Words Matter:

Employer Assessments of Employee Mental Health Conditions

by J. Reed Roesler, Attorney, Davis & Campbell LLC

Under disability laws governing the conduct of Illinois and Missouri employees, perception is reality. So when an employee's job is changed in ways they don't like, and the decision-maker makes a statement about the employee having a medical condition, a claim of disability discrimination is ready, whether the medical condition exists or not.

Under the Americans With Disabilities Act (ADA), an employee can sue their employer for an "adverse employment action" when evidence suggests the decision-maker acted because they "perceived" the employee to be disabled. Viewed through the lens of the ADA Amendments Act of 2008 [ADAAA], it does not matter how slight the disability is thought to be.

These "perceived as disabled" cases are not as likely to arise with medical conditions of a physical nature. Physical health conditions are frequently self-evident and rarely supposed. Mental conditions, not so much. Typically, employers can only guess that an employee's troubling behavior is tied to a mental health condition. Even so, there is an undeniable tendency to size up troubling behavior in medical terms. From the heartfelt, "I think Bob is depressed," to hyperbolic statements like, "Is Betty bi-polar or what?" or "John's got a bad case of OCD," lawsuits of this sort rise and fall on what you say.

Supervisors and HR professionals absolutely control the risks in cases like this. Words matter. There is a huge difference between "suggesting" that troubling employee behavior "might" have a mental health condition as its cause, and actually saying it does.

A case in point. After a series of confrontations with co-workers, Rayshawn Douglas was suspended from work, required to enroll in anger management classes and told she could not have further contact with the co-workers with whom she had problems. Before reassigning Ms. Douglas to a different office (one considered to be in a dangerous part of town), her employer's HR director asked if she had "seen a mental health professional recently" because "a medical condition might possibly be triggering" her difficulties with co-workers.

This series of events led Ms. Douglas to file a lawsuit claiming her employer was guilty of discriminatory treatment on the basis of a "perceived" mental disability. In support of the claim that she was perceived as mentally disabled, Ms. Douglas pointed to the HR director's suggestion that she see a mental health professional.

The U.S. District Court for the District of Columbia disagreed (Douglas v. DC Housing Authority, No. 13-0610, 10/25/13). Noting that no U.S. Appellate Court had ruled on the question under the ADAAA, the District Court followed the same line of reasoning applied by Appellate Courts under the ADA, including the Seventh Circuit (covering Illinois) and the Eighth Circuit (covering Missouri). By this reasoning, the suggestion an employee "might possibly" have a mental health condition is not the same as perceiving they do.

You can bet the result would be different if Ms. Douglas was asked if she had "seen a [psychologist/psychiatrist/psych] recently" because "whatever you are doing about your problem is not working." Words matter. CQ

Davis & Campbell law firm, located in Peoria, Illinois, exclusively serves business clients in employment, labor, employee benefits, corporate, and tax matters.

10 Factoid

The average number of months employees in Missouri and Illinois need to be employed to become eligible for their employer's tuition reimbursement benefit.
(AAIM 2013 – 2014 Policies & Benefits Survey)