DEALING WITH TROUBLESOME COLLEGE FACULTY AND STAFF: LEGAL AND POLICY ISSUES

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INTRODUCTION

Due to their efforts to foster academic freedom and the free exchange of ideas, colleges and universities tolerate a wider spectrum of behavior, particularly with respect to faculty, than many nonacademic organizations would permit.[1] Additionally, because administrators, especially those

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trained as faculty, typically have had little or no preparation to supervise employees, they may be hesitant to respond to performance or behavior problems until those problems have become dysfunctional for the unit.[2] Thus, the culture of colleges and universities may complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally.

Employees with behavior or performance problems may make one or more legal claims if discipline or dismissal is imposed. Examples include claims of discrimination on the basis of race, gender, age, or other characteristics,[3] academic freedom claims,[4] First Amendment claims[5] brought by faculty who allege that their behavior is protected by contract or the Constitution, whistleblower claims,[6] claims of retaliation for asserting

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including governance; hiring/firing; evaluations; policy development and interpretation; and labor negotiations, contract implementation and interpretation. Kathleen serves as general counsel to several colleges and universities, and has been a featured speaker at local, regional and national education and employment conferences. She recently completed service on the Board for NACUA. Kathleen currently is completing post-graduate work in dispute resolution at Marquette University with a focus on dispute resolution systems design for use in the workplace and higher education, and serves as adjunct professor for the graduate course, Dispute Resolution in Education. She also serves as Chair of the Dispute Resolution Section of the State Bar of Wisconsin. Kathleen's B.A. and J.D. degrees are from Marquette University, with a Masters of Arts in Teaching (History) from the University of Chicago.

1. Jennifer Ruark, *In Academic Culture, Mental-Health Problems Are Hard to Recognize and Hard to Treat*, CHRON HIGHER EDUC. (Feb. 16, 2010), *available at* http://chronicle.com/article/In-Academe-Mental-Health-I/64246/ (quoting David R. Evans who stated that among faculty, "there's a pretty high tolerance for eccentricity . . . . Where's the bright line between nonconformism and madness?"). Difficult employees are not limited to academic organizations; according to one writer, "disruptive physicians" are an increasing problem as well. John-Henry Pfifferling, *The Disruptive Physician: A Quality of Professional Life Factor*, PHYSICIAN EXEC. (Mar. 1, 1999), *available at* http://www.thefreelibrary.com/The+disruptive+physician:+a+quality+of+professional+life+factor....-a0102274361.

2. Ruark, *supra* note 1; *see also* John Scott Cowan, *Lessons Learned from the Fabrikant File: A Report to the Board of Governors of Concordia University* 1 (May 1994), http://archives3.concordia.ca/timeline/histories/Cowan_report.pdf (reviewing issues related to the murder of two faculty members by a third at Concordia University; identifying lack of administrative training as one problem contributing to poor quality of supervision of difficult faculty members.); *id.* at 5 ("When faced with the challenge of a 'bad' colleague, whose behavior is disruptive, threatening or merely unethical, [academic administrators] do not in general know what their powers are, and are massively risk-averse when it comes to exercising those powers, even when they are aware of them.").

3. *See, e.g.*, Boise v. Boufford, 42 F. App'x 496, 497 (2d Cir. 2002) (concerning age discrimination).

4. *See, e.g.*, Piggee v. Carl Sandburg Coll., 464 F.3d 667, 671 (7th Cir. 2006).

5. *See, e.g.*, Renken v. Gregory, 541 F.3d 769, 770 (7th Cir. 2008).

6. *See, e.g.*, Runyon v. Bd. of Trs. of the Cal. State Univ., 229 P.3d 985, 988 (Cal. 2010).

one's rights under the Family and Medical Leave Act,[7] or disability discrimination claims.[8] Although each of these claims may be difficult and complicated to defend, even if they lack merit, claims brought by employees who allege that their behavior or performance problems were a result of a mental impairment and that the ensuing discipline or dismissal constituted disability discrimination, are particularly difficult to address both from a legal and an administrative perspective. Thus, although the suggestions for practice offered in later sections of this article should be useful for administrators and counsel dealing with any of the possible claims listed earlier in this paragraph, our legal analysis will focus primarily on dealing with claims of disability discrimination by faculty or staff who claim to have a mental illness.

Although not all employee behavior or performance problems are related to the presence of a mental disorder,[9] it is very likely that some are. Data show that approximately twenty-six percent of all individuals in the United States age eighteen and over suffer from a diagnosable mental illness in any given year.[10] Although employees with mental disorders are protected by federal and state nondiscrimination laws, courts have been, for the most part, unsympathetic to claims brought by employees whose behavior or

7. *See, e.g.*, Kobus v. Coll. of St. Scholastica, 608 F.3d 1034, 1035 (8th Cir. 2010).

8. *See, e.g.*, Lindsay v. Pa. State Univ., 367 F. App'x 364, 366 (3d Cir. 2010).

9. This article will use the term "mental disorder" to refer to any psychiatric disorder that is recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. text rev. 2000). The DSM-IV-TR defines a "mental disorder" as [A] clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above. *Id.* at xxi–xxii. *See also* Ruark, *supra* note 1 (stating data collected by the Standard Insurance Company, which provides health insurance for employees at colleges and universities, indicates that employees of higher education institutions are nearly twice as likely to go on disability for psychiatric reasons than employees who work in other professions).

10. *The Numbers Count: Mental Disorders in America*, NAT'L INST. OF MENTAL HEALTH (2010), http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml (indicating approximately six percent of the U.S. adult population suffers from "serious" mental illness; mental illness is the leading cause of disability in the United States. The NIMH includes the following categories of mental disorders in its data: mood disorders, schizophrenia, anxiety disorders, eating disorders, attention deficit hyperactivity disorder, autism, and personality disorders).

performance problems resulted in discipline or dismissal.[11] Despite this lack of success, employees continue to bring claims. For example, in fiscal year (FY) 2009, the most recent year for which Equal Employment Opportunity Commission (EEOC) data are available, eighteen percent of all disability discrimination claims filed with the EEOC included an allegation of discrimination on the basis of a mental disorder.[12] This is an increase from thirteen percent in FY 2006.[13] Furthermore, the uninformed reaction of a supervisor or manager to an employee's misconduct could lead to a claim that the employer wrongly "regards" the employee as disabled.[14] This latter type of claim is more likely to be brought and potentially more likely to be successful, since Congress amended the Americans with Disabilities Act (ADA) in 2008 to broaden the definition of disability and to clarify the protections of the "regarded as" type of discrimination claim.[15]

Dealing with employees with performance or behavior problems can be challenging, particularly if the behavior is a manifestation of a mental disorder. According to one commentator, "[o]ne of the ways to distinguish between mental and physical illness is the notion that physical illness is characterized by organic causes and symptoms while mental illness is manifested by behavior."[16] This article suggests that administrators should deal with the employee's behavior or performance problems as they would in any situation in which an employee does not follow policies or rules, is disruptive, or does not turn in acceptable work performance, without

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11. *See generally* Dierdre 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 (2006); *see also* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination, and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 273 (2000); Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Law*s, 47 SYRACUSE L. REV. 931 (1997).

12. Eeoc.gov, Charge Statistics FY 1997 Through FY 2010, http://eeoc.gov/eeoc/statistics/ enforcement/charges.cfm (last visited Mar. 2, 2011); Eeoc.gov, ADA Charge Data by Impairments/Bases – Receipts: FY 1997–FY 2010, http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm (last visited Mar. 2, 2011) (categorizing mental disorder claims as the following: anxiety disorder, depression, manic depressive disorder, other psychiatric disorders, and schizophrenia).

13. Eeoc.gov, ADA Charge Data by Impairments/Bases – Receipts: FY 1997–FY 2010, http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm (last visited Mar. 2, 2011).

14. *See, e.g.*, Mastrolillo v. Conn., 352 F. App'x 472 (2d Cir. 2009) (rejecting plaintiff faculty member's claim that college regarded her as disabled and failed to renew her contract for that reason).

15. Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325 (2008) (became effective on January 1, 2009).

16. Stephanie Proctor Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CALIF. L. REV. 701, 705 (1997).

attempting to "diagnose" the reason for the behavior or performance problem. In support of this thesis, the article first reviews the statutory protections for individuals with mental disorders. It then reviews court rulings in cases brought by employees who assert that they were discriminated against on the basis of their actual or perceived mental disorders. The article then discusses suggestions for dealing with troublesome employees in a manner that should minimize discrimination (and other) claims, and finally, concludes with a series of recommendations for policy and practice.

I. DISABILITY DISCRIMINATION LEGISLATION

Two federal laws[17] and the laws of every state[18] prohibit employers from discriminating against applicants or current employees on the basis of a physical or mental disability. Although the two federal laws are very similar in language, their coverage is not in every case coterminous. Title I of the Americans with Disabilities Act of 1990 protects applicants and employees of private sector employers with fifteen or more employees,[19] and Title II protects employees of public entities, such as public colleges and universities.[20] The Rehabilitation Act protects individuals applying to or employed by organizations that receive federal funds, but there is no threshold number of employees that must be met.[21] It is not unusual for plaintiffs to state claims against colleges and universities under both laws[22] and under state law as well.

Unlike other laws prohibiting employment discrimination, both the ADA and the Rehabilitation Act require applicants or employees to prove that they are protected by the law in that the alleged impairment meets the statutory definition of a "disability."[23] Thus, employees seeking legal

17. Both the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000 & Supp. 2004), Pub. L. No. 93-112, and the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (2009), forbid employers from discriminating against individuals with physical or mental impairments in hiring, promotion, or other terms and conditions of employment.

18. *See State Disability Discrimination Laws*, CANCER LEGAL LINE (June 2008), http://www.marrow.org/PATIENT/Support_Resources/Patient_Teleconferen/PDFs/Aug.6.08.Handout-State_Disability_Laws.pdf (last visited Mar. 2, 2011) (listing state laws prohibiting disability discrimination).

19. 42 U.S.C. § 12111(5) (2009).

20. 42 U.S.C. § 12132 (1990).

21. 29 U.S.C. § 794 (2000 & Supp. 2004).

22. Remedies available under the ADA include punitive damages, which are not available under Section 504. Only intentional violations of Section 504 may result in compensatory damages. Because Section 504 applies only to entities that receive federal funds, it is a "Spending Clause statute." In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 31 (1981), the Court ruled that plaintiffs must demonstrate intentional discrimination in order to obtain compensatory damages for violations of Spending Clause laws. For the application of *Pennhurst* to Section 504, see Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D. Colo. 1992).

23. *See generally* 42 U.S.C. § 12111(5) (2009); 29 U.S.C. § 794 (2000 & Supp.

redress for disability discrimination face a threshold issue that plaintiffs suing under other federal (or state) nondiscrimination laws do not.[24]

A. The Americans with Disabilities Act

This law, enacted in 1990,[25] defines "disability" as "(a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."[26] "Major life activities" include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as a variety of "major bodily functions."[27] In response to earlier decisions by the United States Supreme Court requiring the determination of whether a disability "substantially limited" a major life activity to be made after taking into consideration the effect of any "mitigating measures,"[28] the 2008 Amendments specifically reject that requirement and state that the impairment is to be evaluated without regard to any mitigating measures that the employee may have taken or developed.[29]

The amended law also includes disorders that are episodic within the definition of disability if the disorder would substantially limit a major life activity "when active."[30] This provision is particularly important to individuals with mental disorders that may wax and wane, and may require periodic adjustments to medication.[31]

2004).

24. *Id.*

25. Pub. L. No. 101-336, 104 Stat. 327 (1990). The ADA was amended in 2008, in large part to respond to very narrow interpretations by the U.S. Supreme Court of the definition of "disability" and the scope of the term "major life activities." Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (2008). References in this article are to the amended version of the ADA.

26. 42 U.S.C. § 12102 (2009).

27. 42 U.S.C. § 12102(2)(A)–(B) (2009).

28. Williams v. Toyota Motor Mfg., Ky., Inc., 534 U.S. 184 (2002) (finding mitigating measures could include medication that controls the effects of the disorder, prosthetic or other devices, or the employee's own ability to compensate for the effects of an impairment, such as one's brain compensating for the effects of monocular vision).

29. Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325, § 4(a) (2008). *Id.* at §4(a)(4)(E)(ii) (excluding corrective eyeglasses and lenses from this requirement).

30. *Id.* at § 4(a) (amending 42 U.S.C. § 12102(4)(D)).

31. *See* Wittchen, Hans-Ulrich, Roselind Lieb, Hildegard Pfister & Peter Schuster, *The Waxing and Waning of Mental Disorders: Evaluating the Stability of Syndromes of Mental Disorders in the Population*, 41 COMPREHENSIVE PSYCHIATRY 122, 122–32 (2000). According to one scholar, the inclusion of episodic disorders within the definition of disability suggests that employers may be required to accommodate disorders whose effects have not yet materialized. "If an expert hypothesizes that what is now a mild impairment will 'substantially limit a major life activity when active,' the

The law then defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[32] This definition was not changed by the ADA Amendments. If the applicant or employee meets the definition of "qualified individual with a disability," then the employer must provide a "reasonable accommodation"[33] that enables the employee to perform the job's essential functions, unless the employer can demonstrate that such an accommodation would be an "undue hardship" (which is defined as "significant difficulty or expense").[34] The definition of "reasonable accommodation" was not altered by the ADA Amendments.

The ADA is enforced by the Equal Employment Opportunity Commission,[35] which has issued regulations interpreting the law.[36] Individuals must first file a charge with the EEOC and must either wait for its ruling or request a right-to-sue letter before they may file a lawsuit in federal court.[37] Compensatory and punitive damages are capped at a maximum of $300,000, depending upon the number of employees working for the defendant employer.[38] With respect to the EEOC's interpretations of the law's protections for individuals with psychiatric disorders, the agency has issued "Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities"[39] in a question-and-answer

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statutory language, on its face, appears to be satisfied. If this reading is correct, it has the potential to require employers to accommodate individuals who have only hypothetically demonstrated the possibility of meaningful limitation at some point in the future. Take, for example, an employee who has experienced minor depressive episodes in the past, common to many people. If the employee secures a psychiatrist's note indicating that that he or she will experience an active episode of debilitating depression if certain accommodations are not granted, the literal language of the statue would seem to cover the employee's hypothetical condition." Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 664 (2009).

32. 42 U.S.C. § 12111(8) (2009).

33. The statute defines a reasonable accommodation as "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification 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." 42 U.S.C. § 12111(9) (2009).

34. 42 U.S.C. § 12111(10)(A) (2009).

35. 42 U.S.C. § 12111(1) (2009).

36. 29 C.F.R. § 1630 (2011).

37. 42 U.S.C. § 12117(a) (1990). The law specifies that the enforcement provisions of Title VII of the Civil Rights Act of 1964 also apply to claims brought under the ADA. *Id.*

38 . *Id.* Note the ADA's caps on combined compensatory and punitive damages are identical to those of Title VII.

39. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, EQUAL EMP'T OPPORTUNITY COMM'N (Mar. 25, 1997),

format.

As noted above, the ADA provides that an individual may challenge an employment decision on the grounds that the employer "regards" him or her "as disabled."[40] The statute provides:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[41]

Prior to the enactment of the ADA Amendments, few plaintiffs were successful in stating "regarded as" claims because courts required them to prove that the employer actually believed that the employee suffered from a specific impairment, rather than simply proving that the employer treated the employee as though he or she were disabled.[42]

B. The Rehabilitation Act (Section 504)

Section 504 of the Rehabilitation Act of 1973[43] states that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[44] This law applies not only to applicants and employees of federal fund recipients, but to students and other individuals who participate in programs at federally funded organizations such as colleges and universities.[45] Although the statute does not define disability, who is qualified under the statute, or reasonable accommodation, its regulations do, and those definitions are virtually identical to the terms' definitions in the ADA.[46] The definition of "major

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http://www.eeoc.gov/policy/docs/psych.html (may be revised in light of the amendments to the ADA and concomitant changes in its regulations).

40. 42 U.S.C. § 12102(1)(C) (2009).

41. 42 U.S.C. § 12102(3) (2009).

42. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). For a discussion of the difficulties plaintiffs faced in convincing courts that they met the statutory definition of "disabled," *see* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 141 (2000).

43. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000 & Supp. 2004), Pub. L. No. 93-112.

44. *Id.*

45. 34 C.F.R. § 104.3(k)(2)(i) (2011) (providing that the regulations apply to "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education.").

46. 34 C.F.R. § 104.3(j) (2011) (defining handicapped person); 34 C.F.R § 104.3(l)(1) (2011) (defining qualified handicapped person); 34 C.F.R. § 104.12(b) (2011) (defining reasonable accommodation). The Rehabilitation Act uses the term

life activities" includes those activities from the pre-amendment version of the EEOC's ADA Regulations; it is likely that the Rehabilitation Act regulations will be amended to conform to the final ADA regulations.[47] The Office for Civil Rights of the U.S. Department of Education (OCR) enforces Section 504, including its employment provisions. There is no exhaustion requirement, however; individuals may file a lawsuit in federal court without first filing a complaint with OCR.[48] Compensatory damages are available to plaintiffs who bring private lawsuits under Section 504, but punitive damages are not.[49] State laws prohibiting employment discrimination on the basis of disability tend to follow jurisprudence developed under the Rehabilitation Act and the ADA.[50]

The ADA Amendments were enacted, in large part, to extend the law's coverage to more individuals than the small number whose claims had survived the narrow United States Supreme Court rulings prior to the law's amendment.[51] Because the law continues to require an employee with a covered disability to be "qualified" and because any accommodation requested by the employee or provided by the employer must still be "reasonable," it is unlikely that, once the plaintiff has established that his or her disorder meets the statutory definition of a disability, reviewing courts will markedly change their approach to analyzing ADA and Section 504 cases. For this reason, although it appears virtually certain that more ADA and Section 504 claims will be tried than in the past, it is not necessarily true that plaintiffs will prevail at a higher rate when their case is tried on the merits.

"handicap" rather than the preferred term "disability." 29 U.S.C. § 794 (2000 & Supp. 2004).

47. *See* 34 C.F.R. § 104.3(2)(ii) (2011) (listing the following major life activities: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working); 74 Fed. Reg. 48431 (Sept. 23, 2009) (concerning proposed regulations that incorporate the changes occasioned by the ADA Amendments); *see also* Response to Question 3, *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, EQUAL EMP'T OPPORTUNITY COMM'N (Sept. 23, 2009), http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html (stating that all changes made by the ADA Amendments Act also apply to sections 501, 503, and 504 of the Rehabilitation Act).

48. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). *See also* Barnes v. Gorman, 536 U.S. 181, 185–89 (2002).

49. *Barnes*, 536 U.S. at 185–89.

50. *See, e.g.*, Bennett v. Nissan N. Am., Inc., 315 S.W.3d 832 (Tenn. Ct. App. 2009).

51. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554. "The purposes of this Act are—(1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA." *Id.*

II. JUDICIAL REVIEW OF DISABILITY DISCRIMINATION CLAIMS[52]

In lawsuits filed under the ADA or Section 504, employees tend to allege either that they were excluded or removed from a job because of disability discrimination, or that the employer refused to accommodate their disability. In either type of claim, the employee must establish that 1) the employer is subject to the ADA, 2) the employee is disabled within the meaning of the ADA, 3) he or she is otherwise qualified to perform the essential functions of the job, and 4) he or she suffered an adverse employment action because of the disability or did not receive a reasonable accommodation.[53] If the plaintiff-employee cannot meet all of these requirements, the court typically will award summary judgment to the employer.[54] Prior to the enactment of the ADA Amendments Act in 2008

52. Published court opinions involving college or university faculty or staff with mental disorders who claimed that negative employment decisions or alleged failures to accommodate their disability were discriminatory are scarce, and most were decided prior to 2000. This discussion focuses primarily on cases involving colleges and universities, and discusses a few more recent cases involving nonacademic organizations for illustrative purposes. Lawsuits involving post-2008 Amendment discrimination claims have yet to be tried at the time this article was prepared; faculty and staff employees may be more frequent, and more successful, plaintiffs when the broader definitions in the amended ADA are applied by the courts.

53. *See, e.g.*, Alexander v. DiDomenico, 324 F. App'x 93 (2d Cir. 2009).

54. In cases litigated under the ADA prior to the amendments of 2008, courts awarded summary judgment to the employer or ruled against the employee on the merits virtually all of the time. *See, e.g.*, ABA Commission on Mental and Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998) (noting a survey found that employers prevailed in 90 percent of the cases litigated since 1992); *see also* John W. Parry, *1999 Employment Decisions Under the ADA Title I -Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348 (2000) (finding that employers prevailed in 96 percent of the cases); Barbara A. Lee, *A Decade of the Americans With Disabilities Act: Judicial Outcomes and Unresolved Problems*, 42 INDUSTRIAL RELATIONS 11 (2003) (reviewing decisions of federal appellate courts in ADA cases over ten years, concluding that employees prevailed four percent of the time). Prior to the amendment of the ADA in 2008, plaintiffs with mental disorders faced particular difficulties in convincing courts that their claims were meritorious, or even that their claims should be tried. Commentators have been very critical of the judicial approaches to these cases. *See, e.g.*, Jane Byeff Korn, *Crazy (Mental Illness Under the ADA*), 36 U. MICH. J.L. REFORM 585 (2003); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000); Randel I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Air Lines*, 86 CORNELL L. REV. 927 (2001); Stephanie Proctor Miller, Comment, *Keeping The Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701 (1997); Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 725 (2004); Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94 (2006); Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47 (2006).

(ADAAA),[55] plaintiffs had great difficulty convincing federal trial courts that they met the Act's definition of disability.[56] Because the ADAAA has expanded and clarified the definition of disability, it is more likely that courts will find that plaintiffs meet the statutory definition of disability, but the hurdles of establishing that the employee can perform the essential functions of the position and that a "reasonable" accommodation exists to enable the employee to do so remain.[57] With respect to "regarded as" disabled claims, it is more likely now than prior to the Amendments that plaintiff employees may survive summary judgment. Therefore, employees are more likely to find an attorney willing to represent them,[58] and employers are now more likely to either face jury trials in these cases or to offer larger settlements than prior to the enactment of the amendments.

A. The Definition of "Disability"

As noted above, the ADAAA invalidated the narrow definition of disability crafted by the United States Supreme Court in *Toyota Motor Manufacturing v. Williams*,[59] and said that the law was to be interpreted expansively to include as many individuals as possible within its purview.[60] The employee's disability must "substantially limit[ ] one or more major life activities."[61] The list of "major life activities" in the ADAAA is "non-exhaustive," but includes activities, such as concentrating, that some courts had ruled were not "major life activities" under the original version of the ADA.[62] The specific inclusion of communication, concentration, and thinking in the amended statute as major life activities is relevant to individuals with certain mental disorders; in addition, the proposed regulations add "interacting with others" to the list of "major life activities" protected by the ADA.[63] This addition is a very important source of

55. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

56. Amy L. Allbright, *Employment Decisions Under the ADA Title I—Survey Update*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 335, 336 (2008). For example, in 2007, employers prevailed in 95.5 percent of all cases in federal courts brought under the ADA; in most of these cases, the plaintiff could not persuade the court that he or she met the statutory definition of "disabled." *Id.*

57. Hensel, *supra* note 31, at 661.

58. Smith, *supra* note 11, at 111 (stating that the low success rate of plaintiffs claiming disability discrimination made it difficult for potential plaintiffs to find an attorney to represent them).

59. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

60. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553, 3553.

61. *Id.* § 4(a), 3(1)(A), 122 Stat. at 3555.

62. *See, e.g.*, Humbles v. Principi, 141 F. App'x 709, 712 (10th Cir. 2005) (stating that "interactions with others and concentration have not been deemed major life activities by this circuit").

63. 74 Fed. Reg. 48439, 43440 (Sept 23, 2009). The EEOC has explained the parameters of "interacting with others": "An impairment substantially limits an

protection for individuals with mental disorders, since prior to the enactment of the amendments, many courts rejected the EEOC's inclusion of this activity in its regulations[64] and ruled that getting along with fellow employees, supervisors, and customers was an essential function of every job.[65] It remains to be seen whether courts will be more accepting of this "major life activity" in reviewing claims that arose after the effective date of the Amendments.[66]

The Amendments did not change the definition of "substantially limited," which has been interpreted by the United States Supreme Court to require the plaintiff to demonstrate that the disability limits his or her ability to perform a wide range of jobs rather than just one.[67] Thus, the claim that an employee is limited in only one specific job is typically rejected by the courts.[68] If the employee can engage in the daily activities enjoyed by most people, a court will find no substantial limitation.[69]

For example, in *Lloyd v. Washington & Jefferson College*,[70] Karl Brett Lloyd, a professor with agoraphobia and panic attacks, sued when the college refused to provide him the accommodations he sought and, when he did not report for work as required, considered him as having resigned.[71]

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individual's ability to interact with others if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities, Question 9, http://www.eeoc.gov/policy/docs/psych.html.

64. *See Humbles*, 141 F. App'x at 709.

65. *See, e.g.*, Mazzarella v. U.S. Postal Serv., 849 F. Supp. 89 (D. Mass. 1994) (stating that getting along with peers and supervisors is an essential function of every job). It is likely that courts will continue to rule this way, since the definition of "essential functions" was not changed by the ADA Amendments. *Id.*

66. The amendments became effective on January 1, 2009. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 7(2), 122 Stat. 3553, 3558.

67. Sutton v. United Air Lines, 527 U.S. 471, 472 (1999). Although the ADA Amendments express disapproval of the Court's interpretation of the definition of disability under the original version of the ADA, the language of "substantially limits" has not been modified. ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(a)(4), 122 Stat. 3553, 3553.

68. *See, e.g.*, D'Angelo v. Conagra Foods, 422 F.3d 1220, 12 (11th Cir. 2005) (concluding that the plaintiff was not "substantially limited" in the major life activity of working because her vertigo only interfered with her own job, not an entire class of jobs).

69. *See, e.g.*, Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 3 (D.D.C. 2000) (finding that where employee could care for her four children, commute to work, take graduate courses, take a vacation at the beach, and engage in ordinary daily tasks, she was not "substantially limited").

70. 288 F. App'x. 786 (3d Cir. 2008).

71. *Id.* at 788.

The college required all faculty to spend four hours per day, four days per week, on campus.[72] Professor Lloyd said that his disability did not permit this, yet, the court noted, he was able to teach courses three days per week, serve as a local government council member, work on job-related projects on the weekend, and engage in activities with his family.[73] The court rejected the plaintiff's claim that he was substantially limited in the major life activities of thinking and interacting with others.[74]

Since the Amendments have expanded the list of "major life activities" to include several that directly relate to the effects of a mental illness, plaintiffs will very likely have an easier time meeting the ADA's definition of disability than they did prior to their enactment.[75] Furthermore, if an employer challenges the existence of a qualifying disability, the resolution may depend on expert medical testimony on the condition and how it "substantially limits" the employee.[76] The need for such testimony would make it less likely that a court would look favorably on an employer's summary judgment motion, at least on that particular issue.

Despite the inclusion of additional categories of "major life activities" in the Amendments, the plaintiff-employee must still demonstrate that the impairment "substantially limits" one or more of these activities.[77] Courts have been skeptical of plaintiff claims that certain mental disorders *substantially* limit their lives.[78] For example, in *Treaster v. Conestoga Wood Specialties Corp.*,[79] a plaintiff who alleged that she was dismissed because she suffered several panic attacks while at work could not convince the court that these attacks met the "substantially limited" test. The court commented that:

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72. *Id.* Courts have little sympathy for faculty who claim that being required to teach on certain days, or to be present on campus for a particular number of days per week, is either discriminatory or retaliatory. *See, e.g.*, Recio v. Creighton Univ., 521 F.3d 934 (8th Cir. 2008) (ruling that requiring a faculty member to teach on Mondays, Wednesdays, and Fridays when she preferred a different schedule was not an adverse employment action under Title VII).

73. *Lloyd*, 288 F. App'x. at 789.

74. *Id.*

75. ADA Amendments Act of 2008, Pub. L. No. 110–325, §§ 4(a), 3(2), 122 Stat. 3553, 3555.

76. *See* 42 U.S.C. § 12102 (2009).

77. ADA Amendments Act of 2008, Pub. L. No. 110-325 §§ 4(a), 3(2), 122 Stat. 3553, 3555.

78. *See, e.g.*, Lee v. Ariz. Bd. of Regents, 25 F. App'x 530, 534 (9th Cir. 2001) (finding that a faculty member who alleged that university failed to accommodate her depression could not establish that she was "substantially limited" any in major life activity).

79. No. 4:09-CV-00632, 2010 U.S. Dist. LEXIS 63257 (M.D. Pa. Apr. 29, 2010)*No. 4:09-CV-00632, 2010 U.S. Dist. LEXIS 63257 (M.D. Pa. Apr. 29, 2010).*; *see also* Cody v. County of Nassau, 577 F. Supp. 2d 623 (E.D.N.Y. 2008) (computer department staff member at Nassau Community College did not establish that her anxiety and depression substantially limited a major life function; court ruled that she was not disabled).

> [T]he testimony does not support a reasonable inference that the plaintiff's impairment significantly limited a major life activity of the plaintiff. The plaintiff has pointed to no evidence regarding how often she suffers panic attacks and her testimony was that the panic attacks last only a couple of minutes at a time. The plaintiff has failed to come forward with evidence creating a genuine issue of fact as to whether her ability to perform any major life activity is substantially limited. Therefore, the plaintiff has failed to present evidence from which a reasonable trier of fact could conclude that she was actually disabled.[80]

Since the Amendments did not change the law's requirement that the impairment *substantially* limit a major life activity, plaintiffs will still have to provide considerable evidence of limitation in order to meet the statutory definition of "disability."

Unless the employee notifies the employer that he or she has an impairment, there is no requirement that the employer provide an accommodation.[81] Since individuals with mental disorders may fear that they will be stigmatized or shunned when others learn of their diagnosis, employees may not disclose their conditions until they are close to dismissal or have been dismissed.[82] But if a supervisor or co-workers believe that the employee's behavior or performance problems are caused by a psychiatric disorder, they may consider the employee to be disabled even if the employee is not and may even treat the individual as impaired, which could lead to "regarded as disabled" claims by the employee.[83] Due to employees' hesitancy to disclose a mental disorder and the potential for "regarded as disabled" claims, dealing with the behavior and/or performance problems, rather than the underlying cause of these problems—either actual or assumed—is the safer strategy to avoid or defend lawsuits.

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80. *Treaster*, 2010 U.S. Dist. LEXIS 63257 at *94; *see also* Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 3 (D.D.C. 2000) (plaintiff's alleged disabilities did not prevent her from commuting to and from work, caring for her children, or going on vacation).

81. Kobus v. Coll. of St. Scholastica, Inc., 608 F.3d 1034 (8th Cir. 2010) (painter with depression did not notify employer of diagnosis nor need for accommodation; dismissal for excessive absences upheld).

82. Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP. POL'Y J. 293 (2005); *see also* 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, 948–49 (1997).

83. 42 U.S.C. § 12102(3) (2009).

B. Who is a "Qualified Employee?"[84]

The statute requires the employee to demonstrate that he or she can perform the "essential functions" of the position held or desired, with or without reasonable accommodation.[85] Employees who cannot perform the essential functions are not "qualified" and are not protected by the ADA or the Rehabilitation Act.[86] While listing essential functions may be relatively straightforward for many staff positions, it is less likely that a college or university has done so for faculty positions. Neglecting to make such a list can be problematic if a faculty member requests to be relived of a particular job duty, such as teaching, and there is no documentation of the essential functions of the faculty member's position.[87]

The ADA does not require the college or university to reduce, eliminate, or modify "essential functions" of a job in order to accommodate a faculty member with a disability.[88] The college or university must, however, be able to explain what the essential functions of a faculty member are in order for a court to ascertain whether a faculty member with a disability is "qualified" and thus protected by the ADA.[89] For that reason, it is important for a college or university to specify the essential functions of a faculty member, preferably in some official policy document, such as a faculty handbook, an individual employment contract, or a collective bargaining agreement. Determining the essential functions of the faculty member's position prior to a request for accommodation is helpful to the faculty member, the college or university, and, if necessary, to the court; if

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84. This section has been adapted from Barbara A. Lee and Judith A. Malone, "Accommodating Faculty with Disabilities: Legal and Policy Issues," Presented at Stetson University College of Law's 28th Annual National Conference on Law and Higher Education (February 19, 2007), http://justice.law.stetson.edu/excellence/Highered/archives/2007/AccommodatingFaculty.pdf.

85. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000). According to the regulations promulgated by the EEOC, "A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function." Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act 29 C.F.R. § 1630.2 (n)(2)(i)–(iii) (2011). "Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential . . . ." 29 C.F.R. § 1630.2 (n)(3)(i) (2011).

86. Schall v. Wichita State Univ., 7 P.3d 1144, 1157 (Kan. 2000).

87. *See, e.g.*, Kingsbury v. Brown Univ., CA 02-068L, 2003 U.S. Dist. LEXIS 25792 (D.R.I. Sept. 30, 2003), discussed *infra* in note 91 and accompanying text.

88. Cleveland v. Prairie State Coll., 208 F. Supp. 2d 967, 977 (N.D. Ill. 2002).

89. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000); 29 C.F.R. § 1630.2 (n)(3)(i).

a faculty member states that he or she cannot perform a part of his or her job (such as teaching or attending committee meetings) that has been determined to be an essential function, a court could reasonably conclude that the individual was not "qualified" and thus not entitled to an accommodation that would exempt the individual from performing that part of the job.[90]

An example of the importance of developing a list of essential functions is found in *Kingsbury v. Brown University*.[91] In *Kingsbury*, the trial court was very critical of the university for the manner in which it developed a list of essential functions when a professor asked to return from medical leave after brain surgery.[92] The faculty member's colleagues apparently did not wish him to return, and they collaborated in developing a list of "essential functions" that the court believed were not applied uniformly to other faculty.[93] When the university then refused to renew the faculty member's contract, he claimed that the list of essential functions had been manipulated to allow departmental colleagues to create a set of functions that applied only to him. The court rejected the university's motion for summary judgment, in part due to the lack of clarity as to the actual essential functions of his position.[94]

Cataloging the essential functions of a faculty member's job is not an easy task, particularly at institutions where faculty members not only teach but serve on committees, advise students, conduct research, write grant proposals, mentor graduate students, consult, and perform service to their institution, community, state, nation, and discipline. Academic administrators must determine what is expected of faculty (particularly full-time tenure-track faculty). Must all faculty teach, and is there a standard teaching load? This is an important question, because if there is no standard teaching load, would a request for a lighter teaching load be a "reasonable accommodation?" Must all faculty conduct research, and if they do not, are there consequences? Are all faculty expected to advise students, mentor graduate students, or engage in committee work? Would a faculty member's inability to perform service mean that he or she is not "qualified" under the ADA's definition? Must all faculty be able to interact in a professional manner with peers, students, administrators, and the general public? This latter job requirement may be particularly important if a faculty member discloses a stress-related disorder and claims to be unable to work with particular individuals or to interact with a

90. *See, e.g.*, Piziali v. Grand View Coll., No. 99-2287, 2000 U.S. App. LEXIS 1823 (8th Cir. Feb. 11, 2000); *see also* Wynne v. Loyola Univ. of Chicago, No. 97 C 06417 (N.D. Ill., October 10, 2000) (unpublished and unavailable in LEXIS) (on file with authors).

91. *Kingsbury*, 2003 U.S. Dist. LEXIS at *1.

92. *Id*. at *52–*53.

93. *Id.* at *60–*65.

94. *Id*. at *77–*81.

particular supervisor.[95]

In nonacademic settings, getting along with one's supervisor or one's peers has been ruled an essential function of virtually every job, and the EEOC has rejected the idea that an employer is required to reassign the disabled employee to a different supervisor as a reasonable accommodation.[96]

The employer has the right to determine what functions are essential for a particular job or position, and need not remove essential functions from the position in order to accommodate the disabled employee.[97] In determining the list of essential functions, academic administrators should consider what impact a faculty member's inability to teach, conduct research, or perform service would have on the department or program. Would additional part-time faculty have to be hired, or would the institution "close ranks" and ask other faculty to cover that individual's teaching responsibilities? Would a faculty member's long-term absence from teaching make it difficult for advanced undergraduates or graduate students to complete their degrees or significant projects? Would important administrative responsibilities be neglected, or would faculty colleagues need to pick up those responsibilities as well? How do the institution's short- and long-term disability policies operate in a situation where a faculty member can do some, but not all, of his or her job?

In developing a list of essential functions, it is useful to include behavioral requirements. One source of standards for faculty behavior is the American Association of University Professors (AAUP) *Statement on Professional Ethics*.[98] The *Statement* notes that faculty "devote their energies to developing and improving their scholarly competence. They

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95. *See, e.g.*, Wynne v. Loyola Univ. of Chicago, No. 97 C 06417 (N.D. Ill., October 10, 2000) (unpublished and unavailable in LEXIS) (on file with authors).

96. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 33, https://www.eeoc.gov/policy/docs/accommodation.html#other; *see* Gaul v. Lucent Techs., 134 F.3d 576 (3d Cir. 1998) (employer not required to reassign employee to different supervisor as a reasonable accommodation); *see also* Gilday v. Mecosta Cnty., 124 F.3d 760, 765 (6th Cir. 1997) ("The ability to get along with co-workers and customers is necessary for all but the most solitary of occupations . . . ."); Grenier v. Cyanamid Plastics, Inc. 70 F.3d 667 (1st Cir. 1995) (reviewing cases that decide that essential functions include both technical and behavioral skills, such as emotional stability and the ability to get along with others); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227 (S.D.N.Y. 1994) ("It is certainly a 'job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors"). In Cody v. Cnty. of Nassau, 577 F. Supp. 2d 623 (E.D.N.Y. 2008), the court ruled that the employee could not be given her preferred accommodation because she would have been required to be supervised by an individual with whom she had refused to work.

97. Fiumara v. President and Fellows of Harvard Coll., 327 F. App'x 212, 213 (1st Cir. 2009).

98. Statement on Professional Ethics, https://www.aaup.org/AAUP/pubsres/policydocs/contents/statementonprofessionalethics.htm (last visited Feb. 12, 2011).

accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty."[99] Furthermore, with respect to faculty treatment of students, the *Statement* says, "Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. . . . They respect the confidential nature of the relationship between professor and student."[100] With respect to interactions with their colleagues, the *Statement* says, "Professors do not discriminate against or harass colleagues. . . . Professors accept their share of faculty responsibilities for the governance of their institution."[101] The *Statement* has been found to be an appropriate standard of professional conduct by federal courts when faculty challenge discipline or dismissal for actions that colleges or universities have argued violated the *Statement*.[102]

Administrators may resist preparing a list of "essential functions" out of a concern that the college or university may want to accommodate a particularly valuable faculty member under one set of circumstances, but not accommodate a less-valued faculty member if a similar situation arises. Courts have been sympathetic to employers on this issue, and have allowed them to provide accommodations for some employees beyond those legally required without then subjecting the employer to the requirement that it provide similar accommodations to others, particularly if they do not meet the "qualified" requirement.[103] Establishing a clear set of "essential functions" for the institution's faculty members should 1) notify the faculty what they are expected to do; 2) provide a guideline for academic administrators who are asked to provide "reasonable accommodation[s]" for faculty members who cannot perform certain parts of their jobs; and 3) justify an institution's refusal to accommodate a faculty member who cannot perform one or more of the "essential functions" of his or her position if the institution determines that it is in the institution's interest to do so. Of course, it is equally important to develop a clear set of essential functions for staff positions as well.

Courts have ruled, in both academic and nonacademic settings, that an employee who engages in misconduct is not "qualified" and thus is not

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99. *Id.* at Statement 1.

100. *Id.* at Statement 2.

101. *Id.* at Statement 3.

102. *See, e.g.*, Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984); *see also* Hadlock v. Texas Christian Univ., No. 2-07-290-CV 2009, Tex. App. LEXIS 1330 (Tex. Ct. App. Feb. 26, 2009) (affirming dismissal of defamation claims based upon faculty committee's determination that he had violated university's code of ethics, which had incorporated AAUP Statement on Professional Ethics).

103. *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995) (if an employer "bends over backwards to accommodate a disabled worker—goes further than the law requires— . . . it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation").

protected by the ADA. An example of the application of implied (rather than express) behavioral standards to a faculty member is *Newberry v. East Texas State University*.[104] James Newberry, a tenured professor of photography, came to campus two days per week, worked afternoons only, refused to hold office hours, and engaged in numerous disputes with the department chair and other colleagues.[105] After fifteen years of disruptive behavior and several warnings to improve his relationships with his faculty colleagues, the administration decided to dismiss him.[106] Newberry then disclosed that he had obsessive-compulsive disorder, a recognized mental illness, and sued the university under the ADA.[107] A jury concluded that he was not qualified, and found for the university.[108] Newberry appealed.[109] Although several administrators had urged Newberry to seek professional help and believed that he might have a mental disorder, the appellate court ruled that the university had established that Newberry's dismissal was based upon his "work performance and lack of collegiality"[110] and was not motivated by a belief that he had a mental disorder.[111] The court also ruled

104. Newberry v. East Texas State Univ., 161 F.3d 276 (5th Cir. 1998).
105. *Id.* at 277.
106. *Id.* at 278.
107. *Id.*
108. *Id.* at 279.
109. *Id.*
110. *Id.*
111. *Id.* One commentator has criticized the *Newberry* decision, arguing that the faculty member's behavior was linked to the mental illness and that punishing him for the behavior was punishing him for the mental illness. Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J. L. REFORM 585, 643–44 (2003). The author continues: "The concept that people with a mental illness can be held to the same standard of behavior as people without such an illness has no support in the ADA. The ADA only mentions this idea with reference to people who are abusing drugs or alcohol. Moreover, to hold people with a mental illness to the same standard of behavior as non-mentally ill people eliminates much of the protection Congress thought it was affording to the mentally disabled. While employers should not have to endure totally unacceptable behavior, this is not the same as holding someone with a mental illness to the same standard of behavior as others without a mental illness. We do not hold a hearing-impaired person to the same standard of hearing as people who are not deaf. We should not hold people with a mental illness to the same standard of behavior as the non-mentally ill." *Id*. at 646 (footnote omitted). This approach to analyzing ADA claims related to misconduct linked to mental illness does not appear to have found favor in the federal courts. Courts have ruled that bad behavior can be punished even if related to a mental disorder. *See, e.g.*, Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999) ("[T]he anti-discrimination statutes do not insulate an employee from discipline for violating the employer's rules or disrupting the workplace."); Palmer v. Cook Cnty., 117 F.3d 351 (7th Cir. 1997) (employee with major depression and delusional disorder dismissed for threatening to kill a co-worker, not because of her disability; these threats rendered her unqualified for her position); Harris v. Polk Cnty., 103 F.3d 696 (8th Cir. 1996) (holding even if plaintiff's mental illness "caused" her to shoplift, employer could deny re-employment on basis of prior criminal activity); Boldini v. Postmaster Gen. U.S. Postal Serv., 928 F. Supp. 125 (D.N.H. 1995) (finding plaintiff with major depression with psychotic features and

that the trial judge's refusal to include a jury instruction on Newberry's "regarded as [disabled]" claim made no difference to the outcome of the case because there was sufficient evidence to demonstrate that Newberry's behavior, not his mental illness, was the justification for the university's decision to dismiss him.[112]

Another case involving a faculty member, *Motzkin v. Trustees of Boston University*, turned on the question of whether the plaintiff could perform the essential functions of his job.[113] Motzkin, an untenured professor of philosophy, was dismissed after being found guilty by a faculty committee of sexually harassing several students and harassing and sexually assaulting a faculty colleague.[114] Until the university began termination proceedings against him, administrators were unaware that Motzkin apparently suffered from a psychiatric condition that caused "disinhibition," making it difficult for him to control his behavior.[115] Motzkin challenged the termination, stating that his disability had caused the misconduct, and suggested that a "reasonable accommodation" would be an assignment in which he had no contact with students.[116] The court reviewed Motzkin's contract with the university, which required him to teach three courses per semester.[117] The court ruled that, because teaching and interactions with students and faculty colleagues were essential functions of Motzkin's job as a professor, he was not qualified, and thus was not protected by the ADA.[118] The court also noted that the university was not aware of Motzkin's disorder when it terminated him, and granted the university's motion for summary judgment.[119]

Yet another case involving the analysis of whether a faculty member could perform the essential functions of his teaching position is *Horton v. Board of Trustees of Community College District No. 508*.[120] In this case, a

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personality disorder was not qualified for her position because of her hostile behavior toward her supervisor and co-workers); Canales-Jacobs v. N.Y. State Office of Court Admin., 640 F. Supp. 2d 482, 500 (S.D.N.Y. 2009) (holding that a request that an employer excuse misconduct "is unreasonable as a matter of law, because on-the-job misconduct . . . always constitute[s a] legitimate and nondiscriminatory reason[] for terminating employment, even where the misconduct is caused by an undivulged psychiatric condition"); Johnson v. Maynard, 01 Civ. 7393 (AKH), 2003 U.S. Dist. LEXIS 2676 , at *12-13 (S.D.N.Y. Feb. 20, 2003) ("A disabled plaintiff ceases to be otherwise qualified for a position when she engages in misconduct in violation of workplace policy or poses a direct threat to the health or safety of others that cannot be eliminated by a reasonable accommodation.").

112. *Newberry*, 161 F.3d at 280–81.
113. 938 F. Supp. 983 (D. Mass. 1996).
114. *Id.* at 986–90.
115. *Id.* at 991.
116. *Id.* at 993.
117. *Id.* at 994.
118. *Motzkin*, 938 F. Supp. at 994.
119. *Id.* at 1000.
120. No. 95 C 23461996, U.S. Dist. LEXIS 6879 (N.D. Ill. May 15, 1996).

faculty member had been granted a leave of absence because of a "nervous disorder" that his doctor said was caused by "stress from teaching."[121] Horton's leave was extended twice when his physician said that he was unable to return to work because his condition had not improved.[122] Horton was on leave for five years, and requested a fourth leave, saying that he was unable to return to work.[123] The college asked Horton to formally apply for another leave, and to provide updated documentation from his physician.[124] Horton did not provide the requested documentation.[125] When the college dismissed him for failure to return to work and refusal to provide the requested documentation, Horton sued for disability discrimination under the ADA.[126]

The court ruled that Horton was not a qualified individual with a disability because he could not teach, an essential function of his position.[127] Although Horton argued that he could perform non-classroom-related functions, the court rejected that argument, noting that, as a full-time assistant professor, Horton was required to teach twelve to thirteen contact hours per semester (as provided for in the collective bargaining agreement between the faculty union and the college).[128] With respect to Horton's request for an additional leave, the court found that the college made "a more than reasonable accommodation" for Horton's disability.[129] The court granted the college's motion for summary judgment.[130]

In both *Motzkin* and *Horton*, the court reviewed contracts that specified teaching loads, and relied, at least in part, upon these contracts to determine that the faculty members were not "qualified" and thus were not protected by the ADA. The definition of "qualified" was not changed by the ADA Amendments; clearly establishing a position's essential functions, for both staff and faculty, should help colleges and universities defend claims that discipline or dismissal was inappropriate and an example of disability discrimination.

If an employee's misconduct poses a "direct threat" to supervisors, co-workers, or the employee himself or herself, the court may determine that the employee is not qualified and thus is unprotected by the ADA. For example, in *Borgialli v. Thunder Basin Coal Co.*,[131] Dennis Borgialli, a "blaster" who worked for a mining company who had a history of good

121. *Id.* at *1.
122. *Id.* at *2.
123. *Id.* at *3.
124. *Id.* at *4–*6.
125. *Id.* at *4–*6.
126. *Id.*
127. *Id.* at *9.
128. *Id.* at *12 n.2.
129. *Id.* at *14.
130. *Id.* at *21.
131. 235 F.3d 1284 (10th Cir. 2000).

performance, threatened suicide and suggested that he might harm his supervisor or others.[132] He was diagnosed with major depression, anxiety, and personality disorders.[133] His employer attempted to transfer him to vacant positions, but he was not qualified to perform them, so he was terminated.[134] The court affirmed the jury's determination that he could no longer perform his previous job as a blaster because he was no longer qualified to perform those responsibilities safely.[135]

C. What Accommodation is Reasonable?

If the employee can demonstrate that he or she is a qualified individual with a disability, the ADA and Section 504 require the employer to consider whether a reasonable accommodation will enable the employee or applicant to perform the essential functions of the position.[136] Neither law requires the employer to remove or modify essential functions, but EEOC guidelines require an "interactive process" between the employer and the disabled employee to determine the nature of the employee's limitations and the type of accommodation(s) that might be appropriate.[137] Numerous courts have ruled that the employer has the right to select the accommodation that it believes to be appropriate and that will enable the employee to perform the essential functions of the position.[138]

The most frequent type of accommodation requested by employees with mental disabilities is time off from work, either for periods of in-patient

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132. *Id.* at 1284–85; *see also* McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004) (affirming jury's determination that employer was justified in viewing former deputy sheriff with post traumatic stress disorder who shot a gun at her father's grave as a "direct threat" and thus employer's refusal to rehire her did not violate the ADA).

133. *Id.* at 1287.

134. *Id.* at 1289.

135. *Id.* at 1295.

136. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (b)(5)(A) (2000). The law defines "discrimination," in part, as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.*

137. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, Question 5, https://www.eeoc.gov/policy/docs/accommodation.html#general.

138. *Id.* at Question 9 ("The employer may choose among reasonable accommodations as long as the chosen accommodation is effective."); *see* 29 C.F.R. § 1630.9 (1997); Rehling v. City of Chi., 207 F.3d 1009, 1014 (7th Cir. 2000) (finding an employer is not obligated to provide a qualified individual with the accommodation of their choice upon demand); Hollestelle v. Metro. Wash. Airports Auth., 145 F.3d 1324, at *4 n.5 (4th Cir. 1998) (finding an employee does not have the right to select the accommodation of his choice); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285–86 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996).

care, or for psychotherapy.[139] The dual protections of the ADA and the Family and Medical Leave Act[140] require employers to provide these leaves to qualified workers, although courts will not require employers to provide open-ended, indefinite leaves, or protracted periods of leave on a sporadic basis.[141] But courts are less likely to require other accommodations frequently requested by employees with mental disorders, such as the transfer to a different supervisor (or in a higher-education context, the transfer of a faculty member to a different department),[142] a "stress-free" work environment,[143] or working at home[144] (unless, of course, faculty members routinely are permitted to work at home in lieu of being in their offices). Depending on the individual's job responsibilities, it may not be

139. Barbara A. Lee & Karen Newman, *Employer Responses to Disability: Preliminary Evidence and a Research Agenda*, 8 EMPLOYEES RESPS. & RIGHTS. J. (3) 209 (1995).

140. Family and Medical Leave Act, Pub. L. 103-3, 107 Stat. 6; *see also* 29 U.S.C. § 2601 (1991).

141. *See, e.g.*, Fiumara v. President & Fellows of Harvard Coll., 327 F. App'x 212 (1st Cir. 2009); *see also* Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209 (4th Cir. 1994). *But see* Gladden v. Winston Salem State Univ., 495 F. Supp. 2d 517 (M.D.N.C. 2007) (refusing to dismiss claims of director of student activities with depression and anxiety that university terminated him on the basis of his mental disorder when he did not return "promptly" from disability leave and retaliated against him for filing a discrimination charge).

142. *See* Pritchard v. Dominguez, No. 3:05cv40, 2006 U.S. Dist. LEXIS 46607, at *44 (N.D. Fla. June 29, 2006) ("Employees may not use the Act—as Plaintiff is attempting here—as the means to obtain a transfer from an undesirable boss."); Gaul v. Lucent Techs. Inc., 134 F.3d 576 (3d Cir. 1998) (rejecting plaintiff's claim that employer's refusal to transfer him to a different supervisor was denial of a reasonable accommodation); Warnock v. Fed. Reserve Bank of N.Y., 91 F.3d 379 (2d Cir. 1996) (rejecting plaintiff's claim that employer's refusal to transfer him to a different supervisor was denial of a reasonable accommodation). The involuntary transfer of a faculty member to a different department or a different building has been viewed by the courts as appropriate, and faculty challenging such transfers have been unsuccessful in claiming that they are discriminatory or violate the faculty member's rights in some other way. *See* Wynne v. Loyola Univ. of Chi., No. 97 c 6417, 1999 WL 759401 (N.D. Ill. October 10, 2000) (holding dean's refusal to transfer faculty member to another department was not denial of a reasonable accommodation). But if the administration decides to transfer the faculty member involuntarily as a way of responding to behavior issues, courts typically permit it. S*ee, e.g.*, Huang v. The Bd. of Governors of the Univ. of N.C., 902 F.2d 1134 (4th Cir. 1990) (holding transfer that does not result in reduction in compensation or job title is not an adverse employment action); *see also* Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988) (same).

143. *See, e.g.*, Fontan v. Potter, 2006 U.S. Dist. LEXIS 39493 (D.P.R. June 12, 2006).

144. *See, e.g.*, Rauen v. U.S. Tobacco Mfg., 319 F.3d 891 (7th Cir. 2003). *But see* Humphrey v. Mem'l Hosps. Ass'n., 239 F.3d 1128 (9th Cir. 2001) (ruling that plaintiff, a medical transcriptionist with obsessive-compulsive disorder, might be able to establish at trial that working from home was a reasonable accommodation, and thus summary judgment was not appropriate; the fact that other employees with similar positions worked from home suggested that presence at work was not an essential function of the position).

possible to provide a "reasonable accommodation" that enables the individual to perform all of the essential functions of his or her job, but the employer must go through the interactive process of attempting to identify an accommodation that is appropriate.

The significance of the interactive process in determining which accommodations, if any, should be provided is illustrated in *Cleveland v. Prairie State College.*[145] Iris Cleveland, an adjunct instructor, had several physical disorders and requested a variety of accommodations, many of which were provided.[146] She had suffered a stroke and had difficulty writing, so she requested a student aide to record grades and perform other clerical work.[147] The academic vice president refused to consider such an accommodation, stating that all faculty had to record their grades personally to prevent unauthorized changing of grades or tampering with records.[148] Because the vice president had made this determination without engaging in the interactive process and considering ways that the instructor could have ensured that the student aide had recorded the grades correctly, and also did not follow up on another accommodation request, the court rejected the college's motion for summary judgment, saying that the case had to be tried.[149]

Meling v. St. Francis College[150] demonstrates that failing to engage the disabled employee in an interactive process to identify accommodations can result in a punitive damage award as well as reinstatement and compensatory damages. Barbara Meling was an instructor of physical education who was involved in an automobile accident and was on medical leave for a year.[151] When she attempted to return to her teaching position, the college informed her that she could not perform the essential functions of her position—teaching physical education—and she was deemed to have resigned from the college.[152] Meling provided several examples of work she could do on the college's behalf and stated that she could use a student assistant to demonstrate the physical activities required for the courses she taught.[153] In fact, according to the court, Meling could have taught all of the courses assigned to her during the term she was to have returned, with the exception of one course in which she would need a student demonstrator.[154] The college, however, refused to re-employ her.[155] A jury

145. 208 F. Supp. 2d 967 (N.D. Ill. 2002).
146. *Id.* at 973.
147. *Id.* at 974.
148. *Id.* at 977.
149. *Id.* at 979.
150. 3 F. Supp. 2d 267 (E.D.N.Y. 1998).
151. *Id.* at 270–71.
152. *Id.* at 272.
153. *Id.* at 271.
154. *Id.* at 274.
155. *Id.* at 275.

awarded Meling $225,000 in compensatory damages and $150,000 in punitive damages.[156] The trial judge ordered back pay and reinstatement.[157]

In fashioning the accommodation, clear communication between the institution and the employee is critical. For example, faculty or staff with disabilities may take medical or disability leave and seek to return on a part-time basis, gradually increasing their work hours until they can tolerate a full-time schedule. In *Kacher v. Houston Community College System*,[158] Detna Kacher, an instructor in the Radiography Department of Houston Community College, requested a lengthy leave of absence because she needed a liver transplant.[159] When she returned to teaching, she was given a part-time schedule.[160] She was later denied a full-time appointment and was told that she had been terminated from her full-time position while she was on leave.[161] The court rejected the college's motion for summary judgment because the plaintiff and the college disputed whether, in fact, she had known about the dismissal and whether her failure to apply for vacant full-time positions was an appropriate defense to her discrimination claim.[162]

One method of accommodating an employee with a disability is restructuring of the position, as long as essential functions are not removed.[163] This issue was tested in *Hong v. Temple University*,[164] in which an assistant professor of anesthesiology who could not perform many of the essential functions of his position because of chronic pain asked to be excused from most patient care responsibilities, including administering anesthesia and covering on-call responsibilities.[165] The university denied his request and did not renew his faculty appointment. The court ruled that Professor Hong's request for a restructured position was really a request that many of the essential functions of his position be removed—something that the ADA does not require. Although the university had allowed Hong to work in such a "restructured" position for some time, the court said that it was not required to do so indefinitely.[166]

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156. *Id.* at 270.
157. *Id.* at 278.
158. 974 F. Supp. 615 (S.D. Tex. 1997).
159. *Id.* at 617.
160. *Id.*
161. *Id.*
162. *Id.* at 623.
163. *See, e.g.*, Jones v. Saint Joseph's Coll., 847 N.Y.S.2d 584 (N.Y. App. Div. 2007) (ruling that plaintiff, the sole corporate recruiter for the college, who could not drive as a result of injuries sustained in an auto accident, had not requested an accommodation that was reasonable when she asked the college to assign employees with other jobs to perform some of the essential functions of her position).
164. No. 98-4899, 2000 U.S. Dist. LEXIS 7301 (E.D. Pa. May 30, 2000).
165. *Id.* at *2.
166. *Id*. at *23.

The court commented:

> Temple exceeded the ADA's requirements during the period from November 1995 to June 1997 when Dr. Hong was retained despite the fact that he was unable to perform the essential functions of his position with or without reasonable accommodations. It is unclear from the present record whether Temple did so out of benevolence, because of a pre-existing contractual duty, for a combination of both reasons, or for some other reason. In any event, the mere fact that an employer has exceeded its statutory obligations for a limited period of time does not create an obligation for it to continue to exceed those obligations indefinitely. To hold otherwise would undermine the goals of the ADA; employers would be reluctant to attempt extraordinary accommodations of disabled individuals, even for a limited period of time, for fear of being locked in to those extraordinary measures indefinitely.[167]

Reassignment of an individual with a disability may be viewed as a form of retaliation if the reassignment is involuntary. In *Lee v. Arizona Board of Regents*,[168] Chynhye Lee, a faculty member who alleged that she suffered from depression, was transferred to a less desirable teaching schedule after she filed a claim of disability discrimination with the EEOC. [169] Although the court found that the plaintiff had not demonstrated that her depression "substantially limited" a "major life activity," it ruled that her claim of retaliation must be tried.[170]

D. "Regarded as" Disabled Claims

The ADA explicitly includes protection for individuals who can demonstrate that the employer regards them as disabled, even though they are not.[171] The 2008 Amendments to the ADA expanded the definition of the "regarded as" prong, which now reads:

> An individual meets the requirement of "being regarded as

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167. *Id.*

168. 25 Fed. App'x 530 (9th Cir. 2001).

169. *Id*. at 533.

170. *Id*. at 534–35.

171. 42 U.S.C. § 12102 (2009). The regulations define an individual with a perceived disability as one who "1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; 2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or 3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(1) (2011). These regulations may change as a result of the expanded definition of "regarded as" disabled in the ADA Amendments. *See* Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325 (2008) (became effective on January 1, 2009).

> having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[172]

This language was added because, in some cases, courts required the employee to demonstrate that he or she had an actual impairment; the amended language makes it clear that the employee need only show that the employer perceived the employee to be substantially limited as a result of either a real or perceived impairment.[173] The Amendments also clarify the employer's accommodation responsibility for perceived impairments, stating that no accommodation need be made for an individual who is regarded as disabled but who is not substantially limited under the Act's definition.[174]

Employees who have challenged an employer's requirement that they undergo a "fitness for duty" medical or psychiatric examination have claimed that such a requirement proves that an employer regarded the employee as disabled. The courts have disagreed.[175] For example, in *Vosatka v. Columbia University*,[176] Robert Vosatka, an assistant professor of medicine, sued the medical school when his contract was not renewed.[177] After a number of female colleagues complained about his allegedly sexist

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172. 42 U.S.C. § 12102(1)(C)(A) (2011). The law also states that "(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(1)(C)(B) (2011).

173. 42 U.S.C. § 12102(1)(C)(A).

174. The law now states: "(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section." 42 U.S.C. § 12201(h) (2011).

175. *See, e.g*., Doe v. Bd. of Educ. of Fallsburgh Cent. Sch. Dist., 63 Fed. App'x 46, 49 (2d Cir. 2003) ("[T]his fact alone is insufficient."); Colwell v. Suffolk Co. Police Dep't, 158 F.3d 635, 647 (2d Cir. 1998) (stating that the fact that the exams were required "suggests no more than that their physical condition was an open question"); Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999) ("[R]equesting a mental evaluation does not indicate that an employer regards an employee as disabled."); Cody v. CIGNA Healthcare of St. Louis, Inc. 139 F.3d 595, 599 (8th Cir. 1998) ("[A] request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired."). Some employees of public schools and colleges and universities have asserted that ordering an employee to undergo a mandatory psychiatric examination is a violation of due process. *See* O'Connor v. Pierson, 482 F. Supp. 2d 228 (D. Conn. 2007), *aff'd*, 538 F.3d 64 (2d Cir. 2009). Others have asserted that this is a violation of equal protection. *See* Appel v. Spiridon, 531 F.3d 138 (2d Cir. 2008). Courts have rejected these claims as well.

176. 2005 U.S. Dist. LEXIS 18139 (S.D.N.Y. August 25, 2005).

177. *Id.* at *13.

behavior toward them, his supervisor placed him on medical leave and required him to undergo a psychiatric evaluation.[178] The evaluation determined that he was not mentally ill, but had several personality characteristics that made him unaware of the impact of his actions on others.[179] His supervisor offered him a transfer to a different lab so that the colleagues whom he had offended would not have to work with him, but the professor did not follow up on these opportunities.[180] Because the professor was viewed as relatively unproductive and had "low visibility" in the research community, the university decided not to renew his contract.[181]

The court rejected Vosatka's claim that requiring the psychiatric evaluation demonstrated that the medical school leadership regarded him as disabled.[182] Finding that his inappropriate behavior provided a legitimate reason for the decision to request the examination, the court awarded summary judgment to the medical school.[183]

In other "regarded as" disabled cases, defendant employers have successfully defended against these claims by demonstrating that they did not believe that the employee was disabled, even if the employee insisted that he or she had a disability.[184] For example, in *Weigert v. Georgetown University*,[185] Susan Weigert, a research assistant, was rude and uncooperative to both supervisors and peers.[186] When she was dismissed for engaging in these behaviors, she claimed both disability discrimination and that her supervisors regarded her as disabled.[187] The court rejected her claim of disability because there was no medical evidence that she suffered an impairment. With respect to her "regarded as" disabled claim, the court cited testimony from supervisors and peers that they disbelieved her claims of disability, and that the reason for her dismissal was her unprofessional behavior.[188] The court awarded summary judgment to the university on all

178. *Id.* at *11–*13.

179. *Id.*

180. *Id.* at *13–*14.

181. *Id.* at *4–*5, *13–*14.

182. *Id.* at *24.

183. *Id.* at *40. *See also* Mammone v. President and Fellows of Harvard Coll., 847 N.E.2d 276 (Mass. 2006) (ruling that it was the employee's misconduct, rather than a perception that he had a mental disorder, caused his dismissal).

184. *See, e.g.*, Lee v. Ariz. Bd. of Regents, 25 Fed. App'x 530 (9th Cir. 2001) (employer's disbelief that plaintiff had mental disability provided legitimate, job-related justification for ordering plaintiff to undergo psychiatric evaluation and was not probative of disability discrimination); *see also* Cody v. Cnty. of Nassau, 577 F. Supp. 2d 623 (E.D.N.Y. 2008) (finding community college staff member with anxiety and depression was not regarded as disabled because supervisors ignored her claims of disability).

185. 120 F. Supp. 2d 1 (D.D.C. 2000).

186. *Id.* at 4.

187. *Id.* at 6–12.

188. *Id.* at 13.

of Weigert's claims.[189]

As noted above, the amended definition of "regarded as" is likely to result in fewer awards of summary judgment to employers on these claims. Furthermore, employees who either have documentation of a disorder or who can present some evidence that they were treated as though they were disabled may have more success in getting their claims to a jury.[190]

E. Retaliation claims

The ADA prohibits retaliation against an individual "because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."[191] In 2006, the United States Supreme Court expanded the ability of employees to state claims of retaliation for a wide variety of "adverse employment actions,"[192] and the number of retaliation claims has skyrocketed as a result.[193] For example, in 1997, retaliation claims constituted twenty-three percent of all claims filed with the EEOC.[194] By 2009, the latest year for which data are available, thirty-six percent of all claims included a claim of retaliation,[195] which is an increase of fifty-six percent over the twelve year period. In some cases, plaintiffs cannot survive dismissal of their disability discrimination claims, but are permitted to go forward with retaliation claims because of the alleged reaction of their employer when they either request an accommodation or complain of

189. *Id.* Similarly the court in *Newberry v. East Texas State University* ruled that it was the plaintiff's uncollegial behavior, not any perception that he was disabled, that was grounds for his termination; *see supra* text accompanying notes 104–12.

190. *See, e.g.*, Lynch v. Lee, 2004 U.S. Dist. LEXIS 16906 (E.D. La. Aug. 18, 2004) (rejecting employer's motion for summary judgment because plaintiff presented evidence that employer knew of diagnosis of mental illness and ordered her to receive treatment, fabricated complaints against her, and then dismissed her); *see also* Stroud v. Connor Concepts, Inc., 2009 U.S. Dist. LEXIS 112072 (M.D. Tenn. December 2, 2009) (employee dismissed after in-patient treatment for serious mental illness; court rejected defense motion for summary judgment).

191. 42 U.S.C. § 12203(a) (2011).

192. Burlington N. v. White, 548 U.S. 53 (2006). A second ruling by the U.S. Supreme Court in Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 129 S. Ct. 846 (2009), clarified that employees may state retaliation claims under Title VII (and presumably under the ADA, since the nonretaliation language is very similar), if they believe they have suffered an adverse employment action not only for complaining of discrimination themselves, but also for participating in the investigation of another employee's discrimination complaint.

193. Eeoc.gov, *supra* note 12.

194. *Id.*

195. Eeoc.gov, *supra* note 12. Employment attorneys have reported sharp increases in retaliation claims against employers, and one has cited retaliation as the "No. 1 risk for employers today." Cari Tuna, *Employer Retaliation Claims Rise*, WALL ST. J., October 5, 2009, *available at* http://online.wsj.com/article/SB12547038063 6663209.html.

discrimination.[196]

The order of proof in an ADA retaliation case follows the order of proof in Title VII cases, established by *McDonnell Douglas Corp. v. Green*.[197] In order to establish a claim of retaliation, the plaintiff must make out a prima facie case. The plaintiff must show that 1) the employee was engaged in an activity protected by the ADA; 2) the employer was aware of that activity; 3) an employment action adverse to the plaintiff occurred; and 4) there existed a causal connection between the protected activity and the adverse employment action.[198] If the plaintiff successfully makes out the prima facie case, the employer then must articulate a reason for the negative employment action that is unrelated to the employee's alleged protected activity. Should the employer do so, the employee must then establish that this nondiscriminatory reason is a pretext for retaliation.

In order for an employee to prevail on a retaliation claim, the alleged retaliation must have occurred either because an employee sought a reasonable accommodation or as a result of a complaint of discrimination, and the employee must show that the employer took some adverse employment action against the employee after the employee engaged in that protected activity.[199] For example, in *Lee*,[200] Prof. Lee was transferred to a less desirable teaching schedule after she filed a claim of disability discrimination with the university's affirmative action office. Although the court found that she had not established that she met the law's definition of disability, it allowed her retaliation claim to be tried because of the timing of the transfer and because an administrator had told her that the transfer

196. *See, e.g.*, Emmons v. City Univ. of N.Y., 2010 U.S. Dist. LEXIS 54140 (E.D.N.Y. June 2, 2010) (holding an instructor could not establish that she was disabled because she did not provide evidence that she was "substantially limited," but she stated retaliation claim based upon negative treatment of her by her superiors after she took disability leave).

197. 411 U.S. 792 (1973); *see* Rakity v. Dillon Cos., 302 F.3d 1152 (10th Cir. 2002); *see also* Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998); Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1328 (11th Cir. 1998); Barnett v. U.S. Air, Inc., 157 F.3d 744, 753 (9th Cir. 1998); Steffes v. Stepan Co., 144 F.3d 1070, 1074 (7th Cir. 1998); Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1122 (5th Cir. 1998). *But see* Metoyer v. Chassman, 504 F.3d 919, 931 (9th Cir. 2007) (stating that when the plaintiff offers direct evidence of discrimination, the *McDonnell-Douglas* framework need not be used).

198. Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 159 (2d Cir. 1999).

199. *See, e.g.*, Fiumara v. President & Fellows of Harvard Coll., 526 F. Supp. 2d 150 (D. Mass. 2007), *aff'd*, 2009 U.S. App. LEXIS 9558 (1st Cir. May 1, 2009) (holding employee's dismissal not a result of request for reasonable accommodation; complaint about alleged discrimination occurred after dismissal). *But see* Clinkscales v. Children's Hosp. of Pa., 2009 U.S. Dist. LEXIS 38939 (E.D. Pa. May 7, 2009) (noting termination for requesting leave of absence to deal with mental health disorder could be evidence of retaliation; defendant's motion for summary judgment denied).

200. 25 Fed. App'x 530 (9th Cir. 2001).

was a result of her discrimination claim.[201] Similarly, in *Geoghan v. Long Island Rail Road*,[202] the court was skeptical as to whether the plaintiff would be able to demonstrate that his impairment, attention deficit hyperactivity disorder, was sufficiently limiting to qualify as ADA-protected, but noted that his retaliation claim did not depend upon the success of his discrimination claim.[203] The court explained, "A claim of retaliation under the ADA is thus treated separately from a claim of discrimination, and a plaintiff need not show that he or she has a disability to make out a retaliation claim;"[204] the court ruled that the retaliation claim must be tried.[205]

In order to state a claim of retaliation under the ADA, an employee does not need to have first complained about discrimination.[206] Seeking a reasonable accommodation, which is a protected activity under the ADA, would be a sufficient precursor to a retaliation claim if the employee is subsequently disciplined, dismissed, or suffers some other negative employment action.[207] For these reasons, it is critical for the employer to support any negative employment action with documentation of reasons unrelated to the employee's attempt to exercise rights under the ADA.

This review of litigation suggests that administrators need to focus more clearly on articulating the expectations for staff and faculty and to hone their supervisory skills and actions. The next section addresses how that might be accomplished.

III. "TOTO, I HAVE A FEELING WE'RE NOT IN KANSAS ANYMORE": THE CHANGING LANDSCAPE OF CAMPUS SUPERVISION

At the outset of this article, we suggested that the culture of colleges and universities might complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally. Too often this culture has embraced a "non-supervision supervision" approach, which reflects a reticence by professionals to believe that colleagues can or should be "managed" by each other. The current structure of academic administration (e.g., department chairs, deans), further complicates this reality by coupling a lack of formal supervisory skill development with a natural tendency toward conflict avoidance to produce an environment in which troublesome employees are able (or enabled) to behave inappropriately for extended periods of time.

201. *Id.* at 533–34.
202. 2009 U.S. Dist. LEXIS 30491 (E.D.N.Y. April 9, 2009).
203. *Id.* at *80.
204. *Id.*; *see also Sarno*, 183 F.3d at 159; Emmons v. City Univ. of N.Y., 2010 U.S. Dist. LEXIS 54140, *1 (E.D.N.Y. June 2, 2010)
205. *Geoghan*, 2009 U.S. LEXIS 30491 at *80.
206. *Id.*
207. *Id.*

Additionally, the traditional "silo" model of campus organization actually discourages academic supervisors from consulting or interacting regularly with Human Resources and legal counsel to address the increasingly complex array of personnel issues arising on campuses today. As an added factor, supervisory positions on many campuses, such as deans and chairs, are not those for which one formally prepares or trains. Instead, individuals (especially at smaller, independent schools) must assume these roles simply because it is their turn to do so. The result?

1. Performance or inappropriate conduct issues may languish, unaddressed for years, or be ignored in the hope that they will drift away. In contrast, too many issues that do receive formal attention are more likely to be addressed in an *ad hoc* manner, and actions taken in response to inappropriate conduct will be driven more by an individual supervisor's personality (good or bad) or innate leadership skill, rather than by objective best practices that are consistent with established policies and procedures.
2. Performance or conduct issues may be erroneously evaluated through the lens of academic freedom, as opposed to applicable institutional policies and expected standards for professional conduct.
3. Policies, procedures and associated sanctions for violations are more likely to be applied in an inconsistent manner, encouraging too many employees to forum shop for the policy interpretation or application they prefer.
4. Contradictory or competing responses regarding expected standards of workplace conduct produce unnecessary ambiguity and confusion within and across departments on campus.
5. The inconsistent application of policies and resultant confusion actually empower troublesome employees to continue their inappropriate conduct for an extended period of time, and contribute to increased legal exposure for the institution.

Effective compliance with federal law, such as the ADA and other campus risk management concerns, means that campuses no longer can afford—either legally or strategically—to continue this culture of "non-supervision supervision." Instead, a new approach is required: the development of a culture of engaged supervision, supported by a campus-wide system that promotes the infusion of supervisory best practices all across an institution's managerial spectrum. A culture of engaged supervision requires the development of effective, ongoing programs for *all* campus supervisors, programs that stress the critical role and impact supervisors can have on the implementation of institutional objectives. Consistent use of best practices all across the managerial spectrum will empower administrators to better manage inappropriate conduct and

troublesome behavior, as well as to lessen institutional legal risk that might otherwise result from actions taken by well-meaning but ill-prepared supervisors. This system will succeed only if we ensure that an administrative "toolbox" is placed in the hands of every administrator with supervisory responsibility, a toolbox that enables them to: 1) understand that effective supervision is not an inherent talent, but is skill-based and requires continuous refinement; 2) approach supervisory responsibilities in a preventive manner by identifying troublesome employees at a much earlier stage and working with Human Resources and legal counsel to develop practical options to manage or correct the difficult behavior; 3) think about decision-making in a more holistic way and recognize that patterns of inappropriate conduct which are not satisfactorily addressed in one department likely will have institution-wide strategic and legal consequences[208]; and 4) be cognizant of the personal characteristics one brings to the supervisory role and the impact of those characteristics on decision-making, including the ability to address and manage conflict.[209]

Let's consider how a new culture of engaged supervision can influence the management of troublesome conduct in the following situation. Professor A has been a tenured member of the faculty for five years. The prior president actively recruited Professor A, believing that her national

208. This holistic approach is in concert with an increased emphasis on the concept of enterprise risk management, which requires institutions to focus on the broader nature of institutional risk involving the strategic, financial, operational, compliance and reputational aspects of the institution. *See* Ass'n of Governing Bds. of Univs. & Colls. & United Educators, The State of Enter. Risk Mgmt. at Colls. & Univs. Today, *available at* http://www.agb.org/sites/agb.org/files/u3/AGBUE_FINAL.pdf; *see also* E. Gordon Gee, *A Call to (Link) Arms*, PRESIDENCY MAG. Spring 2009. In remarks delivered at the American Council on Education 2009 Robert H. Atwell Lecture, President Gee stated that "[w]e must move from thinking vertically to thinking horizontally," and help campus constituencies initiate new types of collaborations, and "establish much richer partnerships" that enable them to work as allies, not adversaries. Though President Gee's remarks were focused on the role that faculty could and should play, such horizontal thinking also creates a more effective platform for legal counsel, Human Resources and supervisors to address troublesome employees' behavior. *Id.*

209. Engaged, reflective supervisors take the time to consider the personal characteristics, interests and goals they bring to the process of supervision. For example, is the position of dean or chair the best use of one's skills and strengths? Will one who assumes a supervisory role have both the physical *and* emotional stamina to confront the personnel challenges that arise on a daily basis? Are supervisors prepared to carefully distinguish between being a friend and being a professional colleague? The personal characteristics one brings to a supervisory role also include one's "emotional intelligence"—the varying levels of self-control, persistence, or the ability to motivate oneself, which inform the emotional habits we develop—and use—during decision-making. Research regarding intelligence places emotion "at the center of aptitudes for living," helping us know whether we are able to "rein in emotional impulse; to read another's innermost feelings; [or] to handle relationships smoothly . . . ." DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (Bantam Books 2006). Cognizance of one's emotional intelligence is essential to reflective supervision and can be a potent predictor of potential success or failure in the management of daily challenges.

reputation as a researcher would enhance the University's Biology Department and its programs. Though Professor A's work and interaction with others during her first two years on campus were promising, her conduct toward colleagues and students on campus has become increasingly rude, contentious, and unpredictable. Students regularly began to complain that they did not feel free to ask questions in class or to meet with her during posted office hours for fear of being verbally attacked and told that their questions were either stupid or a waste of her time. A number of students also alleged that when they tried to discuss their concerns, Professor A retaliated by lowering their grades.

Colleagues complained that Professor A used department or faculty senate meetings to denigrate their work publicly. More often than not, Professor A refused to attend department meetings, claiming that this type of service was trivial and significantly detracted from the time that should be devoted to her research. Over the last two years, Professor A also started to dress in a more eccentric manner, left inappropriate notes or photos in faculty offices, engaged in public confrontations at campus faculty events, and regularly dismissed her classes or labs thirty to forty minutes early.

It is important to note that during the past six years, Professor A's department has had four department chairs—none of whom ever before served in a supervisory or managerial capacity. Each of the prior chairs found Professor A extremely difficult to work with; she ignored e-mails, voicemails, and other requests to communicate about department and student issues. In a conversation with one prior chair two years ago, Professor A unexpectedly disclosed that she had been on medication for depression most of her life, but stopped filling the prescription four years ago because she felt the medication impaired her ability to concentrate while at work. She then suggested a release from her teaching responsibilities in order to produce a more stress-free environment in which to conduct research. Other than telling Professor A that her request "was not in keeping with the nature of her appointment," the chair never followed up on this conversation with Professor A, nor did he share this information with Human Resources or the Provost.

Over the course of the past year, the Provost worked with the current chair[210] in an attempt to "rehabilitate" Professor A's relationship with her colleagues and students. Nevertheless, no formal or systematic process to accomplish this ever was implemented because the Provost's attention was continuously diverted to institutional financial concerns and student retention.

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210. In this scenario, the Provost happens to be working closely with the department chair. However, in large public or private institutions, it is understood that the department chair would be working on this matter with a dean for the division, school or college in which Professor A received her faculty appointment.

The current chair has the least seniority in the department. She has been easily intimidated by Professor A's conduct and does not know how to address Professor A's angry outbursts, her condescending manner when conversation does occur, or her refusal to complete departmental responsibilities expected of full-time faculty. During a recent meeting with the Provost, the current chair said:

> You know, she's nuts! Everyone on campus believes this. Just look at her conduct over the years; no normal person behaves this way. Other members of the department are increasingly alarmed and fearful. So, I decided to ask a couple of colleagues in the Psychology Department to give me a sense of what they think is wrong with her. Their response: Professor A is a "classic" example of someone with a bipolar illness and associated personality disorder. Finally, we now know what is wrong with her! But, nobody seems to want to do anything about Professor A's conduct because her research and scholarship are viewed as being so valuable to this institution.

The Provost had to admit the institutional dilemma posed by Professor A. On the one hand, the caliber of Professor A's research has, until more recently, brought national recognition and distinction to the University and its Biology programs. On the other hand, Professor A's daily conduct and interactions with those on campus are intolerable. Further, according to the Provost, "What if her conduct worsens, or what if Professor A really is ill; how long can she reasonably sustain her current level of scholarship? I suppose I can no longer hope that she will resign and move on to another university."

What do we know at this point?

1. Professor A's perceived national reputation placed her on a faster track to the attainment of tenure at the university. In many ways, the Promotion and Tenure Committee believed its collective hands were tied. The Committee did not have enough specific evidence to make a negative recommendation five years ago, and the "glimmers" of concern that may have existed for several on the Committee were not enough to sustain a negative recommendation at the Provost, President, or Board levels. Further, the number of turnovers of department chair in the Biology Department during the past several years has made any sustained post-tenure review virtually impossible.
2. Professor A's inappropriate conduct has continued unchecked for well over two years. In fact, we have reason to believe that, absent Professor A's own understanding of what constitutes civil or professional behavior, she never received notice from any campus supervisor that her conduct was unacceptable or in violation of university policy.

3. Both the Provost and the current chair appear to be at a loss regarding how to proceed, whether by personal intervention or through some other formal University procedure, including administrative leave or even termination of tenure.
4. There is no indication that any department chair or the Provost has consulted with Human Resources or legal counsel during the past five to six years to discuss options to manage Professor A's troublesome behavior or identify any potential legal risks for the University.
5. Despite Professor A's disclosure two years ago of her lifelong treatment for depression, no documentary evidence of the diagnosis from her physician has been provided to the University. And, the only mention of anything resembling a request for accommodation also occurred two years ago when Professor A suggested she be relieved of her teaching duties.
6. Solicited and unsolicited opinions on campus regularly characterize Professor A as "nuts," a classic case of bipolar disorder, and one with whom "you don't want to tangle." This view, in combination with the Psychology Department's recent "diagnosis" of Professor A, has meant that she, as a result, has been permitted to chart her own course of conduct.

The Provost, concerned and alarmed by Professor A's conduct, the lack of department chair supervisory effectiveness over the last several years, and the legal implications of the Psychology Department's involvement in the matter, reached out to Human Resources and legal counsel, asking them to help her identify next steps. Their recommendations:

1. Develop a clear, accurate and thorough chronology that candidly answers the question, "How did we get here?" This chronology must identify all the facts—good, bad and ugly—as well as any information gaps. The Provost must speak with the current and former department chairs, each of whom must be completely forthcoming, and provide the Provost with any notes, formal and informal memos, recollections of conversations with Professor A about the performance of her duties, inappropriate conduct, or mental health issues. Legal counsel should review all of this information with the Provost to assess actual or potential legal implications. The Provost also should count on legal counsel to provide assistance in moving this process along, educate reluctant supervisors about short and long-term legal concerns, and address supervisor anxieties about any perceived impact of Professor A's conduct on them.
2. The Provost should consult with Human Resources and legal counsel to assess whether Professor A's conduct poses a threat to

her own health and safety or that of others on campus. If there is a reasonable basis to believe that such is the case, immediate medical and/or psychiatric assistance should be sought regarding how to talk with Professor A about her continued presence on campus and/or ongoing medical concerns and treatment. Too often there is a tendency to think that because someone "always acts that way," the need to address the conduct may not be urgent. Recent tragedies at Virginia Tech,[211] Northern Illinois University,[212] and the University of Alabama at Huntsville[213] provide hard lessons to the contrary.

3. The Provost must review the job description for full-time faculty at the University, especially for members of Professor A's department. If no formal job description exists—and this often is the case—the Provost must work with the department chair and/or the division dean to identify the essential functions full-time faculty are expected to perform (e.g., teaching, scholarship, service on/off campus, student advising). The essential functions must be viewed in relation to the actual activities in which Professor A has engaged—or been permitted to engage—over the last several years. For example, if the primary emphasis at the University is on teaching, but Professor A was hired to focus on research, will it be necessary or productive for the Provost to redirect Professor A's attention to her teaching? As an additional issue, the Provost must consider the long-term consequences of any exceptions made for Professor A on the integrity of a faculty job description (e.g., the cohesion of those essential functions), as well as exceptions that may be requested by other faculty.
4. If Professor A has not been able to perform the established essential functions of a full-time faculty member, the Provost must be prepared to: 1) ensure that Professor A has a clear understanding of what those essential functions are; 2) work with Professor A to identify the reasons why the essential functions are not being met; 3) review any current or prior requests by Professor A to modify those essential functions for medical reasons—thereby implicating the interactive process under the ADA. All of these issues must be fully addressed *before* any discussion of options that include some

211. Virginia Tech Review Panel, Mass Shootings at Virginia Tech: Report of the Review Panel (2010), *available at* https://www.governor.virginia.gov/TempContent/techpanelreport.cfm.

212. U.S. Fire Admin., Technical Report Series No. 167: Northern Illinois Univ. Shooting (2008), *available at* https://www.usfa.dhs.gov/downloads/pdf/publications/tr_167.pdf.

213. *Biology Professor Charged with Murder in Alabama Shooting*, CHRON. OF HIGHER EDUC. (2010), *available at* https://chronicle.com/article/Biology-Professor-Charged-W/64194/.

form of discipline or termination of tenure. [214]

It also will be necessary for the Provost to assess whether an emphasis on teaching by the current or former department chairs actually contributed in any way to Professor A's troublesome behavior. That is, were all department chairs who supervised Professor A during the past several years aware of the conditions of employment established at the time Professor A was hired (e.g., the focus on research/scholarship as opposed to the typical tenure track appointment)? Even if it is determined that ambiguity or confusion regarding the nature of her appointment existed and resulted in unmanaged conflict with Professor A, the Provost must now, on a go-forward basis, keep Professor A focused on compliance with the university's established standards of conduct that apply to all faculty on campus in relation to that appointment.

Bottom line: The Provost must be absolutely clear and candid with Professor A regarding 1) ongoing duties and responsibilities as a tenured member of the faculty; 2) expected compliance with university standards of conduct; and 3) the time frame within which compliance will be expected to occur.[215] The meeting with Professor A should include the Director of Human Resources (or another confidential employee) who will be present as an objective observer and to take notes.[216]

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214. The actions of the Provost, in consultation with Human Resources and legal counsel, constitutes an advanced, and thorough, application of what we call the "Can't vs. Won't" analysis: Is an employee not performing because he or she can't or because he or she won't? If the answer is the former, carefully consider what training, resources, etc., should have been, or can be, provided to enable the employee to comply with established policies/procedures or to perform one's duties and responsibilities. Once these administrative obligations have been met, the burden shifts to the employee to perform his or her work in accordance with clearly articulated standards.

Effective application ensures: (a) the maintenance of the integrity of applicable policies and procedures; (b) identification of any/all critical information gaps; and (c) the prevention of conduct/action by the institution that may serve as a distraction to the underlying inappropriate conduct—and ultimately, as a death-blow to the implementation of an effective resolution. As we know, absent issues that pose an immediate health and safety issue, toxic or inappropriate conduct on campus typically is provided an exceptionally inordinate amount of time to "ferment"—becoming more toxic and more complicated with each passing day. Effective application of the Due Diligence Checklist (discussed further below) and the "Can't vs. Won't" analysis have the effect of supplanting rash or *ad hoc* responses with a more thorough approach to promote and sustain positive, productive outcomes—over the short *and* long-term.

215. The time frame for improvement must be fair and realistic. On the one hand, Professor A is a professional and the University should be able to expect her compliance with clearly articulated and fair conduct standards. But, even if we assume that Professor A did not understand these standards or believed they did not apply to her, once the University provides Professor A with notice of non-compliance, adequate time (e.g., within the first two weeks following notice) must be given to Professor A to ask any follow-up questions, or to permit supervisors to eliminate any ambiguity regarding the application or interpretation of the policy.

216. In order for the Provost to stay focused on the information that must be conveyed to Professor A, The Human Resources Director should be present as an

The Provost is faced with a number of bad facts. First, prior chairs either ignored Professor A's request for accommodation or did not recognize the need to initiate the interactive process when Professor A suggested she be relieved from her teaching duties. Even if it ultimately were shown that such an accommodation was neither warranted nor reasonable, the discussion would have begun the process of "calling the question" regarding Professor A's behavior and established a more productive framework for the review of what is expected of a tenured member of the faculty. Second, the current chair's request for a "diagnosis" by the Psychology Department and the ongoing characterization of Professor A as "nuts" by colleagues created harmful distractions for the University.[217] Instead of keeping focused on Professor A's inappropriate conduct and non-compliance with established standards of conduct, the conduct by the department chair and others permitted the focus to shift to the University's potential non-compliance with requirements under the ADA. Third, the continuous turnover of department chairs in the Biology Department signaled a concern that was broader and deeper than the conduct of Professor A. Many, if not all, of those who held the position of department chair very likely did not receive the type of formal preparation or training considered essential to address the personnel issues, and the associated conflict, they were expected to manage on a daily basis. The result: increased conflict and lack of workable, sustainable resolutions.

Using the always popular "Shoulda, Woulda, Coulda" analysis, let's consider not only what the Provost might have done to prevent (or better manage) the cascade of troublesome conduct involving Professor A, as well as what can be done to prevent similar issues from arising in the future. The first and most fundamentally important step is to make a commitment to a broad-based culture of engaged supervision on campus. As noted earlier, this culture promotes the infusion of supervisory best practices all across an institution's managerial spectrum and the development of an administrative toolbox that serves as a practical daily guide for effective

objective observer and to take notes—notes which can be provided to Professor A, if requested, and to serve as effective documentation of the type and level of notice provided. Should the Provost happen to veer off track or off message, a well-prepared Human Resources Director can ask to see the Provost outside the room for a couple of minutes—time to provide additional support and permit the Provost to refocus on the information that must be unambiguously conveyed to Professor A.

217. One of the most important arguments for the promotion of an engaged, holistic approach to supervision, as suggested in this article, is the prevention of *ad hoc* responses or poor preparation that create unnecessary distraction —distractions that shift the focus from the inappropriate or troublesome conduct of an employee to the ill-advised or inappropriate conduct of the institution and its representatives. Here, the department chair's engagement of Psychology Department colleagues to diagnose Professor A clearly was ill-advised and reflected inadequate supervisory preparation—an error that serves as distraction from her inappropriate conduct and likely could result in a potential claim by Professor A that the University regarded her as disabled.

management and decision-making. The administrative toolbox we propose includes the following:

1. Creation of a Due Diligence Checklist. The regular, ongoing use of this Checklist at *all* levels of supervisory responsibility creates a common language and greater clarity in the identification of issues; improves communication within and between departments; eliminates confusion and ambiguity—both of which can create or exacerbate conflict; serves as a valuable signal that concerns will be addressed early, with clarity and consistency; lessens the inclination toward *ad hoc*, ineffectual responses that may be contrary to policy and procedure, and/or increases the likelihood of legal risk. The essential components of the Checklist are the following:
    a. How did we get here? We must be able to answer this question *before* we can identify where we can/need to go. The answer to this question also helps us identify an essential chronology, fundamental issues, and any "gaps" that may create distractions from the underlying conduct at issue.
    b. What do I know? We must gather all necessary, relevant information and documentation *before* issuing a response. We also must be attentive to all relevant "back-stories" that actually may drive the troublesome behavior at issue.
    c. What documents do I have? What emails, notes, memos, contracts, etc., exist? Is anything "hidden?"
    d. What policy has been implicated? Our examination at this point requires us also to determine whether such policies have been consistently applied; whether the relevant policies are up to date and legally compliant; and whether any past practices have "trumped" current policy.
    e. With whom should I speak—immediately? For example, does the conduct at issue pose a threat to health and safety? Does the conduct involve potential discrimination, such that legal counsel, Human Resources, and/or other administrative leaders should be consulted before further action is taken?
    f. What options/effective next steps exist? At this point, we must be able to identify options to ensure the short and long-term management of the matter at hand, the prevention of legal exposure, and the targeted support required by affected departments. Preparation and effective collaboration are key.
2. Creation of a Culture of Supervisory Effectiveness. This should be done at all levels of supervisory responsibility and requires a

commitment to the ongoing preparation and development of supervisory best practices to ensure a reflective, holistic and engaged approach to supervision. For example, supervisory best practices programs must focus on hiring, evaluation and discipline (including termination)—three areas that cause special problems, both personally and professionally, for supervisors. Absent sufficient preparation, the *ad hoc* or inconsistent actions taken by supervisors in these areas actually may serve to increase the likelihood of institutional legal exposure, rather than to lessen the conduct of troublesome employees.[218] Consider the following:

a. Hiring. Too many hiring decisions are made without taking sufficient time to ensure that: 1) clear and consistently applied hiring policies are in place; 2) job postings and position descriptions accurately reflect institutional needs *and* the essential functions of the position; 3) training is provided to all involved in the search process regarding appropriate interview questions, as well as verbal and electronic communications with candidates; and 4) search committees understand the risk management reasons underlying criminal background and reference checks (especially for adjunct faculty who may be conducting online courses or who are not regularly on campus).

b. Evaluations. Too many supervisors are uncomfortable with the evaluation process and what actually is required to effectively manage the personnel problems that arise. Supervisors who are conflict avoidant or simply unwilling to "call the question" regarding troublesome behavior produce evaluations that are inaccurate or incomplete, delaying the management of that conduct. Therefore, effective evaluations must: 1) be based on a supervisor's first-hand knowledge and provide a realistic assessment of an employee's work for a specified period of time; 2) never come as a surprise or be used as a threat or punishment; and 3) be continuous in order to reflect successes, failures or other performance issues. Human Resources and legal counsel can provide supervisors with valuable support and insight in the preparation of effective evaluations.

c. Discipline. It is critical for all supervisors to conduct a "Can't vs. Won't Analysis": Is an employee not performing because he or she can't or because he or she won't? If the

218. Links to valuable resources that discuss additional best practices and in-service programs are available in the NACUA database of conference outlines and resources. *See* NACUA, http://www.nacua.org (last visited Feb. 13, 2011).

> answer is the former, carefully consider what training, resources, etc., should have been, or can be, provided to enable the employee to adequately perform one's duties and responsibilities. Once these obligations have been met, the burden shifts to the employee to perform his/her work in accordance with clearly articulated standards. If some form of progressive discipline is required, supervisors must: 1) not procrastinate; 2) be clear regarding what is expected and specific regarding which standards have not been met; 3) be consistent in the application of policies and procedures; 4) ensure that adequate documentation is prepared; and 5) provide for timely and meaningful follow-up.

Supervisors also must be aware of the ongoing tension between the legal ability to impose some form of discipline and the political will to do so. That is, supervisors must be prepared to understand how their actions and recommendations will be received and supported (or not) all the way up the decision making chain.

3. "Smarter" Use of Resources, such as Human Resources and Legal Counsel. Ensure that productive relationships are developed with legal counsel and Human Resources to provide supervisors with the necessary support: 1) to assess the major issues and patterns of conduct that contribute to troublesome behavior and potential legal risk for the institution; 2) the development of policy, its review and implementation; and 3) through the conduct of regular in-services.
4. Incorporate Dispute Resolution Techniques into One's Daily Work. Understand the nature and scope of available dispute resolution tools to manage and resolve conflicts *before* they develop into formal disputes. For example, conflict coaching can be used as a daily part of one's supervisory work to assist supervisors to better understand the nature of conflict, the means to manage it, and the communications behaviors that either exacerbate or resolve workplace disputes. [219]

The availability of the administrative toolbox to the Provost does not mean that Professor A's behavior never would have materialized. However, the broad-based, consistent use of these tools by the Provost and Professor A's department chairs over the past several years certainly would have permitted the University the opportunity to identify issues of concern much earlier, intervene where necessary, and craft sustainable options for

219. *See* TRICIA S. JONES & ROSS BRINKERT, CONFLICT COACHING: CONFLICT MANAGEMENT STRATEGIES AND SKILLS FOR THE INDIVIDUAL (Sage Publications 2008).

resolution.

IV. CONCLUSION

The increasingly complex array of personnel issues on campuses too often has bewildered or stymied supervisors who have been ill-equipped to address them. A widespread culture of "non-supervision supervision" leaves academic administrators at all levels of the managerial spectrum without the necessary tools to effectively address these matters. We know that personnel issues and associated conflict are not likely to lessen in complexity anytime soon. Instead, troublesome employees will populate campuses for years to come. These facts make it imperative for campuses to adopt a new culture of holistic engagement that provides supervisors with the skills necessary to prevent, or at least better manage, the immediate impact of an individual's troublesome behavior while also tending to the broader, long-term legal and strategic implications of that conduct across departments and constituencies. In addition, supervisory best practices programs adopted by campuses must include ongoing attention to the: 1) selection, promotion and/or support of individuals who are committed to the new culture of holistic engagement; 2) utilization of a due diligence approach as a daily part of one's supervision; 3) refinement of skills and best practices in hiring, evaluation and, where necessary, discipline; 4) promotion of additional support through the development of productive, ongoing relationships with legal counsel and Human Resources; and 5) tangible and harmful consequences of conflict avoidance. Supervisors who receive a substantive grounding and a better understanding of the wide range of practical options available to them, via models for improved communications and the incorporation of dispute resolution skills into their daily work, will be empowered to address troublesome conduct and manage campus conflicts more productively, and at a much earlier stage.[220] In sum, an engaged, holistic approach to supervision means that the conduct of troublesome employees will not result in supervisory paralysis, or be viewed simply as a part of the fabric of departmental life until the employee chooses to leave or retires. Instead, a culture of holistic engagement encourages prevention, effective management, and the active, coordinated development of options to resolve

220. We recommend that supervisors add the following to their resource libraries: Douglas Stone, Bruce Patton & Sheila Heen, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (Penguin Group USA 1999); Kerry Patterson, Joseph Grenny, Ron McMillan, & Al Switzer, CRUCIAL CONVERSATIONS: TOOLS FOR TALKING WHEN STAKES ARE HIGH (McGraw-Hill Professional 2002); Kerry Patterson, Joseph Grenny, Ron McMillan, & Al Switzer, CRUCIAL CONFRONTATIONS: TOOLS FOR RESOLVING BROKEN PROMISES, VIOLATED EXPECTATIONS AND BAD BEHAVIOR (McGraw-Hill Professional 2004). These readings serve as a valuable introduction to the nature of the dispute resolution tools that can be incorporated into one's daily work.

troublesome conduct—no matter what the nature of that troublesome conduct may be. The outcome: confident supervisors, containment of legal exposure, and greater time to focus on the implementation of institutional strategic goals.