

EMPLOYMENT LAW ALERT

Spilling the “High Tea” Regarding Employee Mental Health: Royal Tell-All Highlights Potential Employer Risks With Regard to Worker Well-Being

By [Jessica Itzkowitz](#)

Ex-royals Prince Harry and Meghan Markle sent shockwaves through the world during their recent tell-all interview with Oprah Winfrey, where one particularly incendiary topic was Ms. Markle’s mental health struggles and her unsuccessful attempts to seek help for same from her “employer,” i.e., Buckingham Palace. Ms. Winfrey looked on in shock as Ms. Markle, in describing her efforts to obtain support for her mental health difficulties, stated: “I went to human resources, and I said, ‘I just really – I need help.’”

Though the royal family may not have been responsible for providing Ms. Markle with such support, this interview serves as a reminder to businesses that employee mental health *can* be both a liability risk and a hidden cost. This topic had become particularly relevant with the COVID-19 pandemic, since many employees have been forced to adapt to a remote work environment and still others must prepare to re-acclimate to “real life” workplaces.

The Royal Treatment – Legal Protections for Employee Mental Health

The Americans with Disabilities Act (ADA) prohibits employers with 15 or more employees from discriminating against qualified applicants and employees because of an actual or perceived disability, and mental illness can sometimes qualify as a disability. Several states have enacted similar laws, some of which define disability more broadly and/or apply to employers with fewer than 15 employees.

Employers do not have to hire or retain employees in jobs they cannot perform without a reasonable accommodation or employ persons who pose a “direct threat” to safety (based on objective evidence) but firing an employee or rejecting an applicant on account of their disability (even a mental one) without engaging in the appropriate interactive process or otherwise satisfying an enumerated exception under the ADA is prohibited.

The ADA requires that employers provide a reasonable accommodation to a qualified applicant or employee with a disability, unless doing so would cause undue hardship to an employer’s business operations. An accommodation is a modification or adjustment to the work environment that will enable a qualified applicant to participate in the application process, or help an employee with a disability perform the essential functions of the job. Individuals may require accommodations to help with maintaining stamina or concentration throughout the day,

staying organized and meeting deadlines, working effectively with supervisors or colleagues, handling stress, and managing change.

Examples of reasonable accommodations for covered mental health conditions can include, but are not limited to:

- permitting flexible work schedules
- providing a job coach or mentor
- encouraging the use of stress-management techniques
- providing organizational aids such as checklists
- providing sensitivity training to team members
- permitting telephone calls during work hours to doctors and others for needed support
- referring individuals to an employee assistance program (EAP), if applicable

“All That Glitters Is Not Gold” – Be Wary of ADA Exceptions

The ADA’s exception to the reasonable accommodation rule exempts employers from accommodation of a disabled employee or applicant if the accommodation would cause an “undue hardship” to the employer, namely an accommodation that is unduly costly, extensive or substantial, or that would fundamentally alter the nature of the business’s operation. However, employers should rely sparingly on the “undue hardship” exception, and only when the accommodations might create extensive financial burden or would prevent the ongoing operation of the business in ways that are capable of being clearly documented. Further, an employer should engage in an interactive dialogue with the employee before concluding an undue hardship exists.

A Princely Sum – High Costs of Employee Mental Health Struggles

Further, going beyond the requirements of the ADA to proactively foster support for those suffering from mental health struggles can also improve your business’s bottom line. Though one in five adults in the U.S. will experience mental illness, only one in three seek help for same; often those suffering will miss work or get less done on the job. The World Health Organization (WHO) estimates that depression and anxiety cost the global economy \$1 trillion per year in lost productivity, but also notes that for every \$1 spent on treating mental health concerns, employers see a return of \$4 in improved health and productivity. Further, in a 2019 survey of more than 1,500 employees nationwide, more than a third of respondents noted they had left a job due at least in part to mental health issues. As the American Heart Association’s CEO Roundtable Report “Mental Health: A Workforce Crisis” found, “The cost of doing nothing is higher than investing in evidence-based prevention and treatment.”

YASS Queen – Tips for Creating a Compliant and Compassionate Workplace

Your company’s attention to employee mental health should be twofold: a focus on legal compliance coupled with a prospective focus on employee well-being. A little communication

and documentation can go a long way toward creating a team of happy employees and preventing costly litigation.

1. **Dialogue and Documentation.**

- If an employee requests a reasonable accommodation or puts you on notice of the need for a change at work due to a mental illness (either explicitly or as the result of unusual observable behavior), begin an interactive process or dialogue with the employee. Meet with the employee, discuss his or her restrictions, and discuss possible accommodations, even if the employee does not officially request reasonable accommodations. Engage in this process even if you do not believe an employee's health condition and request for accommodation are legitimate. Reserve requests for "proof," such as medical records, for when the disability and accommodation are not obvious. Generally, if the need for an accommodation is not obvious, you can ask the employee to provide reasonable medical documentation to confirm the existence of the disability and the need for reasonable accommodation.
- Write it all down. When meeting with an employee as part of the interactive process described above, prepare a written summary of the meeting, including the reasonable accommodation options discussed. Document whether you decided to grant any employee request for accommodation. If you deny an employee's request because of undue hardship, document the reasons for the denial. Invite the individual to further engage in the interactive process and keep the door open to other options. Any change in accommodations should be in writing.

2. **Proactive Prevention; Stigma-Free Support.** Create an open culture of supporting and removing the stigma around disability by creating the following:

- **A culture of connection.** Offer workshops and training for all team members. Encourage willing team members to share their own struggles – research has shown that such authentic leadership can cultivate trust and improve employee engagement and performance.
- **In-house support.** Prioritize self-care by offering mandatory vacation time, access to mindfulness and stress-reduction apps, and flexible schedules to help workers navigate tricky issues like difficulty unplugging or unexpected childcare hiccups.
- **Third-party resources.** Implement an employee assistance program (EAP) and a healthcare plan that includes mental health coverage. Frequently promote and emphasize the cost-free, confidential, and user-friendly nature of these resources.

For more information on how The Americans with Disabilities Act (ADA) can impact your business, and for guidance regarding how to legally and compassionately navigate issues surrounding your team's potential mental health needs, please contact Jessica Itzkowitz at jitzkowitz@rccblaw.com.

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