsroom/wysk/regulations_guidance_resources.cfm?renderforprint=1.

> desired is customarily performed . . . job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.[45]

These regulations also provide that when determining the appropriate accommodation, an employer must engage in "an informal, interactive process with the individual with a disability in need of the accommodation" and "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[46] A covered entity must "provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability" unless it would constitute an undue hardship.[47]

A. *EEOC Position on Mental Illness Accommodations Amid Threats of Violence*

The EEOC's final regulations regarding the ADAAA were published on March 25, 2011, and changed terms to Title I of the ADA and the EEOC's corresponding Interpretive Guidance of the ADA.[48] The ADAAA expands the definition of disability to address several cases that had limited the scope of what types of physical or mental impairments could be covered as disabilities, especially in light of the opportunity to apply mitigating measures to effectively operate in society.[49] The availability of mitigating measures, except for eyeglasses or contact lenses, is no longer considered in establishing a disability as a result of the ADAAA.[50] Persons with many types of impairments—including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder—who had been unable to bring ADA claims because they were found not to meet the ADA's prior definition of "disability" when mitigating measures were considered, will now find it easier to demonstrate that they now meet that definition. Consequently, many more ADA claims based upon these impairments will now focus on the reasonable accommodation merits of the case rather than

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45 *See* 29 C.F.R. § 1630.2(o) (2019).

46 *Id.* at (3).

47 *Id.* at (4).

48 *See Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 2011), http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

49 *See* ADA Amendments Act of 2008, Pub. L. No. 110325, § 4(a), 122 Stat. 3553 (2008); 29 C.F.R. § 1630.2(j)(1)(vi).

50 29 C.F.R. § 1630.2(j)(1)(vi).

the threshold question of whether an employee was actually disabled as defined under the ADA.[51]

The EEOC issued a "Guidance" in 1997 that addresses psychiatric disabilities.[52] The Guidance also added a notice to it after the passage of the ADAAA to acknowledge that changes in how disability is determined by the ADAAA may have some effect on the Guidance.[53] The Guidance provides examples of the mental or emotional illnesses that represent a mental impairment under the ADA.[54] Some of the mental impairments identified in the Guidance include "major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders."[55] The Guidance does note that some mental illnesses may not be a disability if they are only expected to be temporary. The Guidance also discusses a diagnosis of "adjustment disorder" for an employee who exhibited agitation and distress at work after the end of a "romantic relationship" as an example with no expectation of a long-term problem.[56] Another example in the Guidance describes an employee with "bipolar disorder" who is taking medication that has abated his condition, but who is clearly disabled under the ADA because his diagnosis states that the duration of his bipolar disorder is indefinite and potentially long-term.[57] After the ADAAA's expansion of the definition of disability, the more important aspects of the Guidance relate to its discussion of Disclosure of Disability, Requesting Reasonable Accommodation, Selected Types of Reasonable Accommodations, Conduct, and Direct Threat—all of which include excellent examples of employees with mental or emotional illnesses and conduct, including threats of violence.[58]

1. Disclosure of Disability

Employees may fear stigma about their psychiatric disability.[59] This

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[51] *See* Porter, *supra* note 21, at 756 (asserting that ADAAA changes are demonstrating that "many more cases are getting . . . into the merits of the case," which "often include issues of whether an employee is qualified for the job and whether the employer is obligated to provide a reasonable accommodation").

[52] *See EEOC Enforcement Guidance on the American with Disabilities Act and Psychiatric Disabilities*, EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 1997) [hereinafter *Guidance*], http://www.eeoc.gov/policy/docs/psych.html.

[53] *Id.*

[54] *Id.* (Question 1).

[55] *Id.*

[56] *Id.* (Question 7, Example C).

[57] *Id.* (Question 7, Example B).

[58] *See generally Guidance*, *supra* note 52.

[59] *See id.* (Introduction & n.2) (discussing how "individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or

fear could lead an employee to not only fail to disclose the existence of a psychiatric disability, but the employee may even try to hide it from being discovered. Nevertheless, an employer cannot investigate whether an employee has a psychiatric disability that will need accommodation unless the employer has a reasonable belief, based on objective evidence, that the employee's ability to perform his essential job functions is impaired by a mental condition. The Guidance refers to an example where an employee repeatedly fails to deliver packages to the right addresses on his route.[60] The Guidance makes it clear than an employer may not inquire about or seek an examination to determine if the employee has a psychiatric disability if there is no indication that the employee's inability to perform his essential job function is due to a medical condition.[61] Regardless, the employer may also take appropriate disciplinary action under these circumstances.[62]

On the other hand, the Guidance gives an example of a limousine service that knows a driver "has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings."[63] During the episode, the driver "engaged in behavior that posed a direct threat to himself and others" when he drove the limousine in a reckless manner.[64] After taking a leave and returning to work within his usual level of performance, the employer became concerned about the return of a manic episode if it assigned the driver to a job that would require him to drive executives engaged in "around-the-clock labor negotiations."[65] Under these facts, the employer could inquire about the driver's disability-related status.[66] The Guidance states that the employer can show in this example that it has a "reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition."[67] This finding is based upon the fact that the employer has "no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings."[68] This example suggests that once an employer becomes aware of an

misunderstood" and "the myths, fears, and stereotype upon which it is based") (citation omitted).

60 *Id.* (Question 14, Example B).

61 *Id.*

62 *Id.* at n.42.

63 *Id.* (Question 14, Example C).

64 *Guidance*, *supra* note 52 (Question 14, Example C).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

employee's mental illness and a particular job condition that has triggered a situation posing a direct threat to his health and safety or to others, then the employer may inquire into an employee's psychiatric disability status.[69] That inquiry will be appropriate when considering a job assignment for an employee if the assignment may replicate the same job conditions that previously created a direct threat to the health and safety of the employee and others.

2. Requesting Reasonable Accommodation

The Guidance specifically notes that "[a]n employee's decision about requesting reasonable accommodation may be influenced by his/her concerns about the potential negative consequences of disclosing a psychiatric disability at work."[70] Under the Guidance, an employee "must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition."[71] The request does not have to mention the ADA or use the word "accommodation" and the employee may rely on "plain English" in making a request.[72] The Guidance does refer to a case where the court found that "an employee with a known psychiatric disability [had] requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist."[73] The Guidance also says that if an "employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations."[74]

3. Selected Types of Reasonable Accommodation

With respect to the types of reasonable accommodations for psychiatric disabilities, the Guidance discusses a number of options including "changes to workplace policies, procedures, or practices[;]" physical changes to the workplace; or provision of extra equipment.[75] Providing time off from work and modifying work schedules may also represent examples of a reasonable accommodation.[76] The actual

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[69] *See id.*

[70] *Guidance*, *supra* note 52 ("REQUESTING REASONABLE ACCOMMODATION").

[71] *Id.* (Question 17).

[72] *Id.*

[73] *Id.* at n.46 (discussing Bultemeyer v. Fort Wayne Comty. Schs., 100 F.3d 1281 (7th Cir. 1996)).

[74] *Id.* (Question 17, Example A).

[75] *Guidance*, *supra* note 52 ("SELECTED TYPES OF REASONABLE ACCOMMODATION").

[76] *Id.*; *see supra* notes 56–57 (describing the Job Accommodation Network as a source

determination of what is a reasonable accommodation is to be made on a case-by-case basis.[77] The Guidance also notes that there may be occasions where it is not "immediately apparent" to the parties what might be an "effective accommodation" request.[78] In those situations, the Guidance suggests the use of "[m]ental health professionals, including psychiatric rehabilitation counselors," who "may be able to make suggestions about particular accommodations" and "help employers and employees communicate effectively about reasonable accommodation."[79]

4. Conduct

With respect to disciplining employees with psychiatric disabilities, the Guidance provides a number of examples that explain to employees and employers how to deal with issues of misconduct. The Guidance initially notes that any enforcement of a workplace conduct standard must be job-related for the position and consistent with business necessity, such as a provision that prohibits violence or threats of violence in the workplace.[80] An example of conduct provisions that are not job-related nor a business necessity include a policy expecting general courtesy towards co-workers and a dress code policy when both are applied to an employee who has no customer contact and does not come into regular contact with other employees.[81] In identifying threats of violence as being prohibited by a job-related and business necessity conduct standard, the Guidance appears to directly resolve situations where an employee has threatened other employees with violence. The Guidance does require that the employer implementing any discipline for such misconduct can only do so if "it would impose the same discipline on an employee without a disability."[82]

According to the Guidance, even if an employee committed misconduct in violation of a standard that is job-related and a business necessity, an employer may still have to make a reasonable accommodation for the employee's psychiatric disability.[83] In focusing on prospective actions, the Guidance makes it clear that an employer has an obligation to "make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future,

for help in identifying accommodations and suggesting "traumatic brain injuries, stroke, and other mental disabilities" as ones that may not be readily apparent as to the accommodation that would be effective).

77 *Id.* ("SELECTED TYPES OF REASONABLE ACCOMMODATION").

78 *Id.*

79 *Id.*

80 *Id.* (Question 30).

81 *Guidance*, *supra* note 52 (Question 30, Example C).

82 *Id.* (Question 31).

83 *See id.*

barring undue hardship."[84] This suggests that the most important questions to ask would be whether the request for an accommodation occurred before the unacceptable conduct resulted and whether the employer took immediate action based upon that conduct.[85] Several of the examples in the Guidance refer to disciplinary actions involving something less than a termination for conduct occurring before the employee informed the employer of a disability and requested an accommodation.[86] In those circumstances, the discipline does not have to be changed. [87] But, the employer must provide the requested accommodation that could allow the employee to meet the conduct standard in the future and prevent subsequent disciplinary action.[88]

Another specific example from the Guidance describes a situation where the employee has "a hostile altercation with his supervisor and threatens the supervisor with physical harm."[89] In recognizing that an employer may terminate the disabled employee for this misconduct if it consistently terminates all employees for such conduct and does so immediately, the EEOC explains how the timing of the termination protects employers.[90] The Guidance also poses the question of whether the employer must accept the employee's request to put the termination on hold and accommodate a request for a month of leave for treatment when the employee first notifies the employer of his disability and requests an accommodation *after* he receives notice of his termination.[91] If the employer first learns of the employee's disability along with a request for an accommodation after an employee has been terminated, the employer does not have to accommodate the employee's request.[92]

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84 *Id.* (Question 31 (citing 29 C.F.R. § 1630.15(d) (2019)).

85 *Id.*; *see also* Walton v. Spherion Staffing LLC, 152 F. Supp. 3d 403, 411–12, n.17 (E.D. Pa. 2015) (distinguishing other cases of misconduct because this employer waited three weeks to terminate the employee which raised factual questions about whether the termination decision occurred "as a result of [the employee's] disability and need for urgent, and presumably expensive, medical attention, rather than as a result of any workplace threat"); Yarberry v. Gregg Appliances, Inc., 625 F. App'x 729, 742 (6th Cir. 2015) (finding "the timing of a[n] [accommodation] request is crucial, as 'an employer does not have to rescind discipline (including termination) warranted by misconduct'" but if the employee had "not . . . [yet] engaged in misconduct meriting termination," the "request might have been timely" and the employer "would have been obliged to try to accommodate him" to prevent future misconduct that could result in termination).

86 *Guidance*, *supra* note 52 (Question 31, Example B).

87 *Id.*

88 *Id.*

89 *Id.* (Question 31, Example C).

90 *Id.*

91 *Id.*

92 *Guidance*, *supra* note 52.

Pursuant to the Guidance, a request for reasonable accommodation is always prospective and does not require an employer "to excuse past misconduct."[93] As a result, a termination decision for misconduct made before the employer was aware of the employee's disability and before any request for an accommodation was made does not have to be rescinded.[94] An employee is no longer a qualified individual with a disability once he is terminated, consistent with employees without a disability, for a conduct standard that is job-related and consistent with business necessity.[95] Then the employer is not required to offer a reasonable accommodation for the future because the terminated individual is no longer a qualified individual with a disability.[96] But if the employer implements lesser discipline, then an employee can request an accommodation to comply with performance standards before being terminated.[97] This leaves only the question of whether the Guidance provides any other assistance as to whether the employer may possibly assert the affirmative defense of direct threat to the health and safety of the employee or to others.

5. Direct Threat

The Guidance refers to a situation where an employer is considering the hiring of an applicant as an employee and learns that this applicant was terminated from his prior employer for threatening his supervisor.[98] According to the Guidance, an employer can refuse to hire an employee that has "a history of violence or threats of violence."[99] The employer must show a direct threat to health and safety of the employee or others. This showing must be based on an "individualized assessment of the individual's present ability to safely perform the [essential] functions of the job, considering the most current medical knowledge and/or the best available objective evidence."[100] In this example, the showing of a sufficient direct threat was based upon several "recent overt acts and statements (including an attempted fight with a co-worker, punching the wall, and making a threatening statement about the supervisor)" that led to the applicant's termination by the prior employer just a few weeks earlier.[101] All of these acts demonstrated that the applicant posed "a

93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Guidance*, *supra* note 52 (Question 34, Example).
99 *Id.* (Question 34).
100 *Id.*
101 *See id.* (Question 34, Example).

'significant risk of substantial harm.'"[102] Also, there was evidence that despite prior attempts to treat the applicant's disability, those efforts were unsuccessful, and there was no subsequent treatment leading up to the date of his application for employment.[103] The Guidance found that this applicant presented a direct threat. [104]

B. *Part and Parcel: Mental Illness Accommodation Cases with Threats*

One common question regarding mental illness accommodation that has resonated in the courts is whether terminating an employee for conduct that springs from an employee's psychiatric disability may be separated from terminating the employee because of the disability, something prohibited by the ADA.[105] The Ninth Circuit Court of Appeals addressed this issue in 2007 in *Gambini v. Total Renal Care, Inc.*[106] In *Gambini*, the employee worked at DaVita and suffered from multiple health issues that predated her employment.[107] While working at DaVita, the employee was diagnosed with bipolar disorder.[108] The employee informed her supervisors of her disorder and requested accommodations while also notifying co-workers of the mood swings she was addressing through medication and asking them to be patient with her if she seemed irritable.[109]

The employee had a threatening outburst at a meeting with her supervisor to discuss her work performance.[110] After the meeting, the employee started experiencing suicidal thoughts and at the suggestion of the nurse practitioner treating her bipolar disorder, the employee informed the supervisor that she needed "to check into the hospital."[111] When the employee's boyfriend arrived at the supervisor's request to pick the employee up from work to take her to the hospital, the supervisor gave the boyfriend medical leave forms for the employee to complete.[112] The supervisor also signed the employee's personnel change notice for her leave request and granted the request on a preliminary basis subject to verification by the employee's health care provider.[113]

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102 *Id.*
103 *Id.*
104 *Id.*
105 *See* Timmons, *supra* note 25, at 259–61.
106 486 F.3d 1087, 1093 (9th Cir. 2007).
107 *Id.* at 1091.
108 *Id.*
109 *Id.*
110 *Id.* at 1092.
111 *Id.*
112 *Gambini*, 486 F.3d at 1092.
113 *Id.*

After an investigation about the employee's behavior that included an inquiry as to her expected date of return, the employer decided to contact the employee to notify her of its termination decision.[114] Three days after being informed of the termination, the employee sent her supervisor a letter that informed the employer that her outburst and behavior had occurred because of her bipolar disorder and asked the employer to reconsider the termination.[115] DaVita refused to reconsider its termination decision.[116]

The Ninth Circuit held that the employee's violent outbursts were arguably symptomatic of her bipolar disorder and that "the jury was entitled to infer reasonably that her 'violent outburst' . . . was a consequence of her bipolar disorder, which the law protects as *part and parcel* of her disability."[117] This case suggests that an employer faced with knowledge of an employee's mental illness before taking disciplinary action short of termination should instead seek an accommodation when the employee's violent outbursts appear to be "part and parcel" of the employee's psychiatric disability.[118]

In *Menchaca v. Maricopa Community College District*,[119] an employee suffered from post-traumatic stress disorder (PTSD) and brain trauma after being involved in a car accident. After a conversation with a new supervisor, the employee had a violent outburst directed toward the supervisor. The employee threatened to "kick [the supervisor's] ass," and this led to the employer terminating the employee's employment.[120] Citing to *Gambini*, the court stated that "[s]ince the Ninth Circuit concluded that such facts could be protected as part of a disability, the facts here at least present an issue of fact sufficient to forestall summary judgment."[121] This represents another case where the employee had requested an accommodation that the employer had not provided. When an outburst and a threat of violence occurs, the court found that jurors can reasonably believe that the employer's termination actions violated the ADA because the termination was due to the disability, which could not be separated

114 *Id.*

115 *Id.* at 1091–92.

116 *Id.* at 1092.

117 *Id.* at 1094 (emphasis added).

118 *But see* Yarberry v. Gregg Appliances, 625 Fed. App'x 729, 742 (6th Cir. 2015) (discussing the timing issue presented by EEOC Guidance where an employer may still terminate an employee for misconduct, such as threats, if part of the non-discriminatory enforcement of performance expectations that are job-related and a business necessity is action taken before request for an accommodation occurs).

119 595 F. Supp. 2d 1063, 1065 (D. Ariz. 2009).

120 *Id.* at 1073.

121 *Id.* at 1075.

from the misconduct that occurred.[122] In *Bacon v. T-Mobile USA, Inc.*,[123] similar to *Gambini* and *Menchaca*, the court found that the employer was aware of the employee's disability and how the disciplinary action in the case could have occurred because "of his 'conduct resulting from his disability.'"[124] Dismissal was denied based on the reasoning in *Gambini*.[125]

In *Walton v. Spherion Staffing LLC*,[126] the court balanced the "legal requirement to accommodate mentally ill employees and the moral imperative of providing a safe workplace" by looking at "the specific facts . . . as ably pleaded" when the employee expressed suicidal and homicidal tendencies at work in a note given to his supervisor.[127] The note stated: "Lizelle, Please Help Call [telephone number provided] Mom [telephone number provided] Dad The police I'm scared and angry. I don't know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me. Make sure, please. I'm unstable. 'I'm sorry Taj.'"[128]

The employee waited until police escorted him peacefully from the workplace to a hospital.[129] The employee was subsequently diagnosed with depression, required further medical treatment, and tried for a few weeks to inform Parks, his supervisor, about his diagnosis.[130] The employee could not reach his supervisor, so he contacted Human Resources and informed the department of his disability and the need for care.[131] The employee called his supervisor again, and received a returned call by text three weeks after the incident that stated the supervisor was on "intermittent medical leave" and would contact the employee when returning from leave.[132] The next day when the employee called, his supervisor informed him that the employer had terminated the employee, and cancelled the employee's health insurance policy.[133] The employee claimed his supervisor "terminated his employment because of his disability, and failed to make any efforts to accommodate his depression . . . ."[134]

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122 *See id.*

123 No. C09-5608RJB, 2010 WL 3340517, at *1 (W.D. Wash. Aug. 23, 2010).

124 *See id.* at *7 (quoting Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093 (2007)).

125 *Id.* at *8.

126 152 F. Supp. 3d 403, 404 (E.D. Pa. 2015).

127 *Id.* at 404–05.

128 *Id.* at 405.

129 *See id.*

130 *See id.*

131 *Id.*

132 *Walton*, 152 F. Supp. 3d at 405.

133 *Id.*

134 *Id.* at 406.

The employer "moved for judgment on the pleadings . . . on the ground that the threat of violence took Plaintiff outside the protection of the statutes."[135] The court considered several cases that supported the employer's "argument that a disabled person can be lawfully terminated for disability related misconduct—so long as the employer's explanation is not a pretext for discrimination."[136] According to the court, however, those cases were based upon the violence or threats of violent misconduct occurring, and the employer responding to it before the employee informed the employer of a disability and sought an accommodation.[137] In *Walton*, the judge found it crucial that the employer did not take its disciplinary action immediately when the employee's disturbing behavior involving threats of violence occurred.[138] Instead, the disciplinary action occurred three weeks later and after the employee had notified the employer of his disability status and his need for medical treatment.[139] As a result, the court denied without prejudice the employer's motion for judgment on the pleadings because the judge could not find that the employer terminated the employee for his misconduct but not for his disability given the lapse in time.[140]

Also, the judge stated that the "facts presented are not that simple," and the question as to whether a threat existed was questionable, and "gives life to a viable fact dispute."[141] The judge also found that because "mental illness is frequently misunderstood . . . fear of the mentally-ill can skew an objective evaluation of risk."[142] Rather, in this case there was no history of violent conduct and when presented with a "moment of crisis" the employee's individual instinct was to seek help and be protective of others, not take violent action.[143] The common principle from *Walton* and the other cases (along with the EEOC Guidance), suggest a rule that if an employee commits misconduct involving violence or threats of violence, the employer may terminate the employee if it would normally terminate employees without a disability for the same conduct. Also, the employer

135 *Id.*

136 *Id.* at 407.

137 *See id.* at 408–09, 411 (distinguishing cases of misconduct when the employer in this case waited three weeks to take action, and by then any threat had passed and a factfinder could believe that the plaintiff's calls about his diagnosis and his pursuit of treatment could be read as leading to a termination decision based "as a result of his disability and need for urgent, and presumably expensive, medical attention, rather than as a result of any workplace threat").

138 *See Walton*, 152 F. Supp. 3d at 411.

139 *Id.*

140 *Id.* at 411–12.

141 *Id.* at 412.

142 *Id.* at 409.

143 *Id.*

must not have been aware of the employee's disability and the need for an accommodation before the disciplinary action was taken. The next case and the discussion thereafter is another description of this rule and how to address the misconduct problem as a result of mental illness while exploring opportunities for establishing reasonable accommodations and dealing with undue hardship especially if terminations have not yet occurred.

C. *Part and Parcel: Mental Illness Accommodation Cases Without Threats*

In *Walz v. Ameriprise Fin., Inc.*,[144] the employee was diagnosed with Bipolar I disorder, and her bipolar disorder interfered with an essential function of her particular job, which was to maintain good relationships with others within the company. After several bipolar-induced outbursts at work that were witnessed by other employees and supervisors, and after multiple leaves of absence, the employee was eventually terminated from her position by her employer. The employee sued under the ADA and a state human rights act alleging the employer's failure to accommodate her disorder. To determine whether the employer's policy of requiring that the employee "maintain good relationships with other departments in the company" and "act appropriately and courteously towards co-workers" was job-related and consistent with business necessity, the court looked at the EEOC's statement on "Applying Performance and Conduct Standards to Employees with Disabilities."[145]

After finding that the employer's requirements were job-related and consistent with business necessity, the court upheld summary judgment in favor of the employer and referred to the EEOC's Applying Performance document as support for the decision.[146] The EEOC's Applying Performance document specifically refers to an example where an employee with bipolar disorder is terminated and responds to the disciplinary action by stating that she or he is disabled and requests an accommodation.[147] This EEOC document explains that if the termination was the appropriate disciplinary action for the misconduct involved, the

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[144] Walz v. Ameriprise Fin., Inc., 22 F. Supp. 3d 981, 987 (D. Minn. 2014), *aff'd*, 779 F.3d 842 (8th Cir. 2015).

[145] *See EEOC: Applying Performance and Conduct Standards to Employees with Disabilities § III(B) (9)*, EQUAL EMP. OPPORTUNITY COMM'N (Jan. 20, 2011), http://www.eeoc.gov/facts/performance-conduct.html.

[146] *Walz*, 22 F. Supp. 3d at 987 (D. Minn. 2014).

[147] *See EEOC: Applying Performance and Conduct Standards to Employees with Disabilities § III(B*), *supra* note 145, at Question 10, Example 19, 20, n.49 (citing Buie v. Quad/Graphics, Inc., 366 F.3d 496 (7th Cir. 2004) (eleventh-hour declaration of disability does not insulate an unruly employee from the consequences of his misdeeds).

employer may still terminate the employee and would not have to discuss the employee's disability or request for accommodation.[148]

The EEOC Applying Performance document also provides a series of questions and answers about mental health-related disabilities.[149] The EEOC Applying Performance document states that employees with impairments resulting from "PTSD, bipolar disorder, schizophrenia or obsessive compulsive disorder" may need to seek "accommodations such as altered break and work schedules, quiet office space or devices that create a quiet work environment, changes in supervisory methods, specific shift assignments and permission to work from home."[150] The employee's request for an accommodation must be reasonable. In some cases, the request is unreasonable on its face and need not be provided. For example, in *Theilig v. United Tech Corp.*,[151] the court found that an employee's request to have no contact with his co-workers or supervisor was unreasonable as a matter of law. Once one or more reasonable accommodations have been identified, an employer must provide them unless that would create an "undue hardship." An undue hardship includes any action that is unduly costly or disruptive or that fundamentally alters the nature and operation of the business. This can be difficult to judge, because the accommodations necessary for individuals with psychiatric disabilities may require changes to scheduling, attendance or the manner in which work assignments are provided.

Employee requests to work at home or to take leave are also common. These accommodations may seem incompatible with today's workplaces that are often fast-paced and high-stress environments, but courts have made clear that they must be considered. An accommodation that requires other employees to work harder or longer is generally not reasonable, and an employer is not required to reduce production standards or excuse compliance with legitimate, business-related conduct rules. An employer may not be required to change an employee's supervisor or create an entirely new position to accommodate an employee.[152] Even if a requested accommodation is reasonable and does not create an undue hardship, the employer does not have an obligation to provide the exact accommodation required by the employee, so long as the company can provide an alternative that is reasonably expected to allow the employee to perform the

148 *Id.*

149 *Id.*; *see also* Kelly Knaub, *EEOC Details Rights of Workers with Mental Conditions*, LAW360 (Dec. 13, 2016), www.law360.com/articles/871764/print?section=health.

150 Knaub, *supra* note 149.

151 Theilig v. United Tech Corp., 415 F. App'x 331 (2d Cir. 2011).

152 *See* Larson v. Va. Dep't of Transp., No. 5:10-CV-00136, 2011 WL 1296510 (W.D. Va. Apr. 5, 2011) (no need to change the employee's supervisor); Otto v. City of Victoria, 685 F.3d 755 (8th Cir. 2012) (no need to create a new position).

essential job functions. For example, an employee may request a private office to minimize distractions from nearby co-workers. If noise-canceling headphones could effectively reduce these distractions, the employer may provide those instead. Similarly, in *Shin v. University of Maryland Medical System Corp.*,[153] a medical intern with attention deficit disorder needed so much supervision and such a decreased workload that the request was found, on its face, to be unreasonable. There is no bright-line test for reasonableness, however, and an employer who simply denies a request as being unreasonable on its face does so at its own peril.

D. *Mental Illness Posing a Direct Threat to Health and Safety*

The ADA permits an employer to impose standards requiring that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[154] Determining whether the individual poses such a threat "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[155] An employer may assert this defense to an ADA claim by establishing that an employee created a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[156] The Supreme Court has explained that determining whether a direct threat exists should depend on "objective reasonableness of the views of health care professionals" from current medical knowledge.[157] An employer must also conduct an "individualized assessment of the employee's present ability to safely perform the essential functions of the job."[158]

An employer has the burden of persuasion to prove "direct threat" as an affirmative defense, which may not rely on "generalizations or stereotypes" and instead "must be based on an objective standard" derived from "reasonable medical judgment."[159] An employer can also request a mental examination for an employee making threats of violence and then rushing at a supervisor "with a clenched fist" and calling the supervisor a liar.[160] By requiring the employee to undergo a mental examination, the

153 Shin v. Univ. of Md. Med. Sys. Corp., 369 F. App'x 472 (4th Cir. 2010).

154 *See* 42 U.S.C. § 12113(b) (2018); *see also* 42 U.S.C. §12111(3) (2018) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation").

155 29 C.F.R. § 1630.2(r) (2012).

156 *See* 42 U.S.C.§ 12111(3) (2018); *see also* 42 U.S.C. § 12113(b),

157 *See* Bragdon v. Abbott, 524 U.S. 624, 650 (1998); *see also* Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 86 (2002) (quoting 29 C.F.R. § 1630.2(r)).

158 *See* 29 C.F.R. § 1630.2(r). (2012).

159 *Id.*; *see also* Hoey, *supra* note 15.

160 Hoey, *supra* note 15 (referring to Williams v. Motorola Inc., 303 F.3d 1284 (11th

employer is acting prudently in building the case to establish that the employee poses a "direct threat."[161] Nevertheless, "direct threat" is a high threshold to meet. Employees seeking not to divulge their mental health issues may make it a challenge for an employer to determine the existence of a mental health issue via an examination.[162] Whether conducting a fitness for duty examination to assess a reasonable accommodation or a "direct threat" examination when reasonably believing based on objective evidence that a significant risk to health and safety is present, employers should not assume the results will provide a clear answer.[163]

E. *Changing Employer Motivations to Choose Accommodations Over Fear of Violence*

When the ADA first passed and the EEOC issued guidelines on reasonable accommodations, many small businesses dreaded the burdens created in navigating an employee's mental illness issues without violating the law.[164] One commentator explained the weight of the challenges as follows:

> [M]any questions are still unanswered. If smoking, for example, is classified as nicotine dependence and a psychiatric disorder, must an employer provide a worker a time and place to smoke on demand—because he is mentally disabled? If an employee claims he has a phobia about rush-hour traffic, must he be given shorter work hours? If he says his poor performance review aggravated his depression, must his boss toss it out? If he is often late for work because he is hung over, must his boss

Cir. 2002)).

161 *Id.* (referring to Yin v. State of California, 95 F.3d 864, 868 (9th Cir. 1996)).

162 *See* Aaron Vehling, *Caution a Must for Employers Tackling Mental Health Issues*, LAW360 (Apr. 13, 2015), www.law360.com/corporate/articles/641902/caution-a-must-for-employers-tackling-mental-health-issues (suggesting how tests may not uncover mental illness as "many men view admitting depression as admitting weakness, failure and unmanliness" and may not be willing to disclose their mental health issues); *see also* Kevin Love, *Everybody Is Going Through Something*, PLAYER'S TRIB. (Mar. 6, 2018), https://www.theplayerstribune.com/en-us/articles/kevin-love-everyone-is-going-through-something (describing professional basketball player Kevin Love's discussion of his anxiety that led to a panic attack and how he had been resistant to share his psychological struggles but realized that may not have been the best thing for his ongoing treatment); Goldburn P. Maynard, Jr., *#MeToo Movement Helps Men to Shed Light on Depression in Men*, HILL (Mar. 8, 2018), https://thehill.com/opinion/healthcare/377413-metoo-movement-helps-to-shed-light-on-depression-in-men (applauding the Kevin Love story as well as the efforts of another professional basketball player, DeMar Derozan, who had come forward earlier to discuss his depression as all positive signs that are helping men to "destigmatize mental health and treat it as something more than the blues").

163 *See* Vehling, *supra* note 162.

164 *See* Joan Beck, *Accommodating Mental Illness on the Job*, CHI. TRIB. (May 8, 1997), https://www.chicagotribune.com/news/ct-xpm-1997-05-08-9705080053-story.html.

> accommodate his disability due to alcohol dependence? . . . Employers are going to find it more difficult to screen out problem workers before they are hired and harder to deal with them once they are on the payroll . . . . It could be a major mess.[165]

With these fears in mind, courts started to weigh in on issues regarding employee misconduct versus ADA coverage in favor of employers.[166] Most of the court responses seemed to ameliorate any employer concerns about accommodating an employee's mental illness.

1. Misconduct and Fears of Violence Caused by Psychiatric Disabilities

Five years ago at the twenty-fifth anniversary of the ADA, several employment discrimination law attorneys acknowledged that the ADAAA, after its seventh year, had started a sea of change in moving ADA analysis away from a concentration on disability definitions to more attention on reasonable accommodations; as a consequence, "20 percent of all physical and mental impairments identified as the bases for charges were depression, anxiety, post-traumatic stress disorder, manic depression, intellectual disabilities and learning disabilities."[167] With a connected increasing number of requests for accommodations for mental impairments after the ADAAA, a lot of the legal fights have centered on "outside the box" requests for accommodations.[168]

Given that violence in the workplace does occur, employers have to decide what response would be appropriate when an employee who has committed misconduct makes an accommodation request.[169] When an

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165 *Id.*

166 *See* Timmons, *supra* note 25, at 211–15, 259–60 (describing cases finding misconduct committed as preventing the need to provide a reasonable accommodation as the majority approach). *See also* Hoey, *supra* note 15 (referring to how "HR executives feel hamstrung by the ADA and state disability discrimination laws, which they believe prevent them from acting when an employee exhibits threatening fear" but asserting that those fears are "unfounded" because employers can now rely on "courts [which] have recognized that the ADA does not protect an employee who is violent or threatens violence").

167 *See* Aaron Vehling, *ADA at 25: Accommodation Issues Dominating Suits*, LAW360 (July 24, 2015), https://www.law360.com/articles/682880/ada-at-25-accommodations-issues-dominating-suits.

168 *Id.*; *see also* Porter, *supra* note 28, at 78 (arguing that employers and courts are less willing to approve an accommodation request that seeks to change structural norms in the workplace versus changes to physical aspects of performance).

169 *See Workplace Violence and the ADA*, HR DAILY ADVISOR HERO LINE (Feb. 18, 2010), https://hrdailyadvisor.blr.com/2010/02/18/workplace-violence-and-the-ada/ (finding due to the costs from workplace violence, "employers should be vigilant" but "must be careful not to discriminate against the mentally ill" by "taking action against an employee based only on the presumption of mental or emotional instability or failing to accommodate a mental illness").

employee starts to behave in a "threatening" manner or is starting to frighten others but never acts on that threat while revealing the existence of "mental illness," some employers have argued that the ADA limits their ability to prevent violence in the workplace.[170] Courts and the EEOC recognize that employees may not find protection from the ADA when an employee becomes violent or threatens other workers.[171] Regardless, employers have an obligation to provide a safe workplace for employees under federal law, the OSH Act, and some levels of common law based on defending against claims of negligent hiring and negligent retention.[172] Also, employers know that a shooting in their companies can affect the "brand's reputation as well as the legal costs and declining employee morale and productivity that follow."[173]

A Gallup study of worker feelings indicated that "work is more often a source of frustration than one of fulfillment for nearly 90% of the world's workers."[174] Despite being unhappy or angry at work, those feelings rarely translate into an employee pursuing a violent action against co-workers.[175] Addressing mental illness in the workplace requires a comprehensive approach especially when concerns about co-worker safety from violent attacks may be an issue.[176] Employers and employees should not feel that

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170 *See* Hoey, *supra* note 15.

171 *Id.*

172 *Id.* (citing Senger v. U.S., 103 F.3d 1437 (9th Cir. 1996)) (referring to a claim against the U.S. postal service when one of its postal employees with a record of violent acts attacked a third party who came on to the post office premises); *see also* Mark A. Lies & Craig B. Simonsen, *A Tale of 2 Cases Shows Dilemma over Workplace Violence*, LAW360 (Aug. 24, 2015), https://www.law360.com/articles/693491/a-tale-of-2-cases-shows-dilemma-over-workplace-violence (discussing two separate cases with separate results, one where an employee who threatened workers and was immediately terminated and lost case seeking an ADA claim and a second case under OSHA where an employee was killed after the employer did not keep sufficient policies and protections in place when sending her out to visit a customer who had committed prior violent acts).

173 *See* Bill Whitmore, *The Broad Spectrum of Workplace Violence*, HUFFINGTON POST (Mar. 9, 2011), https://www.huffpost.com/entry/the-broad-spectrum-of-wor_b_833333.

174 *See* Susan Adams, *Unhappy Employees Outnumber Happy Ones by Two to One Worldwide*, FORBES (Oct. 10, 2013), https://www.forbes.com/sites/susanadams/2013/10/10/unhappy-employees-outnumber-happy-ones-by-two-to-one-worldwide/#3b029350362a.

175 *See* Eileen Roche, *Do Something—He's About to Snap*, HARV. BUS. REV. 10 (July 2003), https://hbr.org/2003/07/do-something-hes-about-to-snap ("Tens of thousands of disgruntled Americans in workplaces large and small are frustrated, never smile, and live alone. Yet very few will ever translate their inner feelings of anger into outward expressions of violence."); *see also* Ben Finley, *Gunman's Motive Unclear, Officials Quiet Days After Shooting*, APNEWS (June 3, 2019), https://apnews.com/a4b676d0a3494be0b1e0f21483e4248e (describing comments from criminologist that "[t]here are countless Americans who are angry, who don't have lots of close friends, who own guns and admire killers in the past who got even" but "few may pick up a gun and shoot people").

176 *See* Widiss, *supra* note 19, at 688 (referring to CDC report discussing the need for employers to define teams including "personnel from human resources, security, and legal

they have to address these concerns without seeking outside resources and making referrals to those with expertise about the subject matter.[177] Human resource professionals should also be working with the company and the employee to address discrimination and safety issues.[178]

Some research on "active-shooter" situations suggests that being vigilant about specific behavior may help because of the existence of a "substantial time continuum" from the initial desire to commit mass violence that includes making statements on social media or to friends, then to purchasing weapons and ammunition, and finally arriving at the workplace.[179] Certain industries are more at risk for workplace violence but employers and employees working together with human resource and healthcare professionals can refer to and use additional resources to identify risk factors and develop prevention strategies.[180] While there is no miraculous method or surefire approach to detecting potential violence in the workplace, identifying specific activities and using conflict resolution strategies appear more reliable than just assuming a threat exists because of an employee's mental illness.[181] Nevertheless, using professionals as part of an "interdisciplinary threat assessment team" must occur to identify "concerning behavior" because the families of injured workers may challenge the employer's responses through lawsuits seeking millions of dollars.[182]

Before the enactment of the ADAAA,[183] most cases involving violent

departments" to handle workplace violence situations while also identifying other resources that may be helpful for the employees at issue).

177 *Id.*

178 *See* Damaune Journey, *Can HR Prevent Shootings in the Workplace*, SHRM (June 19, 2005), https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/hr-prevent-shootings-workplace.aspx.

179 *Id.*

180 *Occupational Violence – NIOSH Workplace Safety and Health Topic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/niosh/topics/violence/default.html (last visited Mar. 16, 2020); *see also* Miller, *supra* note 38 (discussing the key need for companies to develop crisis management plans and form response teams with valued human resource personnel with expertise and skills in detecting certain employee behaviors as part of addressing workplace violence).

181 *See* Journey, *supra* note 178 (describing three steps to prevent an active-shooter scenario which do not mention mental illness and include: practicing conflict resolution and violence de-escalation techniques; cultivating a workplace culture that encourages open venting in a safe and respectful manner; and planning for situations that would require immediate attention).

182 *See Workplace Shootings, Like Orlando's, Tick Upward in U.S.*, PBS NEWS HOUR (June 5, 2007), https://www.pbs.org/newshour/nation/workplace-shootings-like-orlandos-tick-upward-u-s.

183 *See* Hoey, *supra* note 15 (describing the analysis of several cases involving employees with violent tendencies and employers being able to take disciplinary actions without violating the ADA and all of these cases arose before the passage of the ADAAA

behavior would give comfort to an employer that the ADA would not require the retention of a violent employee as an accommodation to a mental illness.[184] For example, the ADA did not protect an anesthesiologist from being terminated by a hospital after he asserted mental illness when he told a co-worker that if his cancer metastasized, he would "take some people with me."[185] In another case, an employee was terminated without any ADA violation after he threatened his supervisor during an argument.[186] The rationale in these pre-ADAAA cases was that the employer did not discharge the employee for mental illness but because of the threatening behavior.[187] In those situations, the argument focuses on the ADA not being intended to accommodate that behavior, only to accommodate the disability. At that time, other employees did not have to face the jeopardy of a subsequent violent act by a co-worker who made prior threats but was still allowed to return to work because the employer agreed to an accommodation.[188] These situations had precluded an employee from recovering under the ADA due to mental illness if he or she would have needed an accommodation that placed other employees in danger.[189] Notably, other workers sometimes do not like it when employees receive accommodations, and the lack of understanding about mental illness could make nondisabled co-workers resentful.[190]

More recently courts have questioned whether employers can separate the disability from the misconduct resulting from the mental disability.[191] After the application of the ADAAA, cases involving employees exhibiting violent tendencies may get more traction with the courts than the pre-ADAAA cases.[192] If feeling trapped by the worries from this possible trend

became effective in 2009); *see also* Befort, *supra note* 28, at 2048 (referring to pre-ADAAA cases as "those that arose out of factual circumstances that occurred prior to the ADAAA's effective date of January 1, 2009").

184 Hoey, *supra* note 15 (citing Sista v. CDC IXIS N. America, 445 F.3d 161 (2d Cir. 2006)).

185 *Id.* (citing Bodenstab v. Cnty. of Cook, 569 F.3d 651, 658 (7th Cir. 2009)).

186 *Id.* (citing *Sista*, 445 F.3d 161).

187 *Id.*

188 *See* Palmer v. Circuit Court of Cook Cty., 905 F. Supp. 499, 511 (N.D. Ill. 1995), *aff'd* 117 F.3d 351 (7th Cir. 1997).

189 *Id.*

190 *See* Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 238–39 (2016) (describing how employers have concerns about making accommodations under the ADA because of how nondisabled employees may feel slighted).

191 *See* Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093 (9th Cir. 2007); *see also* Timmons, *supra* note 25, at 216–22 (citing cases separating the conduct from the disability and referring to these cases in a 2005 article before the ADAAA as a "minority approach").

192 *See, e.g.*, Walton v. Spherion Staffing, LLC, 152 F. Supp. 3d 403, 404 (E.D. Pa. 2015) (allowing ADA claim to go forward despite alleged threat made by employee).

and the legal uncertainties, an employer could pursue a pessimistic response and simply weigh the risks of a violent workplace catastrophe in comparison to an ADA violation and choose to face the ADA claim, especially if courts will be sympathetic to the employer's dilemma.[193] An employer may feel further constrained by the expanded mental and personality conditions in the current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* which can be overwhelming to consider.[194]

This employer mentality of choosing the lesser of the two liabilities could resonate in these violent times after legal counsel and the EEOC suggest that almost any mental health condition will be considered a disability under the ADAAA.[195] Michelle Travis highlighted this type of employer fear when she examined employer objections to the proposed EEOC regulations for the ADAAA statutory definition of being "regarded as" disabled by employers without knowing the underlying disability.[196] The proposed EEOC regulations identified two examples of being regarded as disabled that received an abundance of employer complaints.[197] Those examples included refusing to hire an employee with a facial tic related to Tourette's syndrome and refusing to hire a driver who was taking anti-seizure medication.[198]

As Travis explained, employers objected to this regulation by worrying that they would be subjected to liability for a "colorful array of feared misconduct and inadequate performance, even when employers are unaware that an individual's behavioral problems are linked to an underlying impairment."[199] The employer objections identified concerns about employee "impairments that cause them to fall asleep on the job, to

193 *See* Vehling, *supra* note 162.

194 *See id.*; *see also* Douglas A. Hass, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L. J. 683, 707–14 (2013) (criticizing expansions of the definition of mental disability as creating problems for employers and employees and mentioning a concern about increasing the nature of the interactive process for determining a reasonable accommodation and its costs).

195 *See* Vehling, *supra* note 162; *see also* Palmer v. Circuit Court of Cook Cty., 117 F.3d 351, 352 (7th Cir. 1997) ("The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge—in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."); Calef v. Gillette Co., 322 F.3d 75, 87 (1st Cir. 2003) ("Put simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. Such an employee is not qualified.").

196 *See* Travis, *supra* note 28, at 40–43.

197 Travis, *supra* note 28, at 42.

198 *Id.*

199 Travis, *supra* note 28, at 43.

curse at customers, to engage in violent or profane outbursts, to steal, to arrive at work late, leave early, skip meetings, or miss deadlines, or to otherwise engage in 'surly, unproductive, insulting, or threatening' behavior."[200] Concerns, however, about taking disciplinary actions based upon performance issues when these behaviors arise would only become a legal concern under the ADA if the employer received a request for a reasonable accommodation or should have realized an accommodation was necessary.[201]

Employer fears about competing responsibilities pursuant to the new ADAAA analysis should not cause courts to allow employer's wholesale protections from even having to justify their actions. If an employee's misconduct or performance problems were so egregious or inappropriate and the employer knew about the need for an accommodation, the accommodation should still look forward. An employer should not be excused from taking responsible actions because courts find the prior threatening behavior of an employee too disturbing to go forward. Otherwise, this approach would allow employers to always prevail when an employee has committed any prior misconduct while relying on myths, stigma, and stereotypical discrimination all because of employer safety and liability concerns that represent a "red herring."[202]

A more pragmatic approach to navigate the concerns once misconduct has occurred and the employee seeks to return to work is to engage in the interactive process with the employee to, at a minimum, determine if a reasonable accommodation might be possible.[203] Then the employer may assert that the employee poses a "direct threat" defined as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations."[204] Employers should not rush to use direct threat

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200 Travis, *supra* note 28, at 43–44 (internal citations omitted).

201 *See* Travis, *supra* note 28, at 60–61.

202 *See* Travis, *supra* note 28, at 45.

203 *See* Hass, *supra* note 194, at 716 (suggesting that due to the ADAAA and its increasing specter of disability definitions being expanded, an employer "should respond to all requests for accommodation, even if the diagnosed 'impairment' seems ludicrous on its face" because "[c]areful preparation for and engagement in the interactive ADA accommodation process will minimize exposure for failure to accommodate claims and focus both parties on the issues most relevant to post-ADAAA litigation (i.e., whether the employee is 'qualified' and what motivations the employer has for its actions)"); Travis, *supra* note 28, at 61–62 (criticizing employer fears about ADA claims when employers take disciplinary actions for misconduct without knowing about an employee's disability as being based on troubling stereotypes and describing the employer's simple burden if it takes disciplinary action based upon conduct or information that is either a symptom or a mitigating measure without knowing of a disability is to defend its actions as not being subject to a reasonable accommodation or establish how the employee presented a direct threat to health and safety).

204 *See* 42 U.S.C. § 12111(3) (2018).

analysis in response to documented behavior of threats from an employee suffering from mental illness because that action might backfire if it leads to a medical statement saying the employee can return to work or it raises new questions about the need for an accommodation.[205]

2. Give Me *Mayo* and I Win Regardless of What the EEOC Says

In *Mayo v. PCC Structurals*,[206] Mayo worked for twelve years at his employer before being diagnosed with major depressive disorder.[207] After a meeting to discuss his claims of bullying behavior by his supervisor, the employee made numerous threatening comments to co-workers, including he "'fe[lt] like coming down [to PCC] with a shotgun an[d] blowing off' the heads of his supervisor and another manager" and he was going to "com[e] down [to PCC] on day [shift] . . to take out management."[208] The employee also said he "want[ed] to bring a gun down [to PCC] and start shooting people" and "all that [he] would have to do to shoot [the supervisor] is show up [at PCC] at 1:30 in the afternoon" because "that's when all the supervisors would have their walk-through."[209]

When the employee spoke by phone with a Senior Human Resources Manager about these threats which had been reported to management, the employer suspended Mayo and notified the police of his threats to kill other employees.[210] After being hospitalized and taking two months of leave, a treating psychologist and a nurse practitioner cleared Mayo to return to work after finding he was "not a violent person."[211] Additionally, both healthcare professionals recommended a new supervisor assignment presumably to reduce Mayo's stress related to his prior complaints about being bullied by his present supervisor that resulted in the threats made.[212] Despite these reports and requests for an accommodation, however, the employer terminated Mayo.[213]

In response, Mayo sued the employer for disability discrimination.[214]

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205 *See* James J. McDonald, Jr., *Terminating the Violent Employee*, FISHER & PHILLIPS HUMAN RES., 39, 42 (Winter 2007) ("In fact, sending an employee who has engaged in a violent act or serious threatening conduct for a fitness-for-duty evaluation is not advisable, as the examiner may determine that the employee might be fit for duty some time in the future in spite of his or her violent act, raising the issue of whether a reasonable accommodation might have to be provided.").

206 Mayo v. PCC Structurals, Inc., 795 F.3d 941 (9th Cir. 2015).

207 *Id.* at 942.

208 *Id.* (alterations in original).

209 *Id.* (alterations in original).

210 *Id.* at 942–43.

211 *Mayo*, 795 F.3d at 942–43.

212 *Id.* at 943.

213 *Id.* at 942–43.

214 *Id.* at 943.

The district court granted the employer's summary judgment motion pursuant to the ADA, reasoning that Mayo was not qualified after making his violent threats.[215] In affirming the district court's dismissal, the court of appeals summarized its holding succinctly by finding that "[e]ven if Mayo were disabled. . . , he cannot show that he was qualified at the time of his discharge" because "[a]n essential function of almost every job is the ability to appropriately handle stress and interact with others."[216] According to the court, an employee loses his qualified status when he responds so drastically to stress that it "leads him to threaten to kill his co-workers in chilling detail and on multiple occasions (here, at least five times)."[217] The court found that employers would face "an impossible" situation in choosing between ADA liability to Mayo and the safety and welfare of the threatened co-workers if Mayo's "major depressive disorder" protected him from being terminated after making such serious and extreme threats.[218] With this finding, the employer's termination action was lawful and Mayo's claim was dismissed.[219]

The *Mayo* decision appears inconsistent with the other cases and the EEOC Guidance. The employer did not discharge Mayo without knowing of his disability and appeared to rely on his past threatening behavior without engaging in an accommodation discussion before deciding to terminate him. Similar to the *Walton* case, the decision to terminate Mayo was made after the threatening conduct occurred and the employer was aware of Mayo's disability status. Further, and beyond what happened in *Walton*, Mayo received medical treatment and before being terminated, he specifically requested an accommodation that the medical professionals involved suggested.[220] That request merely asked that the employer accommodate Mayo's treatment by granting the request to provide him with another supervisor.

On its face, this request seems to be a reasonable accommodation based upon his current medical status at the time and for an employee who had worked for twelve years without any problem until his mental illness started after he complained about alleged bullying by his supervisor. But instead of engaging in a prospective focus on whether the employee's current medical state might suggest that a new supervisor could represent a reasonable accommodation at that time to help him in complying with future performance obligations, the district court and the court of appeals

215 *Id.*

216 *Id.* at 944 (citing Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002)).

217 *Mayo*, 795 F.3d at 944.

218 *Id.* (internal citations omitted).

219 *Id.* at 947.

220 *Id.* at 943.

seemed to focus on looking backward at the threats made and the content of the threats. The court of appeals statement that "[a] contrary rule would place employers in an impossible position" appears to be favoring workplace safety over the worker's accommodation request.[221] If, however, having a different supervisor would have allowed Mayo the opportunity to return to work and perform his job without threats or incident as he had done for twelve years before developing mental illness, this appears to be a reasonable accommodation.

The result reached by the court of appeals in *Mayo* could have been the same but only if the employer demonstrated that the accommodation would create an undue hardship or the employee represented a direct threat to the health and safety of the workers. The court of appeals in *Mayo* does not use this analysis. It reflects on the past actions that occurred before Mayo's medical treatment as evidence that he could not perform the essential functions. This analytical approach places too much emphasis on the medical professionals' suggestion that a new supervisor would help Mayo deal with stress. There is no evaluation of the medical professionals' assessment as not being sound medical advice. Further, there was no evaluation of whether the employer's action was being applied in a backward-looking way that just perpetuates the stigma and myth that employees with mental illness must face. If you extrapolated the court's reasoning it could lead to an absurd result in that Mayo may not be able to work again despite successful treatment and recovery because he has requested accommodations to limit his stress and every job's essential function involves being able to deal with stress.

Instead, it appears the court of appeals was more horrified by the nature and severity of the threatening comments Mayo made rather than focused on deciding whether the medical treatment Mayo received as well as the small request to change supervisors would allow him to perform the essential functions of his job. It is not easy to return an employee to work who is off getting necessary treatment when that employee has made repeated and violent threats against co-workers. The ADA, however, requires analysis of whether the medical treatment received and any reasonable accommodation request would allow that employee to perform the job. The *Mayo* case is exactly the type of situation where mediation of the accommodation request would have been helpful. Given the nature of the threats made my Mayo and any strong feelings of co-workers who were the subjects of those threats, the employer may have felt compelled to play the least liability game. Under this least liability game, the employer chooses to accept the liability risk from a psychiatric disability

221 *Id.* at 944.

discrimination claim as opposed to the emotional fallout and liability arising when returning an employee to the workplace who made extreme and violent threats. For courts that follow *Mayo*, the employer will win that least liability game without even being subjected to liability.[222]

Using mediation with experienced mediators who possess sensitivities and knowledge of psychiatric disabilities could help the employer and the employee navigate the reasonableness of the accommodation request. In light of the example provided by the *Mayo* case, this mediation would also have to include sound medical judgment about the current status of the employee's mental health condition and what type of conditions would be necessary to provide a reasonable accommodation. The employer's interests in safety would have to be addressed, and this might also include training for co-workers who had been threatened in how to work with an employee experiencing mental illness. In undergoing this type of delicate mediation, the employer would have developed some form of safe harbor in its determination as to whether any accommodation being proposed would be reasonable or pose an undue hardship. Also, the mediation documentation and experience would place the parties in the best position to determine whether an employee, despite having gone through treatment, still posed a direct threat to the health and safety of others without any accommodation being possible.

Employers certainly have protections under the ADA when taking disciplinary actions against an employee who has caused concerns through threats or violent behavior. But if the employer is arguably aware of the employee's mental illness before taking action and the possibility of a reasonable accommodation could be explored or has even been clearly requested before termination, these cases and the EEOC Guidance suggest the employer should work with the employee to determine that accommodation. The employer may consider what accommodations may

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[222] *See generally* Brian M. Dougherty, *The Americans with Disabilities Act's Limitations: Not a Tool for the Brazen*, DUPAGE CTY. ASS'N BRIEF (Jan. 2018) (citing *Mayo* and an unpublished case, *Gogos v. AMS Mech. Sys., Inc.*, from the Seventh Circuit to assert that an employer can know an employee is disabled and fire the employee for misconduct and not have to distinguish whether the termination was part and parcel of a decision based on the employee's disability that caused the misconduct). *See also* Reaves v. Nexstar Broad., Inc., 327 F. Supp. 3d 1352, 1366–68 (D. Or. 2018) (distinguishing *Mayo*, as fact pattern here did not involve the same level of misconduct). *But see* Gogos v. AMS Mech. Sys., Inc., 678 Fed. App'x 41 (7th Cir. 2017) (following, but not citing, the reasoning of *Mayo*). In *Gogos*, the Seventh Circuit agreed that an employee who believes he was discriminated against in violation of the ADA for a termination must show that the supervisor who terminated him: (1) knew that he had a disability and (2) terminated him because of that disability. *Id.* at 414. The court found that there was a factual issue as to whether the supervisor knew of the employee's disability. *Id.* The employee also grabbed the supervisor to turn him around, which all clearly justified that the termination was not due to the employee's disability but due to his insubordination. *Id.* at 414–15.

be in order while factoring in the employee's misconduct via threats of violence against a co-worker or a supervisor.

If an accommodation would present an undue hardship or the nature of the behavior, after investigation and individualized assessment, shows such a history of misconduct and accommodations that have been unsuccessful in treatment to result in a direct threat to the health and safety of the employee or others, then the employer may proceed with a termination decision. This action would, of course, have to be consistent with the case law in that jurisdiction.[223] But if there is doubt about the issues and whether an accommodation might work, mediation can offer a positive outlook for the parties. The mediator must understand the unique circumstances that employees with psychiatric disabilities face and must also help employers understand how any accommodations might work or not. Pursuing mediation, however, represents a better option for all involved rather than an employer's reliance on myths and stigma about violence that always pose a concern for employees with mental illness when seeking a reasonable accommodation from their employer.[224]

III. REASONABLY ACCOMMODATING WORKPLACE MENTAL ILLNESS THROUGH MEDIATION

Employment discrimination litigation is not a pleasant experience for employees.[225] Many employees lose their livelihoods attempting to win an uphill court battle in pursuing these claims while being unhappy with attorneys if they have representation and unhappy with the legal process as a whole.[226] A survey of both employers and employees indicated that both groups agreed that "litigation is unfair."[227] Mediation has become a key and more satisfying option to parties seeking to resolve employment discrimination claims than the courts.[228] But even before litigation ensues, the possibility of using mediation can represent a worthwhile endeavor for

[223] In this respect, the *Mayo* case appears to be an outlier for now. *Cf.* Walton v. Spherion Staffing, LLC, 152 F. Supp. 3d 403, 404 (E.D. Pa. 2015).

[224] *See* Kaminer, *supra* note 16, at 218–20, 244–46 (discussing perceptions that the mentally ill are violent and how that stereotype is a big reason for workplace discrimination based on mental illness but those suffering from challenges posed by mental illness do tend to create workplace misconduct issues which courts are more willing to justify as a basis to terminate an employee even with mental illness).

[225] *See* Debra Cassens Weiss, *More than Half of Bias Plaintiffs in ABF Study Deemed Their Lawyers Incompeten*t, ABA J. (May 10, 2012), http://www.abajournal.com/news/article/more_than_half_of_bias_plaintiffs_in_abf_study_deemed_their_lawyers_incompe (discussing dissatisfaction expressed by plaintiffs in employment discrimination lawsuits with lawyers and the system overall).

[226] *Id.*

[227] *Id.*

[228] *See* Ballard & Henry, *supra* note 29.

the parties.

When considering appropriate workplace accommodations for mental health issues, employees may need some "nontraditional or unique accommodations" from employers.[229] Unfortunately, as Stacy Hickox and Angela Hall explain, employers have resisted atypical requests for structural work changes as accommodations "such as performing duties in a different way, environmental changes, and exceptions to work rules."[230] Ryan Ballard and Chris Henry have explained how employers may pursue proactive measures to address worker mental health issues through education.[231] Also, Ballard and Henry referred to the use of the Job Accommodation Network (JAN) website as a resource for possible accommodations for worker mental health issues.[232]

Funded by a contract from the U.S. Department of Labor, Office of Disability Employment Policy (ODEP),[233] JAN was created from the collaborative efforts of ODEP, West Virginia University, and private industry throughout North America.[234] JAN provides a free and confidential resource for employees and employers in determining a reasonable accommodation for an employee's psychiatric disabilities.[235] JAN has developed its workplace accommodation suggestions through the employment of consultants who "[a]ll have earned at least one Master's degree in their specialized fields, ranging from rehabilitation counseling to education and engineering."[236] Employers, employees, union representatives, medical and rehabilitation service providers, and attorney representatives can all contact JAN consultants for free advice on developing workplace accommodations.[237] JAN consultants can provide free accommodation ideas through one-on-one consultations while also

229 *See* Hickox & Hall, *supra* note 26, at 538.

230 Hickox & Hall, *supra* note 26, at 547.

231 *See* Ballard & Henry, *supra* note 29, at 64.

232 Ballard & Henry, *supra* note 29, at 65.

233 *See About ODEP–Office of Disability Employment Policy – United States Department of Labor*, U.S. DEP'T LAB., https://www.dol.gov/odep/about/ (last visited Mar. 31, 2020) (describing the beginnings of ODEP in 2011 as a "non-regulatory federal agency" associated with the Department of Labor and created by Congress to "promote[] policies" and work "with employers and all levels of government to increase workplace success for people with disabilities").

234 *See About JAN*, JOB ACCOMMODATION NETWORK, https://askjan.org/about-us/index.cfm (last visited Jan. 22, 2020).

235 *Id.*

236 *See JAN Staff*, JOB ACCOMMODATION NETWORK, https://askjan.org/about-us/staff/index.cfm (last visited Jan. 22, 2020).

237 *See Contact Us*, JOB ACCOMMODATION NETWORK, https://askjan.org/contact-us.cfm#tele (last visited Jan. 22, 2020).

suggesting product vendors and referral services.[238] JAN resources would be helpful in the interactive process when discussing a reasonable accommodation and would also provide an excellent resource to find possible mediators or consultants to work with employees or employers during the mediation.

A. *Mediating as a Form of Interactive Accommodation*

Mediation provides employees benefits from receiving broader and creative options to resolve workplace disputes without having to pursue difficult litigation choices and endure poor morale in the workplace.[239] Employers have started embracing mediation on a broader level as a workplace dispute resolution tool and the better morale and prevention of litigation also benefits employees.[240] The EEOC regulations provide that reasonable accommodations should be determined through the following interactive process:

> (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[241]

This interactive framework sets up the parameters nicely for the mediation.[242] "Determining what is a reasonable accommodation is intensely fact-dependent."[243] The mediation could likely include reviewing a lot of medical information regarding any treatment plans for the

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238 *See Information by Role*, JOB ACCOMMODATION NETWORK, https://askjan.org/info-by-role.cfm#for-others (last visited Jan. 22, 2020).

239 *See* Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 391–96 (2004) (describing the benefits for employees, unions, and employers to mediate employment discrimination claims).

240 *Id.* at 396–400.

241 29 C.F.R. § 1630.9 (2019).

242 *See* Miller, *supra* note 38, at 36–37 (suggesting that because employers must engage in an interactive process with employees who need or request a reasonable accommodation, this suggests a good opportunity for a mediator to play a role in facilitating discussions between the parties and identifying checklists for such a mediation).

243 *Id.* (describing a nine-point checklist developed by Miller for an accommodation mediation structure).

employee.[244] Also, through coordination with the mediator and follow-up, medical service providers, employees, employers, human resource personnel, and legal representatives can channel necessary information in a fair manner through the mediation process. One of the key benefits of using mediation is that the parties have a documented and fair process that not only demonstrates the parties followed the EEOC interactive process, but allowed for a fair way to approach the discussion given the power differentials and bridges to communication that employees with mental illness might need to navigate.

B. *Finding Qualified Mediators*

Mediators used for reasonable accommodation determinations would definitely have to be skilled in both employment discrimination mediation and issues of mental illness.[245] The JAN resources already mentioned could provide possible mediators and, if not, they could probably recommend mediators. Elayne Greenberg has recently identified a number of issues for parties to consider in choosing what she referred to as disability-sensitive lawyers to represent individuals with disabilities in mediations as part of the 2008 United Nations Convention on the Rights of Persons with Disabilities.[246] Many of those same traits would apply when selecting disability-sensitive mediators for ADA workplace accommodations. The meditators would have to be competent in mediation advocacy but also aware and able to assess their personal biases towards individuals with psychiatric disabilities.[247] In fact, these mediators would need to have prior training on hidden biases, have familiarity with how the ADA protects employees, and be knowledgeable in potential reasonable accommodations.[248]

While Greenberg suggested states might want to have attorneys seek "education through a variety of modalities, including online courses, webinars, in-person courses, and the dissemination of written materials,"[249] there are a host of these options that are already available to mediators and lawyers and parties including through JAN. Also, the EEOC, the National Council on Disability, and the Department of Justice have jointly issued

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244 *Id.* at 36.

245 *See* Harris, *supra* note 35, at 3–4 (discussing the unique requirements for mediators involved in disability accommodations as they must consider capacity to participate issues for certain disabled individuals and also have substantive knowledge of the ADA as well as any barriers to compliance when considering reasonable accommodations).

246 *See* Elayne E. Greenberg, *Overcoming Our Global Disability in the Workforce: Mediating the Dream*, 86 ST. JOHN'S L. REV. 579, 596–600 (2012).

247 *Id.* at 596.

248 *Id.* at 598–600.

249 *Id.* at 597.

two publications addressing how to ensure that mediation of equal employment opportunity disputes is accessible to people with disabilities.[250] Written in question and answer format, the publications address the rights and obligations of parties to mediation and of mediation providers.[251] Also, the Department of Justice Information and Technical Assistance on the Americans With Disabilities Act webpage provides several resources for mediation of ADA matters.[252] All of these sources and resources could be employed by experienced mediators addressing mental illness accommodations.

Greenberg also called for the use of "Disability-Responsive Neutrals" which would include mediators.[253] These "disability responsive neutrals" could help the participants navigate the tough issues while making sure all parties including the individual with a disability are treated fairly.[254] Greenberg also asserted that the "style of mediation" could be important in helping the parties address matters beyond just the questions of law presented.[255] While that might be an important issue for the parties, mediators should always focus on what the parties' needs are regardless of the particular style or orientation of the mediator.[256] If the mediator has the

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250 *See Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/mediation/ada-parties.cfm (last visited Mar. 1, 2020); *Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/mediation/ada-mediators.cfm (last visited Mar. 1, 2020).

251 *Id.*

252 *See ADA Technical Assistance Program*, DEPT. OF JUSTICE, https://www.ada.gov/taprog.htm (last visited Mar. 31, 2020).

253 Greenberg, *supra* note 246, at 598.

254 Greenberg, *supra* note 246, at 598–99.

255 *Id.*

256 *See* Green, *supra* note 37, at 336–38 (discussing mediator orientations but suggesting party autonomy is more important than mediator orientations and the mediator should make sure he or she understands what the parties desire, not what the mediator desires); *see also* Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?*, 7 PEPPERDINE DISP. RESOL. L.J. 65, 82–83 (2007) (describing challenges under special education law mediation because the statute mandates mediation as an option but does not specify the style or model of mediation to be employed while having certain legislative goals that the mediation will accomplish without considering specific needs of the parties in a particular conflict). Unlike the ADA, which does not mandate mediation, special education disability mediations may involve considerations of legislative goals aimed at longstanding partnerships that do not match other school special education statutory concerns. *See* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 584, 612, 668 (2004) (suggesting that special education legislation may create certain expectations about what mediation is to accomplish beyond just the parties' needs).

training and awareness to be concerned about implicit biases, the actual style of the mediator should focus on the expectations of the parties to the mediation.[257] It would, however, help the mediator if the expectations of the employees and the employers in the mediation process were fleshed out as soon as possible and even before the mediation, possibly through a pre-mediation meeting. This would help the mediator focus on applying whatever orientation or style that is best needed to meet the parties' expectations.[258] Regardless, as Greenberg further suggests:

> Neutrals who are experienced working with individuals with disabilities have learned to monitor their own reactions and adjust their interventions based on the disability of the person. For example, neutrals will use simple, concrete language if the participant has a learning disability. A sensitive neutral, working with an individual with cerebral palsy and a speech difficulty, will allow the person ample time to complete his thoughts, encourage that of other participants, and make sure the individual is accorded appropriate respect, rather than being discounted because of his disability.[259]

Interestingly, Greenberg does highlight another important point—the ability of the neutral to accommodate the physical and medical needs of the disabled participants. This might include: making sure the location of the mediation is accessible, including having tables where wheelchairs could be placed and with wide corridors; providing interpreters for hearing-impaired; translating writings into Braille or having them recorded; providing access for service animals; and allowing on-line mediations for those who cannot meet in-person. Overall, there are professional mediators out there with the expertise in mental health issues and the ADA who can provide added value to the interactive reasonable accommodation process if the parties choose to use them.

C. *Learning from Education Law*

Within the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA),[260] Congress determined that states receiving federal funds for special needs education must offer mediation as a mechanism to resolve disputes between parents or guardians of children with the schools

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257 Green, *supra* note 37, at 336–38; *but see* Greenberg, *supra* note 246, at 598.

258 *See* Welsh, *supra* note 256, at 658–60 (suggesting extensive stakeholder training to help parties and mediators be prepared and have their expectations better met when they do go into mediation).

259 Greenberg, *supra* note 246, at 599.

260 *See* Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37, 90 (1997) (codified at 20 U.S.C. §§ 1400–1401 (2018)).

about assessments and services to be provided to a particular student.[261] The IDEA not only requires that states offer free education with substantive entitlements for children with disabilities, it also guarantees certain procedures to protect those entitlements including mediation.[262] Each state shall also maintain a list of individuals who are qualified mediators and knowledgeable in the laws and regulations relating to the provision of special education and related services. These "qualified and impartial" mediators are "trained in effective mediation techniques" and "knowledgeable in laws and regulations relating to the provision of special education and related services."[263] The state may either assign mediators on a random basis from a pre-established list or may permit the parties to select their mediator through mutual agreement. In special education, mediation has become a central part of the process of resolving disputes related to individual students with disability issues.[264]

Some studies about "the parties' general satisfaction with the mediation processes and their perception of procedural fairness have suggested that special education mediation may have fallen short of some of its desired goals."[265] While written agreements were often reached, parties reported only moderate satisfaction with the mediation process and felt that the goals of long-term relationship building, improved communication and collaboration, and the establishment of mutual trust, were not always achieved. Similar to employees with disability accommodation disputes with employers in mediation, some consideration of students with disability special education disputes with schools in mediation may be helpful.[266] The power dynamics may differ because special education mediation involves public education principles that may not be present in private ADA accommodation principles. The one area of overlap, however, is that both types of mediations would require mediators with knowledge in the subject matter, knowledge as mediators and knowledge about mental health as well as unique understandings about implicit bias. Adding professionals with those kinds of skills to the

261 *See* Welsh, *supra* note 256, at 584, 612 (citing 20 U.S.C. § 1415 (1997) (amended 1999)).

262 Welsh, *supra* note 256, at 612–13.

263 20 U.S.C. § 1415(e)(2)(A)(iii), (C) (2018).

264 *See* Thomas A. Mayes, *A Brief Model for Explaining Dispute Resolution Options in Special Education*, 34 OHIO ST. DISP. RESOL. J. 153, 154 (2019).

265 *See* Blau, *supra* note 256, at 73 n.78, 74 n.89 (citing Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 38, 43 (1997) (explaining that between forty-five and seventy percent of mediations resolved disputes via agreements)).

266 *See* Welsh, *supra* note 236, at 662 (describing similarities "like many other disputes that find their way to mediation, special education disputes also require difficult legal, medical, and psychological determinations").

discussion and overall ADA accommodation process as mediators can only improve the varied interests of all the stakeholders despite the challenges that mediators face when facilitating reasonable accommodation agreements.

IV. CONCLUSION: MEDIATING MENTAL ILLNESS ACCOMMODATIONS—A WORKPLACE WIN-WIN

This Article addressed the competing interests of an employee exhibiting the potential for harassing or violent behavior as a result of mental illness and the employer's need to accommodate psychiatric disability and not respond simply with discriminating and stigmatizing actions. But fears about violence in the workplace make the question of accommodating some psychiatric disabilities a challenging legal question after recent amendments created by the ADAAA. In addressing this legal predicament as to how to accommodate employee mental illness in the workplace, the Article asserted that mediation should become a more significant tool in resolving the balance of concerns the parties must confront when these situations develop. Instead of rushing to judgment and concluding that all mental illness impairments somehow translate into workplace violence, the basic concern should be that employers not act based upon myths, fears, or stereotypes. Mediation should become the first option to address a reasonable accommodation determination regarding mental illness and threats. This will alleviate concerns of employers who feel compelled to pick the least liability option rather than respond by seeking accommodations to assist employees with psychiatric disabilities protected from discrimination by the ADA.

When the ADA was first enacted, many advocates promoted the use of mediation to resolve those discrimination claims when filed with the EEOC or in the courts. Unfortunately, the initial legal analysis under the ADA focused more on the statutory definition of a disability rather than resolution on the merits through reasonable accommodation analysis while leaving mediation behind as a viable option. Now with the ADAAA shifting the legal analysis to questions about reasonable accommodations, the use of mediation should be employed at the earlier interactive engagement stage of that process to address the dilemmas posed when thinking about workplace violence. Employing experienced professionals, familiar with psychiatric disability matters, as mediators can help all involved in discerning appropriate and reasonable accommodations especially when fears of harassment and violence may be an issue. This Article concludes that these mediators must become a part of the reasonable accommodation determination to protect the interests of employees with psychiatric disabilities under the ADA and to protect the

interests of their employers and co-workers in working within a safe environment during violent times.