

Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process

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I. INTRODUCTION

A survey conducted prior to the enactment of the Americans with Disabilities Act of 1990 (ADA)¹ found that persons with disabilities were particularly underprivileged and disadvantaged.² The survey noted that when compared with persons without disabilities the disabled had less money, education, social and community interaction, and overall satisfaction with life.³ Historically, the public viewed these conditions as the unavoidable consequences of mental or physical impairments.⁴ Over time, policy makers began to realize that the disabled's social and economic statuses were not an inevitable consequence, but instead, it is one perpetuated by discriminatory policies based on stereotypes and myths.⁵ As a result, Congress enacted the ADA.⁶

The ADA promised a bright future of inclusion and integration for individuals with disabilities.⁷ Congress enacted the statute in an effort to end discrimination against the disabled and to add them into the mainstream of American life.⁸ Congress intended for the ADA to be a clear and comprehensive mandate that provides enforceable standards

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1. 42 U.S.C. §§ 12101-12213 (1995).

2. H.R. REP. NO. 101-485, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447 (citing LOUIS HARRIS AND ASSOCIATES, THE ICD [INTERNATIONAL CENTER FOR THE DISABLED] SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986)).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 26.

7. *Id.*

8. *Id.* at 23.

for the federal government to use and prevent discrimination against individuals with disabilities.⁹

Specifically, the employment provision of the ADA, Title I, provides that no employer shall discriminate against a qualified individual on the basis of the individual's disability with regard to various aspects of the employment.¹⁰ In general, the ADA protects those who have an actual impairment, record of an impairment, or are perceived as impaired.¹¹ Additionally, the individual with a disability must be qualified to hold the position, with or without reasonable accommodation.¹²

The Equal Employment Opportunity Commission (EEOC), the agency charged with implementing Title I of the ADA,¹³ issued guidelines that call for employees with disabilities and their employers to engage in an interactive process to determine the appropriate reasonable accommodation.¹⁴ The EEOC suggests that the employee initiate the process because the employer must have notice that the employee is disabled and needs such an

9. *Id.*

10. 42 U.S.C. § 12112(a) (1995). “[N]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.*

To recover under the ADA, an individual must prove by a preponderance of the evidence: (1) that she is disabled; (2) that she was subjected to an adverse employment action; (3) at the time of that action, she was performing her job at a level that met her employer's legitimate expectations; and (4) the adverse employment action occurred under circumstances which raise a reasonable inference of unlawful discrimination.

Kenneth E. Young & William H. Foster, III, *Stress and Mental Disorders in the Workplace: Increased Focus Under the Americans with Disabilities Act*, S.C. Law., July-Aug. 1996, at 33, 35 (citing *Ennis v. Nat'l Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995)).

11. 42 U.S.C. § 12102(2) (1995).

12. 42 U.S.C. § 12111(8). The ADA defines qualified individual with a disability as:

an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires . . . [C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Id.; see also *infra* note 23.

13. 29 C.F.R. § 1630.2(a) (2000).

14. 29 C.F.R. § 1630.2(o)(3).

accommodation.¹⁵ Once the employee puts the employer on notice, however, the employer should actively engage in the process.¹⁶

In recent years, more attention has been focused on the plight of the disabled. A 1997 article stated that over the past four years, 12.7% of the charges filed under the ADA with the EEOC alleged discrimination based on emotional or psychiatric disability.¹⁷ In 1996, 18,000 of the nearly 78,000 charges filed with the EEOC, or 23%, alleged disability discrimination.¹⁸ In 1997, the EEOC issued policy guidelines on psychiatric disabilities in response to increased public awareness of mental illness and questions regarding application of the ADA.¹⁹ However, courts continue to disagree over how to interpret these guidelines.

The central issue in evaluating the ADA's application to individuals with a mental disability centers on what, if any, additional steps the employer should take in the interactive process if the employee cannot effectively communicate his or her limitations. This Note proposes to address the importance of the interactive process and the need for a clear EEOC mandate on that process primarily when the employee is mentally disabled. Part II examines the ADA's general requirements and EEOC regulations that set out how the ADA is to be implemented. In addition, Part II discusses the EEOC interpretive Guidance on Psychiatric Disabilities, which gives suggestions on the application of the ADA to mental disabilities. Part II also examines cases interpreting both the interactive process in general and the process as it specifically applies to mental disabilities. Finally, Part III provides analysis of the EEOC regulations, guidelines, and relevant case law. Part III also addresses the importance of the ADA in the context of mental disabilities and the need for concrete EEOC guidelines that require participation in the interactive process.

15. 29 C.F.R. app. § 1630; *see also infra* note 53.

16. 29 C.F.R. app. § 1630.

17. Nancy Montwieler, *Disabilities Discrimination: EEOC Sets Out Employer Guidance on Psychiatric Disabilities Under ADA*, 59 DLR AA-1 (1997).

18. *Id.*

19. *Id.*

II. HISTORY

A. *The ADA*

In 1990 Congress enacted the ADA in an effort to protect the civil rights of the disabled,²⁰ thus extending the scope of the Rehabilitation Act to private employers.²¹ The ADA covers employers engaged in industries affecting interstate commerce who employ twenty-five or more employees.²² The ADA refers to employees that it protects as qualified individuals with a disability, meaning an individual with a disability who can perform the essential functions of the job he or she holds or is applying for, with or without a reasonable accommodation.²³ Furthermore, the Act defines “disability” as “a physical or mental impairment that substantially limits one or more of

20. H.R. REP. NO. 101-485, *supra* note 2, at 26. The ADA states that its purpose is:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

21. The Rehabilitation Act of 1973, 29 U.S.C. §§ 790-796 (1994) was the precursor to the ADA. The Rehabilitation Act was the first statute to protect the civil rights of individuals with disabilities. With regard to employment, the statute mandated an end to discrimination by the federal government and most federal contractors. H.R. REP. 101-485, *supra* note 2, at 29. In addition, the Act required the federal government and most federal contractors to use affirmative action to employ the disabled. *Id.*

The Rehabilitation Act will be of little significance to this Note because the EEOC guidelines regarding psychiatric disabilities address only the ADA. *See Montwieler, supra* note 17. For purposes of this Note, the Rehabilitation Act is important only in that it provides insight into the foundations of the ADA. Additionally, some of the ADA cases rely on the reasoning of the Rehabilitation Act cases since the two statutes address essentially the same issues.

22. 42 U.S.C. § 12111(5)(A).

23. 42 U.S.C. § 12111(8); *see also supra* note 12. *See generally* Michel Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations are Courts Really Demanding?*, 13 LAB. LAW. 149 (1997) (providing a detailed discussion of the meaning of “qualified individual with a disability”).

the major life activities.”²⁴

The ADA mandates that employers provide reasonable accommodations to qualified individuals with a disability.²⁵ Generally, reasonable accommodations require adjusting the work environment or changing policies or procedures to provide equal employment opportunities to individuals with disabilities.²⁶ The ADA excuses employers from their obligation to provide reasonable accommodations only when doing so would cause undue hardship on the operation of the employer’s business.²⁷

24. 42 U.S.C. § 12102(2). *See generally* Carolee Kvoriak Lezuch, Note, *The Americans with Disabilities Act: Redefining “Major Life Activity” to Protect the Mentally Disabled*, 44 WAYNE L. REV. 1839 (1999) (providing a general discussion of the ADA’s “major life activity” and “substantially limits” language).

25. 42 U.S.C. § 12112(b)(5)(A). However, the mandate calling for “reasonable accommodation” does not mean that the employer must provide the “best” accommodation possible. Rather, the employer is only required to provide an accommodation that “is sufficient to meet the job-related needs of the individual being accommodated.” 29 C.F.R. app. § 1630. *See generally* Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227 (1999) (providing a general explanation of “reasonable accommodation” and judicial interpretation of the term).

26. 29 C.F.R. app. § 1630. There are three types of reasonable accommodation:

(1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer’s employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer’s employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

Id.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

Id.

27. 42 U.S.C. § 12112(b)(5)(A). The ADA defines undue hardship as “an action requiring significant difficulty or expense, when considered in light of” the following factors:

(i) the nature and cost of the accommodation needed . . . ;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation

B. EEOC Regulations

The EEOC regulations note that the process of determining whether an individual is protected by the ADA should be done on a case-by-case basis because disabilities limit individuals in different ways.²⁸ For this reason, the ADA does not include a “laundry list” of impairments that constitute disabilities. The ADA, rather, focuses on the impairment’s effect on the individual’s life.²⁹

A disabled employee must communicate to the employer that he or she is limited by the disability and needs an accommodation.³⁰ If

upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10).

28. 29 C.F.R. app. § 1630.

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of factors Other impairments, however, such as HIV infection, are inherently substantially limiting On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.

Id.

29. *Id.* An impairment is a disability within the ADA if it substantially limits a major life activity. *See* § 1630.2(g)(1). Major life activities include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* § 1630.2(i). An impairment is substantially limiting if it prevents the individual from performing a major life activity that an average person in the general population is capable of performing, or if it significantly restricts the condition, manner, or duration of a major life activity, compared to that of an average person in the general population. *Id.* § 1630.2(j)(1)(i)(ii). In determining whether an individual’s major life activity is substantially limited, the EEOC considers three factors: “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” *Id.* § 1630.2(j)(2). *See generally* Lezuch, *supra* note 24.

30. 29 C.F.R. app. § 1630. It is important to note that the employer is not required to

an employer knows that an employee is disabled and has difficulty performing the job, the employer may ask whether an accommodation is necessary.³¹ The regulations, however, do not require the employee to accept unrequested or unwanted accommodations.³² If the employer doubts the need for an accommodation, the employer may require that the employee provide documentation to prove the necessity of the accommodation.³³

When the appropriate accommodation is obvious, the employer and the employee may not need to engage in a formal process to determine a reasonable accommodation.³⁴ However, when an accommodation is not apparent, the employer and employee may need to engage in an informal, interactive process.³⁵ The EEOC suggested that parties use this process to identify the precise limitations caused by the employee's disability and the "potential reasonable accommodations that would overcome these limitations."³⁶ Once the employer becomes aware that the employee

provide the "best" accommodation. Rather, the ADA only obligates the employer to provide a reasonable accommodation that is sufficient to meet the job-related needs of the qualified individual with a disability. *Id.*

31. *Id.*

32. 29 C.F.R. § 1630.9(d). However, if the individual rejects an accommodation and, as a result, is unable to perform the essential functions of the job, the individual will not be considered a qualified individual with a disability, and thus will not be protected under the ADA. *Id.*

33. 29 C.F.R. app. § 1630; *see also* Gerdes v. Swift-Eckrich, Inc., 949 F. Supp. 1386, 1405 (N.D. Iowa 1996) (holding that the employee caused a breakdown in the interactive process due to his failure to provide requested medical information). *See infra* notes 57 and 85 and accompanying text.

34. 29 C.F.R. app. § 1630.

For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

Id.

35. 29 C.F.R. § 1630.2(o)(3). *See, e.g.,* John F. Birmingham, Jr., *The Interactive Accommodation Process: Cooperate or Pay the Price*, 77 MICH. BUS. L.J. 1044 (1998) (discussing recent cases interpreting the interactive process generally).

36. 29 C.F.R. § 1630.2(o)(3). Although both this Note and the EEOC guidelines describe the interactive process in terms of reasonable accommodations that enable qualified individuals to perform the essential functions of the jobs they hold or desire, the interactive process is equally applicable to accommodations made during the job application process and accommodations that provide equal benefits and privileges of employment to disabled

is limited in the performance of his or her job and thus is in need of an accommodation, the employer should use a problem-solving approach to determine what accommodations may be appropriate.³⁷

First, the employer should determine the purpose and essential functions of the individual's job.³⁸ Next, the employer and employee should discuss the exact job-related limitations and the ways in which a reasonable accommodation might help.³⁹ Both parties should then make a list of potential accommodations and identify how each accommodation would prove effective in overcoming the limitations and enabling the individual to perform the essential functions of his or her job.⁴⁰ Finally, the employer should implement the most appropriate accommodation, taking into consideration the preference of the individual and resources available to the employer.⁴¹ If more than one reasonable accommodation is possible, the employer should give primary consideration to the one that is preferred by the employee.⁴² The employer, however, makes the ultimate decision as to which accommodation to provide.⁴³ As a result, the employer may opt to furnish the accommodation that is the least expensive or the

individuals. 29 C.F.R. app. § 1630.

37. *Id.* See generally Hope A. Comisky, *Guidelines for Successfully Engaging in the Interactive Process to Find a Reasonable Accommodation Under the Americans with Disabilities Act*, 13 LAB. LAW. 499 (1998) (providing advice for employers on how to generally participate in the interactive process).

38. 29 C.F.R. app. § 1630.9. In order to be a "qualified individual with a disability," the individual must be able to perform the essential functions of his job with or without a reasonable accommodation. 29 C.F.R. § 1630.2(m). "Essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires," not including the "marginal functions of the position." *Id.* § 1630.2(n)(1). A job function may be considered essential because performance of the function is the reason the position exists, because the function can only be distributed to a limited number of employees, or because the function is highly specialized, such that the individual was hired for his expertise. *Id.* § 1630.2(n)(2)(i)-(iii). Several factors may be used to determine whether a job function is essential: the employer's judgment regarding which functions are needed; written job descriptions; the amount of time the employee spends performing the function; the consequences of having a different employee perform the function; the contents of a collective bargaining agreement, if any; the work experience of past employees who have held the position at issue; and the experience of employees in similar jobs. *Id.* § 1630.2(n)(3)(i)-(vii).

39. 29 C.F.R. app. § 1630.9.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

easiest to implement.⁴⁴

There may be instances when neither the employer nor the employee is able to determine potential accommodations.⁴⁵ For example, the employee may not be able to suggest a reasonable accommodation because he or she is not sufficiently familiar with the employer's resources or equipment. Similarly, the employer may not know which accommodations would be appropriate because the employer does not know enough about the employee's disability or job-related limitations.⁴⁶

When an appropriate accommodation is not readily identified, it may be necessary for the employer to initiate a formal interactive process to make a reasonable effort to find an appropriate accommodation.⁴⁷ Following this interactive process, if both parties remain unable to identify potential accommodations, the employer may seek technical assistance to help determine appropriate accommodations. The guidelines suggest that for technical assistance the employer should contact the EEOC, "state or local rehabilitation agencies, or disability constituent organizations."⁴⁸

C. EEOC Guidance on Psychiatric Disabilities and the ADA

In 1997, the EEOC issued guidance regarding psychiatric disabilities and the ADA.⁴⁹ The guidance aimed to advance enforcement of the ADA to protect employees with psychiatric disabilities in an employment context, answer questions and concerns

44. 29 C.F.R. app. § 1630.9. The individual with a disability may choose to provide his or her own accommodation. However, the employer is still required to provide a reasonable accommodation if the individual becomes unwilling or unable to continue providing his or her own accommodation. *Id.*

45. *Id.*

46. *Id.*; see also *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997):

The employers will not always know what kind of work the worker with the disability can do, and conversely, the worker may not be aware of the range of available employment opportunities, especially in a large company. Thus, the interactive process may often lead to the identification of a suitable position.

47. 29 C.F.R. app. § 1630.9.

48. *Id.* If an employer fails to obtain or receive assistance from federal agencies, the employer is still obligated to provide a reasonable accommodation. *Id.*

49. *EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act*, 59 Daily Lab. Rep. (BNA) (Mar. 27, 1997).

raised by employees with psychiatric disabilities, and explain to employers how the ADA applies to psychiatric disabilities.⁵⁰ The EEOC noted that an employee with a psychiatric disability may hesitate to request a reasonable accommodation because of concerns about the possible negative consequences of revealing such a disability at work.⁵¹ In response to this problem, the EEOC answered several questions relating to how employees can request a reasonable accommodation.⁵²

Because the ADA does not require an employer to provide a reasonable accommodation unless it is aware of the employee's job-related limitations,⁵³ the employee, or someone acting on his or her behalf,⁵⁴ must make an initial request to start the reasonable accommodation process.⁵⁵ The employee may use ordinary, everyday language when making the request; the request need not include the phrase "reasonable accommodation."⁵⁶ The individual is simply

50. *Id.*

51. *Id.*

52. *Id.*

53. 29 C.F.R. app. § 1630.9; see *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 928, 932 (7th Cir. 1995):

We think that an employer cannot be liable under the ADA for firing an employee when it indisputably had no knowledge of the disability At the most basic level, it is intuitively clear when viewing the ADA's language in a straightforward manner that an employer cannot fire an employee 'because of' a disability unless it knows of the disability.

See generally Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347, 1379-81 (1999) (discussing the employer's defense that it did not have notice of the employee's disability). See, e.g., Sarah Starnes, *Psychiatric Disabilities and the ADA: An Analysis of Conventional Defenses and EEOC Guidelines*, 18 REV. LITIG. 181 (1999) (providing comprehensive coverage of employers' defenses to ADA claims by mentally ill employees). See *infra* note 56 and accompanying text.

54. *Supra* note 49. However, if a representative requests a reasonable accommodation on behalf of the individual, the individual may refuse the accommodation. *Id.*; see *supra* note 32 and accompanying text.

55. Compare Karin Mika & Denise Wimbiscus, *Responsibilities of Employers toward Mentally Disabled Persons under the Americans with Disabilities Act*, 11 J.L. & HEALTH 173, 189-90 (1996-97) (calling for a requirement that mentally disabled employees present a "documented mental health evaluation" to the employer when requesting a reasonable accommodation), with Blair, *supra* note 53, at 1397-98 (criticizing Mika and Wimbiscus's proposal).

56. *Supra* note 49. However, the individual must provide enough information to put the employer on notice that he or she has a medical condition that is connected to his or her ability

required to communicate to the employer that he or she needs a modification at work because of a medical condition.⁵⁷ Additionally, when an employee requests a reasonable accommodation, he or she can use any means of communication; the request does not have to be in writing.⁵⁸ Furthermore, an employee may request a reasonable accommodation at any time; the ADA does not obligate the employee to make a request at the beginning of employment.⁵⁹

The EEOC emphasized that it is the employer's responsibility to know when an employee's disability is protected by the ADA and, therefore, imposes an obligation on the employer to provide a reasonable accommodation.⁶⁰ In response to this, the guidelines allow an employer to ask the employee requesting an accommodation about his or her disability and job-related limitations if the need for the accommodation is not obvious.⁶¹ The EEOC permits health professionals to provide documentation relating to psychiatric disabilities that may assist an employer in understanding the

to perform the essential functions of his or her job. The EEOC provided an illustration of an insufficient request. *Id.*

An employee asks to take a few days off to rest after the completion of a major project. The employee does not link her need for a few days off to a medical condition. Thus, even though she has requested a change at work (time off), her statement is not sufficient to put the employer on notice that she is requesting reasonable accommodation.

Id.; see *supra* note 53 and accompanying text.

57. *Supra* note 49. The EEOC provided examples to illustrate how an individual may request a reasonable accommodation.

An employee asks for time off because he is "depressed and stressed." The employee has communicated a request for a change at work (time off) for a reason related to a medical condition (being "depressed and stressed" may be "plain English" for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations.

Id.; see *supra* note 33 and accompanying text.

58. *Id.* at E-1.

59. *Id.*

60. *Id.*

61. *Id.* It is important to note that, subject to certain specifically permitted medical examinations and inquiries, the ADA prohibits employers from requiring an employee to receive a medical examination or inquiring as to whether an employee is disabled unless the employee first indicates to the employer that he or she is disabled. 29 C.F.R. § 1630.13 (1999).

disability and the particular limitations of the employee.⁶² If the employee does not provide sufficient information to show that he or she has a disability under the ADA that necessitates an accommodation, the employer can require the employee to see a health professional chosen by the employer.⁶³ Such examinations are limited to those that are job-related and consistent with business necessity.⁶⁴

D. Judicial Interpretation of the Interactive Process in General

In order to comprehend how the interactive process relates to mental disabilities, it is important to understand the interactive process. The following two cases show how courts have interpreted the process. In addition, the cases address liability when the process breaks down and a reasonable accommodation is not implemented.

In *Beck v. University of Wisconsin Board of Regents*,⁶⁵ the plaintiff worked as a secretary at the University of Wisconsin.⁶⁶ Over the course of her employment, Beck took three leaves of absence from her job due to mental and physical conditions.⁶⁷ Upon her return

62. 59 DLR E-1 (1997); 29 C.F.R. app. § 1630. The EEOC provided examples to illustrate when an employer is allowed to ask for documentation regarding an individual's disability.

An employee asks for time off because he is "depressed and stressed." Although this statement is sufficient to put the employer on notice that he is requesting an accommodation, the employee's need for accommodation is not obvious based on this statement alone. Accordingly, the employer may require reasonable documentation that the employee has a disability within the meaning of the ADA and, if he has such a disability, that the functional limitations of the disability necessitate time off.

Id. § 1630. However, the EEOC limited such document requests to include only information that is relevant to the disability and reasonable accommodation under the ADA. The employer is not entitled to an individual's mental health records that do not relate to the particular disability and accommodation at issue. *Id.* § 1630.

63. *Supra* note 57, at E-1. All information from medical examinations relating to disabilities must be kept in separate medical files and must be treated as confidential medical records. However, supervisors and managers may be advised about an individual's necessary restrictions and accommodations and first aid and safety personnel may be notified when appropriate, if the disability may require emergency attention. 29 C.F.R. §§ 1630.14(c)(1)(i)-(ii).

64. *Supra* note 57, at E-1.

65. 75 F.3d 1130 (7th Cir. 1996).

66. *Id.* at 1132.

67. *Id.* at 1132-33.

to work after being hospitalized for depression and anxiety, Beck presented to her employer a letter from her doctor stating that she suffered from major depression and may need an accommodation to prevent the condition from recurring.⁶⁸ The University requested that Beck sign a release so that her supervisor could receive additional information from her doctor, but she refused to sign the document and did not provide any other information.⁶⁹ A meeting was scheduled to discuss the situation, but the meeting did not take place.⁷⁰ Not long after the meeting was cancelled, Beck took another medical leave.⁷¹ Upon returning to work, she again provided her employer with a letter from her doctor stating that she suffered from depression and, as a result, may need help in “[tailoring] her work load.”⁷² An administrator informed Beck that the University did not understand what accommodations she needed, and thus none would be given until she provided further information.⁷³ In the meantime, the University reduced Beck’s workload.⁷⁴ Beck took a third medical leave several months later.⁷⁵ While on leave Beck filed suit, asserting that, among other claims, the University had violated her rights under the ADA.⁷⁶ In addition, Beck requested that she be assigned to a different department upon her return.⁷⁷ The University denied this request, and Beck refused to return to work.⁷⁸ The University subsequently terminated her employment.⁷⁹

The Seventh Circuit held that the University was not liable under the ADA.⁸⁰ The court noted that, in order for the interactive process to be effective, both the employer and employee must participate.⁸¹

68. *Id.*

69. *Id.* at 1133.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1137.

81. *Id.* at 1135. The court discussed the employee’s duty to put the employer on notice that the employee has a disability and needs accommodation. *Id.* at 1134. The court noted that

The court found that while both parties had engaged in an interactive process, that process had broken down.⁸² The court held that because Beck did not provide additional information about her disability, the University never knew what accommodations were needed and, thus, could not be responsible for failing to provide a reasonable accommodation.⁸³

Noting that neither the ADA nor the EEOC regulations assign responsibility when the interactive process fails, the court called for a flexible, case-by-case rule where courts should attempt to isolate the cause of the breakdown and then assign responsibility.⁸⁴ The court determined that a party causes a breakdown in the process when the party fails to participate in good faith or fails to make reasonable efforts to help the other party determine what specific accommodations are needed.⁸⁵ An example of this type of failure is when one party withholds information that is necessary in determining which accommodations are possible and appropriate.⁸⁶

In *Barnett v. U.S. Air, Inc.*,⁸⁷ the plaintiff suffered from a back injury that prevented him from engaging in the physical activity that

“‘reasonable accommodation’ is limited by the employer’s knowledge of the disability.” *Id.* at 1135; *see supra* note 53 and accompanying text.

82. 75 F.3d at 1135.

83. *Id.* at 1136; *see supra* note 33 and accompanying text.

84. 75 F.3d at 1135.

85. *Id.* The court noted that:

[A] party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Id.

86. *Id.* at 1136. The *Beck* court was persuaded by the fact that:

[T]he information required to determine the necessary accommodations was of the type that only Beck could provide It does not appear in the record, nor does Beck argue, that she failed to specify a necessary accommodation because she did not sufficiently understand the nature of the work environment to enable her to suggest an accommodation. The fact that the missing information concerns the employee’s medical condition might not always indicate that the employee is responsible for failing to specify a necessary accommodation, but where, as here, the employer makes multiple attempts to acquire the needed information, it is the employee who appears not to have made reasonable efforts.

Id. at 1137.

87. 157 F.3d 744 (9th Cir. 1998).

his cargo job required.⁸⁸ Barnett made several requests for accommodations, but the employer denied these requests without discussing the situation with the employee.⁸⁹ Barnett sued U.S. Air for discrimination under the ADA for failing to accommodate his disability.⁹⁰

The Ninth Circuit held that employers cannot be liable under the ADA for simply failing to engage in the interactive process.⁹¹ The court noted that the EEOC regulations provide only that an interactive process “*may be necessary.*”⁹² The court further noted that employers are liable for discrimination under the ADA for failing to provide a reasonable accommodation when one is available, but the court refused to hold that a failure to engage in the interactive process creates independent liability under the ADA.⁹³ The court did recognize that employers should engage in an interactive process because that process may enable the employer to better identify reasonable accommodations.⁹⁴ The interactive process, however, was

88. *Id.* at 746.

89. *Id.* at 747. Specifically, Barnett requested that U.S. Air make an exception for him in its seniority system so that he could keep a less strenuous position. *Id.* U.S. Air, without responding to Barnett’s request, placed him on limited duty. This position was temporary, though, and Barnett was required to leave the position after several months. Months later, Barnett requested that he be given special equipment or modified duties that would enable him to perform his original cargo job without doing heavy lifting and moving. *Id.* U.S. Air denied these requests without discussion as well. *Id.*

90. *Id.* Specifically, Barnett claimed that the employer’s refusal to participate in an interactive process in and of itself violated the ADA. *Id.* at 752.

91. *Id.*

92. *Id.* at 752 (quoting 29 C.F.R. §1630.2(o)(3)). The court interpreted the EEOC regulations’ “*may be necessary*” clause as:

permissive language which also serves as a warning to employers that a failure to engage in an interactive process might expose them to liability for failing to make reasonable accommodation [T]he employer “*must make a reasonable effort to determine the appropriate accommodation.*” 29 C.F.R. § 1630 app. § 1630.9. This statement means that the employer will be liable for discrimination if a reasonable accommodation was available, but the employer did not act upon it. The ADA and its regulations do not, however, create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation.

Id.

93. *Id.*; *see also* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (“The ADA . . . is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee’s disability could reasonably have been made.”).

94. 157 F.3d at 753.

viewed as only one factor in a reasonable accommodation claim, not as a separate basis for inquiry into liability.⁹⁵

The dissent argued that the holding reduces the effectiveness of the ADA by allowing employers to simply do nothing except find fault with accommodations proposed by the disabled employee.⁹⁶ Arguing that courts should not interpret the language of the EEOC as merely permissive, the dissent claimed that “may” should be read narrowly to apply only when the availability or unavailability of a reasonable accommodation is clear.⁹⁷ The dissent believed that, when a reasonable accommodation potentially exists, both employer and employee are obligated to engage in an interactive process.⁹⁸

95. *Id.*

If the employer is incorrect in its assessment of the existence of reasonable accommodation that would not unduly burden the employer (given the employer’s knowledge of the employee’s abilities), the employer is liable under the ADA for failing to provide reasonable accommodation. Thus, an employer’s decision not to engage in an interactive process may put it at peril, but it does not create liability independent from a resulting failure to accommodate the employee’s disability.

Id.

96. *Id.* at 755. The dissent noted that, if the employer is not required to participate in the interactive process, then the employee is left with his or her own limited knowledge to help him or her determine possible accommodations. *Id.* The dissent reasoned that in order for an employee to determine which accommodations are reasonable, an assessment of the employer’s resources is necessary. If employers are not required to participate in the process, then the employee may have no way of knowing what the employer is capable of providing. *See supra* note 46 and accompanying text.

97. *Id.*

The term “may” describes the fact that sometimes there may be the necessity to engage in an interactive process. When it is necessary, it is not optional. ‘May’ is not being used to create a permissive option. Only if it is clear that a reasonable accommodation is available, or clear that there is no reasonable accommodation available, may an employer not initiate an interactive process with the disabled employee.

Id.

98. *Id.* The dissent also noted that the burden of engaging in the interactive process would not be heavy, since the interactive process frequently involves nothing more than communication between the employer and employee in order to determine what the problem is. *Id.* at 756; *see also* Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281, 1286-87 (7th Cir. 1996).

E. Judicial Interpretation of the Interactive Process as it Relates to Mental Disabilities

In *Bultemeyer v. Fort Wayne Community Schools*,⁹⁹ the plaintiff suffered from a variety of mental illnesses, including bipolar disorder, anxiety attacks, and paranoid schizophrenia.¹⁰⁰ Bultemeyer took a series of disability leaves from his position, and when he was ready to return, a school official told him that he would have to undergo a physical examination, and would be reassigned to a new job.¹⁰¹ Bultemeyer provided his employer with a letter from his psychiatrist, which stated that it would be in Bultemeyer's best interest to return to a position that would be less stressful than the job to which the employer reassigned him.¹⁰² After the employer terminated Bultemeyer for his failure to report to work or take a physical, Bultemeyer delivered the letter to the employer, but received no response.¹⁰³ Bultemeyer then filed suit, alleging that the school district was liable under the ADA for failing to provide a reasonable accommodation.¹⁰⁴ The trial court granted summary judgment in favor of the school district, but the court of appeals reversed and remanded, holding that the employee presented evidence of a genuine issue of material fact.¹⁰⁵

The Seventh Circuit reasoned that finding the appropriate

99. 100 F.3d 1281 (7th Cir. 1996).

100. *Id.* at 1281-82.

101. *Id.* at 1282. Bultemeyer worked as a custodian for the Fort Wayne Community Schools. *Id.* at 1281. When Bultemeyer was ready to return to work, the district advised him that he would be reassigned to one of the largest schools in the district. *Id.* at 1282. Bultemeyer visited the larger school, and the custodial foreman told him that he would not be able to complete his work because he moved too slowly. *Id.* Bultemeyer contacted the employee relations director and informed her that he did not think he was capable of working at the larger school, but that he was not resigning. *Id.* In addition, he did not want to take a physical examination because he feared that, if he passed, he would have to work at the larger school, and if he worked there, he would not be able to perform his duties and would be terminated. *Id.*

102. *Id.*

103. *Id.* The school district sent a letter to Bultemeyer informing him that he was terminated, and a few hours later, Bultemeyer delivered the letter from his doctor, which was written a few days earlier. Bultemeyer did not receive a response from the employee relations director, although someone from the district did contact him to reschedule his physical examination. Bultemeyer called the district to reschedule the exam, but he received no response. *Id.*

104. *Id.* at 1282.

105. *Id.* at 1287.

reasonable accommodation requires significant communication between the employee and employer.¹⁰⁶ Recognizing that communication may be difficult when an employee has a mental illness, the court found it essential for employers to acknowledge the difficulties and help the employee determine the appropriate accommodation.¹⁰⁷ The court noted that the ADA does not require the employee to specifically mention the phrase “reasonable accommodation,” but rather, he or she must simply communicate to the employer enough information to put it on notice that he or she needs an adjustment to his or her working conditions or duties due to a medical condition.¹⁰⁸ In support of the interactive process, the court called for the employer to “meet the employee half-way” and “do what it can to help” when the employee appears to need an accommodation but does not know how to ask for one.¹⁰⁹ The court reasoned that the employer cannot put the burden of the interactive process entirely in the hands of the employee, especially when the employee suffers from a mental illness.¹¹⁰ In addition, the court recognized that if an employer knows that an employee is mentally ill, the employer could reasonably be required to ask the employee to explain his or her condition, or contact the employee’s health care professional for clarification.¹¹¹

106. *Id.* at 1285.

107. *Id.* (citing *Beck v. Univ. Wisconsin Bd. of Regents*, 75 F.3d. at 1130, 1135 (7th Cir. 1996)).

108. *Id.*; see *supra* note 56 and accompanying text.

109. *Id.* at 1285. Here, the court noted that Bultemeyer requested an accommodation in the only way he knew how—he asked for a letter from his psychiatrist. The court pointed out that, if the employer did not understand the nature of Bultemeyer’s request, the school district could have asked the doctor for clarification or additional information. See *supra* note 62 and accompanying text. The court noted that the situation at issue could have been avoided if someone at the school district had simply met with Bultemeyer to discuss the problem. 100 F.3d at 1286.

110. *Id.* Cf. *Wooten v. Acme Steel Co.*, 986 F. Supp. 524, 530-31 (N.D. Ill. 1997) (distinguishing *Bultemeyer* by rejecting employee’s claim that employer failed to reasonably accommodate him because he was not reinstated after quitting as a result of his mental illness; noting that, prior to quitting, employee had not informed employer that he needed any accommodation in addition to the counseling he was already receiving).

111. 100 F.3d at 1286-87. The court noted that had the school district spoken with either Bultemeyer or his doctor, the district would have been engaging in the interactive process. *Id.* at 1284. Instead, the employer unilaterally determined that the employee was incorrect about his ability to perform his duties. The court reasoned that the employee’s concerns should be measured subjectively because what is stressful to one person may not affect another person in

In *Taylor v. Principal Financial Group, Inc.*,¹¹² the plaintiff suffered from bipolar disorder. The employer was unhappy with Taylor's performance, and the parties had met in the past to determine how Taylor could become more productive.¹¹³ During one of the meetings, Taylor informed his supervisor that he was struggling with a mental illness, and asked his supervisor to research the disease so that the employer could gain a better understanding of the symptoms.¹¹⁴ In addition, Taylor asked for a reduction in his performance objectives and less "pressure."¹¹⁵ Taylor's supervisor asked him if he was "all right," and Taylor said "yeah."¹¹⁶ Taylor then sent an e-mail to his employer detailing his belief that he could meet his performance expectations.¹¹⁷ When Taylor did not meet his objectives, the employer granted him an extension.¹¹⁸ Taylor took a leave of absence due to his illness, and subsequently filed suit alleging that the employer was liable under the ADA for failing to provide a reasonable accommodation.¹¹⁹ The trial court granted summary judgment in favor of the employer, reasoning that Taylor had not made a request for a reasonable accommodation, and thus, the ADA did not obligate the employer to provide one.¹²⁰ The Fifth Circuit Court of Appeals affirmed the trial court's ruling.¹²¹

The Fifth Circuit held that in order to prevail under the ADA, an employee must prove that the employer knew of the employee's substantial limitation and, despite this knowledge, failed to reasonably accommodate the employee.¹²² The court distinguished an employer's knowledge that an employee is disabled from an employer's knowledge that the disability limits the employee's ability to perform the essential functions of his or her job.¹²³ The court found

the same way. *Id.*; see *supra* notes 28 and 29 and accompanying text.

112. 93 F.3d 155 (5th Cir. 1996).

113. *Id.* at 158-59.

114. *Id.* at 159.

115. *Id.*

116. *Id.*

117. *Id.* at 159-60.

118. *Id.* at 160.

119. *Id.* at 157, 161.

120. *Id.* at 161.

121. *Id.* at 166.

122. *Id.* at 163; see *supra* note 53 and accompanying text.

123. *Id.* at 164; see *supra* notes 28-30 and accompanying text.

the distinction necessary because employers are only required to accommodate limitations, not disabilities.¹²⁴

The court reasoned that when an employee's limitations are not obvious, the employee bears the burden of informing the employer that he or she needs an accommodation.¹²⁵ Recognizing that the employee and his or her health care provider possess the best knowledge about the employee's limitations and the most appropriate accommodation, the court refused to allow the employee to remain silent while expecting the employer to realize the need for, and then suggest, a reasonable accommodation.¹²⁶

III. ANALYSIS AND PROPOSAL

Employers may feel that accommodating employees with mental disabilities under the ADA is a difficult and ambiguous process, but the interactive process can provide a clear, efficient way to determine possible reasonable accommodations. The EEOC regulations and guidance provide a useful outline of how the interactive process should occur.¹²⁷ When successful, this process allows disabled employees to receive the same benefits and opportunities as those without disabilities.¹²⁸ In cases of employees with mental disabilities, the interactive process is even more important because the employee

124. *Id.*; see *supra* notes 37, 38, and 45 and accompanying text. The court pointed to important public policy interests to justify this reasoning. The court recognized that, under the EEOC guidelines, employers are not allowed to restrict an employee based simply on the fact that the employee is disabled. 93 F.3d at 164. To allow this would promote myths and stereotypes that characterize the disabled as unable to perform at the same level as someone without a disability. *Id.* Thus, employers should determine whether individual employees are limited by their specific disabilities and provide accommodation only to those who truly need it. *Id.* See 29 C.F.R. app. §§ 1630.2(j), 1630.5 (1999).

125. *Taylor*, 93 F.3d at 165. The court noted that the employee's health care provider could also inform the employer of the employee's limitations. *Id.* See *supra* note 62 and accompanying text.

126. *Id.* at 165. The court reasoned that "[w]hen dealing in the amorphous world of mental disability, . . . health-care providers are best positioned to diagnose an employee's disabilities, limitations, and possible accommodations." *Id.* The court found that, based on the specific facts of the case, Taylor's request for lowering his "objectives" and lessening the "pressure" was not explicit enough to rise to the level of a request for a reasonable accommodation. *Id.*

127. See *supra* notes 36-44 and accompanying text. See generally 29 C.F.R. § 1630.2(o) and App.; *supra* note 49.

128. 29 C.F.R. app. § 1630.1(a).

may not be able to effectively articulate to the employer that he or she is disabled and needs an accommodation. Additionally, a mental disability may render the employee unable to fully grasp the requirements of the ADA. If the interactive process is used, the employee and employer can work together to find a solution to the employee's limitations.

The EEOC properly recognizes that the employee must take the initial step in requesting a reasonable accommodation.¹²⁹ However, this should not be interpreted to mean the employee should bear the entire burden. The EEOC notes that the employee does not need to use specific words to inform the employer about his or her disability or limitation.¹³⁰ Rather, the employee must simply use plain language to put the employer on notice that he or she is limited by a disability.¹³¹ The EEOC allows for health care professionals or family members to request accommodations on behalf of employees, and thus, takes pressure off of mentally ill employees.¹³² By permitting third parties to request an accommodation, the EEOC admirably recognizes that someone with a mental disability may not have the same mental capacity as someone with a physical disability, and may not be able to understand that he or she must communicate with the employer about his or her limitations. The EEOC properly allows for some flexibility when the employee is mentally disabled.

While the employee must take the first step in the interactive process, the employer must also take an active role in determining reasonable accommodations.¹³³ By outlining the steps that the employer should take in this process, the EEOC ensures that the employee will not be left on his or her own to determine what accommodations are possible. At the same time, the interactive process helps the employer make an informed decision when choosing the most appropriate accommodation.¹³⁴ The EEOC recognizes that some accommodations may be obvious, but also provides guidance for both the employer and employee when the

129. *See supra* notes 30, 55, and 57 and accompanying text.

130. *See supra* note 56 and accompanying text.

131. *See supra* notes 56 and 57 and accompanying text.

132. *See supra* note 54 and accompanying text.

133. *See supra* notes 37-41 and accompanying text.

134. *See supra* notes 44 and 46 and accompanying text.

choice may not be evident.¹³⁵ The regulations and guidance ensure that no party will be left in the dark.

In *Beck*, the Fifth Circuit recognized that the employee must take the first step in the interactive process.¹³⁶ In addition, the court found that the employer must participate in the process once it becomes aware of the employee's disability and limitation.¹³⁷ The *Beck* court correctly held that, if necessary, the employee must do more than simply inform the employer of his or her disability. The employee must provide additional information about his or her illness and/or limitation if the employer is unclear as to what is needed for a reasonable accommodation.¹³⁸ The court's holding closely follows the EEOC regulations and guidelines.¹³⁹ In *Beck*, the employer tried to accommodate the employee, but the employee refused to effectively communicate with the employer.¹⁴⁰ Both sides must take an active role in the entire process to ensure that the needs of both the employer and employee are met.

In *Barnett*, the employer prevailed even though it had not participated in the interactive process.¹⁴¹ The rationale of the Ninth Circuit, however, should be narrowly applied. While the employer was not independently liable for failing to participate in the process, the factual circumstances surrounding *Barnett* will rarely occur. Apparently, no accommodation would have been reasonable in the particular situation at issue in that case.¹⁴² Thus, the court did not require the employer to participate in the process to find an appropriate accommodation.¹⁴³ One cannot interpret *Barnett* as holding that the employer can simply choose not to engage in the interactive process. In almost all instances, some accommodation will be reasonable. By not participating in the interactive process, the employer risks creating a situation in which it will not find an

135. See *supra* notes 34 and 35 and accompanying text.

136. 75 F.3d 1130, 1134 (7th Cir. 1996).

137. *Id.* at 1135.

138. *Id.* at 1136.

139. See *supra* notes 33, 61, and 62 and accompanying text.

140. 75 F.3d at 1136-37.

141. 157 F.3d 744, 752.

142. *Id.* at 750-52.

143. *Id.* at 753.

appropriate accommodation, thus making the employer liable for failing to reasonably accommodate the employee.¹⁴⁴

The *Barnett* court misinterpreted the EEOC guidance regarding the interactive process. The court noted that none of the employee's suggested accommodations were reasonable,¹⁴⁵ but it failed to recognize that the employer should engage in the process to prevent the exact result of *Barnett*.¹⁴⁶ The employer should have participated in the interactive process so that the employee would know if there were other possible options. If the employer communicated with the employee, more possibilities may have been discovered.¹⁴⁷ The EEOC regulations aim to avoid precisely this lack of communication.¹⁴⁸

The *Barnett* majority incorrectly interpreted the EEOC language to mean that the interactive process is always a permissive option, but is never a necessity. As the *Barnett* dissent noted, the EEOC

144. *Id.* at 753, 756.

145. *Id.* at 749-52.

146. 157 F.3d 744 (9th Cir. 1998). In criticizing the result reached by the majority, the dissent commented that:

[a]ll that we know about potential accommodations is what Barnett proposed. U.S. Air made no effort to determine if it could reasonably accommodate Barnett, instead it simply rejected Barnett's proposals as unworkable. Under the majority opinion, this is all U.S. Air, and any other employer, has to do—sit on the sidelines and find fault with suggested accommodations. If the employer has no obligation to participate in determining if a reasonable accommodation exists, the disabled employee has no resource beyond his own knowledge, skill and ability. The employer's broad knowledge and experience is not available to him. As a result, the effectiveness of the ADA as a tool to use constructively the skills of disabled persons is seriously diminished.

Id. at 754-55.

147. As the *Barnett* dissent notes:

[i]nformational barriers are high. A reasonable accommodation may require detailed knowledge of a company's work flow and staffing, as well as knowledge of the available technology that could be used in conjunction with the company's operations. This is particularly true because, under the ADA, the term "reasonable" is tied to the resources and processes of the individual company. So what would be reasonable for one company to implement may not be reasonable for another. Determinations of reasonable accommodation also require information about the worker's disability and the limitations that the disability imposes.

Id. at 755-56 (citations omitted); see *supra* notes 28, 29, and 46 and accompanying text.

148. See 29 C.F.R. § 1630.2(o)(3), app.

guidelines do not use permissive language.¹⁴⁹ By using “may,” the EEOC merely suggested that all of the steps of the interactive process may not be necessary when the appropriate accommodation is obvious.¹⁵⁰ When a reasonable accommodation is not immediately apparent, however, the interactive process is mandatory.¹⁵¹

In *Bultemeyer*,¹⁵² the Seventh Circuit properly recognized that the employee successfully initiated the interactive process when he asked his doctor to write a letter to his employer.¹⁵³ In effect, the employee put the ball in the employer’s court, and the employer failed to respond.¹⁵⁴ Although the letter that Bultemeyer’s doctor wrote was vague, the employer had notice that the employee had a disability and a limitation.¹⁵⁵ Thus, the employer was required under the ADA to provide a reasonable accommodation.¹⁵⁶ If the employer was unclear about what accommodation was necessary, the employer should have asked the doctor or the employee for clarification.¹⁵⁷

The *Bultemeyer* court recognized that the employer cannot wait until the employee says exactly what accommodation is needed.¹⁵⁸ Rather, the employer should communicate with the employee to determine what is needed and what is feasible.¹⁵⁹ The Seventh Circuit noted that this process may require the employer to ask the employee or his health care professional for further guidance when the employee has a mental disability.¹⁶⁰ The mental illness may affect the employee’s ability to communicate effectively.¹⁶¹ Once the employer knows of the employee’s disability and limitations, the employer should help the employee determine the appropriate accommodation.¹⁶²

149. 157 F.3d at 755-56.

150. *Id.*; see *supra* note 34 and accompanying text.

151. 157 F.3d at 755-56.

152. 100 F.3d 1281 (7th Cir. 1996).

153. *Id.* at 1285.

154. *Id.*

155. See *supra* notes 54 and 57 and accompanying text.

156. 100 F.3d at 1286; see *supra* note 60 and accompanying text.

157. 100 F.3d at 1285; see *supra* notes 61 and 62 and accompanying text.

158. 100 F.3d at 1285.

159. *Id.* at 1285-86.

160. *Id.* at 1286.

161. *Id.*

162. *Id.*

In *Taylor*,¹⁶³ the Fifth Circuit failed to recognize that employees with mental disabilities may not be able to tell their employers exactly what accommodations they need. The employee in *Taylor* told his employer that he was mentally ill and asked his employer to research the disease.¹⁶⁴ For an employee with a mental disability, this may be the best way to communicate the effects of the disability. Because the employer admitted that he did not know about the disease,¹⁶⁵ the employee may have been trying to inform the employer about his own situation by suggesting that the employer do some research. The employee also asked the employer for less “pressure” on the job and lower “objectives.”¹⁶⁶ If the employer was unclear as to what was needed to accomplish this, the employer could have simply asked, as the *Bultemeyer* court suggested.¹⁶⁷

The *Taylor* court improperly interpreted the public policy that it relied on for support.¹⁶⁸ Public policy, as well as the EEOC, suggests that employers should not restrict their employees based on stereotypes or myths regarding the employee’s disability when the employer does not know the employee’s specific limitations.¹⁶⁹ The employee in *Taylor*, however, informed the employer that he was limited and asked for less pressure on the job.¹⁷⁰ The Fifth Circuit seemed to suggest that the employee must give a detailed account of

163. 93 F.3d 155 (5th Cir. 1996).

164. *Id.* at 159.

165. *Id.*

166. *Id.*

167. *See supra* text accompanying note 157.

168. 93 F.3d at 164. The *Taylor* court noted that:

while a given disability may limit one employee (and therefore necessitate a reasonable accommodation), it may not limit another. For this reason, the ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs. Such a policy is supported by the E.E.O.C.’s interpretive guide: employers “are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual’s disability. Rather, the capabilities of qualified individuals must be determined on an individualized, case by case, basis” Accordingly, it is incumbent on the ADA plaintiff to assert not only a disability, but also any limitation resulting therefrom.

Id. (citing 29 C.F.R. app. § 1630.5 (1995) (citation omitted)).

169. *See* 29 C.F.R. app. § 1630.5 (1999).

170. 93 F.3d at 159.

his or her limitation for the employer to even consider an accommodation. Taken to the extreme, the employer could ignore the employee's requests for an accommodation until the employee made a formal request.

The EEOC has explicitly rejected the notion that the ADA requires employees to use specific language when requesting a reasonable accommodation.¹⁷¹ The *Taylor* court's view fails to consider that an employee with a mental disability may not be able to communicate as effectively as someone who is not mentally ill. When a mentally disabled employee reaches out to the employer and asks for changes in order to accommodate his or her illness, the employer should help the employee find out what is needed, regardless of whether or not the request is well-articulated. Public policy and the ADA mandate that employers may not discriminate against those who are disabled.¹⁷² Courts should not require a mentally disabled employee to specifically spell out his or her limitations without exception or flexibility. Such a requirement would enable employers to almost always find a way out of accommodating an employee with a mental disability simply because he or she did not use the magic words when requesting an accommodation.

The interactive process is a vital tool for the implementation of the ADA. The process ensures that employers and employees effectively communicate. The employee is able to talk with the employer about his or her disability in an informal, non-intimidating setting. In this type of environment, the employee can be honest about his or her limitations without feeling threatened. In addition, the employer is able to learn about the employee's limitations and ask questions about what is needed to improve the employee's ability to perform his or her job. Also, the employer can tell the employee what it is capable of providing, both logistically and economically.¹⁷³

When both parties actively participate in the process, both employers and employees benefit. The employee learns what is expected of him or her and is able to determine what the employer

171. *Supra* note 49.

172. *See* H.R. REP. NO. 101-485, pt. 3, at 23 (1990).

173. *See supra* text accompanying note 46.

can provide to help him or her meet the job requirements. Ultimately, the employee is more comfortable in his or her work environment and the employer has a more productive employee.

The EEOC's efforts in formulating the interactive process are especially important for employees with mental disabilities. The mentally and physically disabled are fundamentally different, yet the ADA protects both.¹⁷⁴ The physically disabled are aware of their limitations and, presumably, have the capacity to express them to the employer. The mentally disabled, on the other hand, may be aware of their limitations, but may not have the ability to articulate them to their employer. Mental illness is much less understood than physical illness. In fact, a mentally disabled employee may not have a full understanding of his or her own illness, thus, making it especially difficult for the employee to fully explain his or her limitations to the employer. The interactive process is a useful mechanism that encourages communication and openness, which helps the mentally disabled overcome any misunderstandings that may arise as a result of the illness.

The EEOC should issue guidelines that explicitly require employers and employees to engage in the interactive process. As indicated in *Barnett*, courts are misinterpreting the current guidelines, reading the language as permissive rather than mandatory.¹⁷⁵ By issuing new guidelines, the EEOC could provide a clear statement on the issue, eliminating some of the confusion behind the interactive process. The issue should not be whether or not the interactive process is required, but rather to what extent a formal process should be used. When a reasonable accommodation is obvious, employers and employees do not need to engage in an intricate, step-by-step process.¹⁷⁶ However, they should communicate in an informal way about what is needed and what is feasible, thus, participating in the interactive process at the most basic level. The interactive process is the easiest way to determine the appropriate reasonable

174. See Lezuch, *supra* note 24, at 1860-62 (discussing the differences between the physically and mentally disabled); see also Mika & Wimbiscus, *supra* note 55, at 174-79 (discussing mental illness in both general and legal terms).

175. See *supra* text accompanying notes 92, 97, 98, and 149-51.

176. See *supra* note 34 and accompanying text.

accommodation. By making the process mandatory, the EEOC would be effectuating the clear policy behind the ADA while making the determination of reasonable accommodations more standard and streamlined. All parties would understand what they are required to do; an EEOC mandate would obligate parties to openly communicate about the employee's limitations and the employer's duty to reasonably accommodate.

If the EEOC requires that employers and employees engage in the interactive process, employees with mental disabilities would greatly benefit. Such a mandate is especially important for mentally disabled employees because of their possible fears of revealing the extent or cause of their limitations.¹⁷⁷ By requiring the interactive process, the EEOC would be sending a message that employees need not be anxious—all parties must listen and work toward a resolution together, rather than leaving the accommodation decision entirely in the employer's hands. Misunderstandings that arise while searching for reasonable accommodations could be overcome if the EEOC obligated both employers and employees to work together.

All employers and mentally disabled employees should engage in the interactive process to determine if a reasonable accommodation is possible. The process does not unduly burden employers or employees. Participation merely requires that both the employer and employee communicate about what possible accommodations exist. The free exchange of knowledge is an integral part of the interactive process. Mandating participation in the process would allow mentally disabled employees to inform the employer of their illness. The employee could take comfort in the fact that the employer would help find a solution to the limitations caused by the illness, rather than fearing that the employer would unilaterally dismiss the employee based on stereotypes or myths about mental illness.

IV. CONCLUSION

Congress enacted the ADA in hopes of eradicating discrimination against the disabled based on myths and stereotypes. The EEOC has called for an interactive process to encourage dialogue between

177. See *supra* text accompanying note 51.

employers and disabled employees in order to determine if accommodations are feasible. In determining the proper role for employers and employees in this process, one must consider the type of disability limiting the employee. Mental and physical disabilities are significantly different and require different measures. Mental disabilities and the limitations they cause may not manifest themselves in obvious ways. Thus, open communication between employers and employees is crucial when the employee is mentally disabled. Employers and mentally ill employees should be required to participate in the interactive process to ensure that they identify and implement the appropriate accommodations, thus, realizing Congress' goal of integration for the disabled.

