INTRODUCTION

Dealing with employee medical problems is a major responsibility of federal supervisors in all environments. You can't escape it because it's only a matter of the types of problems you'll encounter. In industrial activities, there are primarily injuries and the effects of those injuries on performance. In white-collar departments, medical problems involve those of applicants and employees with preexisting conditions, as well as those conditions caused by environmental and external factors. And all federal agencies have problems with absences caused by real or imagined medical issues. Every government activity has employees who show up for work with medical problems or alcohol-related problems that pose an imminent danger to themselves or others. The effects of all medical problems are both tangible, with measurable impact, and intangible, influencing productivity and morale.

The biggest difficulty you face, though, is that dealing with these issues is more closely governed by laws, regulations, and oversight than any other aspect of federal supervision. As we'll see in many situations, you're bound by rules from several regulatory agencies over the same issue and with the same employee. An employee gets hurt of the job, and you're immediately faced the workers' compensations rules and procedures about reporting the injury and helping the employee, as well OPM rules about the leave and pay issues. Then that same employee wants to come back to work after a while, but asks for some accommodation and the Americans with Disabilities Act (ADA) now requires you to begin what we'll call an interactive process to identify reasonable accommodation, over which issue the Equal Employment Opportunity Commission gets involved if the employee alleges you didn't meet your burden. As often happens, if indeed the employee is no longer physically or medically capable of working and must be separated, the Merit Systems Protection Board (MSPB) will hear the appeal and determine whether you met its standards for medical removals. And, by the way, if the employee is not happy with the MSPB, EEOC comes back into picture, with possible subsequent review by a special panel if the two agencies cannot agree.

Learning how to deal with these processes is an important part of the federal supervisor's job. I can help by sorting these issues out for you, and then giving you definite steps to follow and practical measures to enable you to deal with them. Although workplace medical issues are tightly bound by laws and regulations, I'm not going to overwhelm you, but only teach you

what you need to know about them from a supervisory standpoint, with a focus on their practical implications and how to handle them.

Every medical problem on the federal worksite can fall within the ADA, so we'll spend the first five chapters on disability discrimination, reasonable accommodation and the burdens the ADA puts on both employees and supervisors. Then we'll turn to the medical issues not necessarily involving disabilities under the ADA definition. We'll spend a chapter on your responsibilities and the steps in workers' compensation claims, and close out looking at the discrimination complaint process and how it affects you.

CHAPTER ONE
Disability Discrimination—The Legal Overview

This is a book written by a layman for laypeople and, as in all my writings, I try hard to avoid tedious discussions about fine legal points and limit discussion of legalities to those points that help you make practical decisions about supervising federal employees. However, unlike other areas of human resources management for supervisors, this broad topic of dealing with employee disabilities and other medical problems is guided by an iron hand of extensive and often complex legal doctrines and precedential decisions by the adjudicators that rule on the legal issues—federal courts, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Department of Labor.

So, we start with an overview of the legal requirements and legal definitions that guide us in dealing with employee disabilities and medical problems. I promise, though, to keep this as succinct and practical as possible and to give you only what you need as supervisors to start dealing with these medical issues. We'll begin with a short look at the laws on disability discrimination, a brief conceptual framework of what they require, and then a skeletal definition of terms that we'll develop in the remainder of the book.

LAWS ON DISABILITY DISCRIMINATION

For our purposes as supervisors we needn't spend much time on the legal history of disability discrimination. A few sentences will suffice.

The Rehabilitation Act of 1973 prohibited discrimination in federal service against "handicapped" employees. However, unlike with other types of prohibited discrimination—race, color, sex, national origin, age, and religion—it went beyond requiring mere passive compliance, and required federal agencies to make reasonable accommodations for employees with known disabilities. The Act directed the Equal Employment Opportunity Commission (EEOC) to write implementing regulations and oversee an administrative complaint process allowing employees and applicants to file complaints against federal agencies.

The Americans with Disabilities Act (ADA), effective in 1992, prohibited discrimination in the private sector against what the law now calls the

disabled. While the ADA did not apply to federal employees, the ADA Amendments Act (ADAAA) of 2008 made extensive and expansive substantive changes and directed EEOC to incorporate these changes in its regulations, effectively extending the ADA to federal employees. Throughout this book, we'll use the term ADA to refer to all legal provisions, regardless of their source, that govern disability discrimination.

DISABILITY DISCRIMINATION DEFINED

We'll start by making an important distinction between the different types of disability definitions in federal service and then we'll turn to the specific ADA criteria for disability.

ADA Definition of Disability Different From All Others

The term "disability" appears in many different federal laws, and each has different definitions and different standards. It is not only possible, but common, for somebody to be considered disabled for the purpose of one law, but not disabled for the purposes of another. The VA rates disabled veterans on a percentage basis from zero to one hundred. Yes, there is a VA zero percent disability: somebody who has a service-connected ailment, but not serious enough for compensation or who has a Purple Heart for being wounded in combat. OPM rules on disability retirement for federal employees based upon the job they currently hold; the Social Security Administration standards for disability payments are also different; OPM, in addition to standards for disability retirement, also has different standards for labeling applicants who are "severely disabled" for purposes of eligibility for noncompetitive hire; same holds with OWCP disability standards that we'll discuss in Chapter Seven. No agency is bound by a disability determination under another agency's program.

Describing the relationship between workers' compensation disability standards and the ADA disability standards, EEOC says, "the ADA does not require an employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a disability as defined by the ADA." EEOC, in a decision rejecting an employee's contention, explained, "At the outset, we note that an employee with an occupational injury who has a 'disability' as defined by workers' compensation statute may not necessarily have a 'disability' under the Americans with Disabilities Act."

In a federal appeals court case in a private industry ADA allegation, a company argued that a professional employee injured on the job was unable to perform the essential functions of his position because he was

receiving disability benefits from a private insurer. The court found that the insurer's classification of the employee as disabled was meaningless because that particular company's classification was based in large part on the employee's ability to work in other occupations, rather than the unique duties of his particular job.

Before we start to peel back the layers of the ADA definition of disability, there's an even more crucial difference you must understand when dealing with disability issues. In federal programs that grant a disability status on a person, there actually is a tribunal or official who, after comparing the evidence of disability against the applicable standard, slaps an official label on a person.

If you apply for VA disability benefits, you file papers and go through reviews and medical exams, and if you meet the standards, some bureaucrat pulls out a rubber stamp, slaps it on an inkpad, and smacks the imprint, "disabled" on your paperwork, allowing you all manner of VA and military benefits. Similarly, when an employee files an on the job injury claim, the Office of Workers' Compensation Program (OWCP) of the Department of Labor gathers information and, if approved, some official in OWCP uses its own rubber stamp of disabled. Similarly, SSA, OPM, and others follow a similar process that ends up with an official classification of "disabled" for the purposes of their individual program, most always signed by the bureaucrats who made the decision.

No such thing with the ADA. Rather, the ADA gives descriptions as best it can, but while it gives numerous examples of disabilities, it does not issue a comprehensive list, like OPM does with its "severely disabled" classification in hiring. Similarly, there is no adjudicator who, during the steps we'll be guiding you through in the remainder of the book, actually affixes an official label of disabled on the employee at the center of the issue. Now, to be sure, physicians will give medical information on the condition and its effect on the person and toss around the word "disability" indiscriminately, but that physician does not actually make a ruling of "disabled" for purposes of the ADA. Nor does that physician make any binding conclusions on the subsequent issue of reasonable accommodation. So, who then does decide if the employee is disabled?

You do. Now, don't get frightened. To be sure, you'll be getting more advice and help from agency lawyers and specialists than you probably want, and your "decision" may be challenged and tested after the fact before adjudicators and courts. But it is you as that supervisor or manager in the trenches who, after considering all facts and opinions, will be forced into that initial decision on behalf of your agency. Take a quick example.

In a federal agency, an employee—position irrelevant—asserts that he has Attention Deficit Disorder (ADD) and is asking for various accommodations. As we'll discuss in detail later, even before we reach the issue of reasonable accommodation, the employee must prove, not merely assert, that he or she is disabled, which means proving the medical condition and, importantly, what effect this condition has on his ability to function either on or off the job.

The evidence from the doctor in this case was spotty to begin with, and the employee showed how it affected him by stating that he had difficulty balancing his check book, misplaced tax documents, occasionally ran out of gas, and procrastinated with gift shopping. The supervisor, again with plenty of help, never even considered accommodation, deciding that the employee had not even crossed the threshold of proving that he was disabled because he had not shown he was seriously enough affected.

After he filed his EEO complaint alleging disability discrimination, EEOC agreed. But the EEOC was simply validating the decision of that agency supervisor or manager who, after considering the evidence and listening to the counsel of staff people, decided that any discussion of accommodation was out of the question, as the employee was not disabled in the first place. However, as we'll discuss later, the applications are highly individualized, based on the details of each case. In other cases, adjudicators have upheld ADD as a disability when the employee was able to show seriously debilitating effects both on and off the job. We'll discuss ADD situations in Chapter Five. Now let's continue with the overview by looking at what the ADA calls a disability.

ADA Definition of Disability

Broadly, the ADA prohibits discrimination against persons with disabilities. It then defines disability, and it's important to use the exact language, "(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." In this chapter, we'll focus on (a) and we'll cover the last two in a later chapter. The key phrases in that definition, repeated time and time again in decisions and discussions, are, "physical or mental impairment," and "substantially limits major life functions."

"Physical or Mental Impairment"

The ADA does not define impairment, but the EEOC regulation does:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or

anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as intellectual disabilities [formerly mental retardation], organic brain syndrome, emotional or mental illness, and specific learning disabilities.

You can see how broad this is. Note first in part (1) where it lists the body systems. That happens to be, if you remember your high school biology, a list of every single body system. Second, in part (2) on mental disorder, it uses the word, "any" and only names specific disorders as examples. While expansive, it does have some limits that we'll discuss in a few minutes in the section on what are not disabilities.

"Substantially Limits Major Life Activities"

While the concept of impairments is virtually unlimited, the impairment will not be a disability unless it "substantially limits major life activities." This phrase is better understood if we break it into its two components of "major life activities" and "substantially limits."

Major Life Activities

The ADA and EEOC regulations describe major life functions as including, but not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working; and (ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

As with the definition of impairment we discussed above, the ADA lists a broad enough range of major life functions that you'll rarely be able to dismiss an employee's request on the basis that what he or she is able to do is not a major life function.

The items on that list are obvious and need little elaboration, but a minute is worth spending on EEOC's addition of "working" as a major life activity. EEOC

considers it a major life activity of last resort because it's hard to imagine somebody who is not substantially limited in one of the other 36 activities and functions in the list above, but is substantially limited in the life activity of working. Since there is most always another life activity that substantially limits the person, adjudicators usually focus on that and if at all, mention working impairment in conjunction with another activity.

However, one of the points EEOC makes in grappling with defining it coherently is clear: it is intended to exclude from ADA coverage an employee or applicant whose disability limits him or her from only one unique job or set of duties. EEOC says the disability must, "substantially limit his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities…. Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working."

In one case, a GS-13 Navy Contract Specialist worked in an Arlington, Virginia, office building in Crystal Mall. She suffered severe allergic reactions causing her to go into anaphylactic shock resulting in paramedics having to resuscitate her. Physicians concluded that she was allergic to diesel fumes, any type or form of alcohol, or certain strong odors. Her own doctor advised her that future attacks could be fatal and that she could not return to that same building.

Your first reaction is, no problem, just move her work location. The problem with that obvious solution was that her unique job involved being a team leader supervising 18 other employees in high-level contracts on Naval missile systems. The Navy concluded that she could not work in any location outside that Crystal Mall building, and removed her for physical inability to perform. In her appeal to the Merit Systems Protection Board, she alleged disability discrimination based upon failure to accommodate. An employee who has an appealable action to the MSPB, as in this case a non-probationary removal, can also raise an allegation of discrimination as well. The Board will rule on the merits of the removal as well as separately over the discrimination allegation. After the MSPB decision, the employee can pursue the discrimination part of the case to the EEOC. Many of the cases we'll use as examples will be MSPB appeals that include discrimination claims. The Navy introduced overwhelming evidence to support its assertion that the work could only be done in that building.

The Board sustained the removal and found no discrimination under the rationale we discussed just above—she was not disabled to begin with therefore accommodation was not required. While she was clearly limited

under any legal or medical standard from working in that building, she was not foreclosed from working as a contract specialist or even in her same job in any other location. The Board relied heavily on the fact that off the job, she was active in scuba diving, whitewater rafting, running, playing different sports, and other physical activities. We'll discuss allergy cases in more detail in Chapter Four, but this same rationale has been applied to other similar EEOC and MSPB disability cases where an employee suffered from an allergy, but only in a particular location.

While this narrow issue of an employee/applicant not being disabled because he or she is only substantially limited in one particular unique job is rare, it does happen. Remember that even before you reach the issue of whether you can reasonably accommodate, the employee has the threshold burden of proving disability.

Substantially Limits

Two important points: First, Congress intended that the term "substantially limited" be broadly construed. It specifically stated in the ADA Amendments Act that one of its purposes was to nullify several Supreme Court decisions that had narrowly interpreted "substantially limits" in the original ADA. The Supreme Court had, before the ADAAA, ruled that "substantially limits" required the employee to show that he or she was "severely restricted."

Second, as I mentioned in the earlier ADD example, these determinations are highly individualized because so much depends on exactly how a condition affects each individual. That is another reason why Congress, EEOC, and the federal courts have not made a dispositive, all-encompassing ruling that this or that medical condition is a disorder. EEOC regulations stop short of assigning some label like automatic disability, but use the term "predictable assessments" and list about 30 conditions like blindness, deafness, and missing limbs that are so apparent that little time need be spent deciding whether they meet the ADA definition of disability. Migraine headaches, for example, can have a broad spectrum of effects on people from mild and occasional inconvenience to seriously debilitating consequences. Similarly, the limitations of epilepsy vary dramatically from one person to another, resulting in some cases where it was ruled a disability because it seriously affected a person's ability to work, while in others it did not qualify as a disability because the effects on that particular person were far less serious. A few more examples:

- While breathing is a major life activity, EEOC found that a Postal employee with sinusitis was not "substantially limited"; it was a non-chronic condition caused by dust and seasonal allergies.

- An employee with dyslexia was substantially limited in the major life activity of learning because he required extra study time, showed significant differences between performance on written and non-written tests, made numerous errors in spelling and writing, and needed extra time to finish tests.

- EEOC agreed that diabetes affected an insulin-dependent Postal employee's ability to care for himself and his eating. However, he introduced no evidence about the extent to which the disease affected any major life activities. The Commission, finding no substantial limitation, saw no detail about how often he experienced episodes of hypoglycemia, how long they lasted, or their severity other than the need to eat or drink a high-carb item during the attacks.

- But in a Social Security Administration case, EEOC found that a diabetic employee was substantially limited because the condition caused severe complications and was even further limited by requirements of monitoring and controlling the condition.

What Is Not a Disability

Although the expansive ADA and subordinate EEOC regulations intend that medical conditions be considered disabilities, there are some clear limits.

Temporary Conditions

EEOC uses the term "transitory or minor" referring to conditions generally lasting less than six months. The practical effect of this on federal supervisors is that any temporary medical issue whether serious or minor, e.g. flu, broken limb, medical care, is handled through regular leave provisions—sick leave, annual leave, LWOP, or FMLA.

Current Users of Illegal Drugs and Alcoholics Engaged in Misconduct

See Chapter Four for the details, but another significant departure in the ADA from the past assessment of alcoholism and drug addiction as disabilities was to narrow the protection given to alcoholics and drug addicts who commit disciplinary offenses.

EEOC Exclusions

The EEOC regulations specifically exclude:

- *Physical characteristics*, e.g. eye color, hair color, left-handedness, or height, weight, or muscle tone. However, abnormal physical characteristics that are the result of a disability are generally not

excluded. For example, under EEOC guidance, obesity by itself is not considered a disability, unless the obesity is the result of some other physiological condition.

- *Personality traits* like poor judgment or a quick temper. In one federal court of appeals case, the court made a distinction between a personality conflict between a supervisor and subordinate and one that was caused by a mental impairment. The court ruled that a simple personality conflict was not a disability and suggested that the employee "get a new job." However, as with the physical characteristics above, they would not be excluded, as the court suggested, were they the symptom of a mental disorder.

- *Age by itself*. However, the effects of aging otherwise meeting disability definition above would certainly be covered. For example, an older employee becoming deaf would be considered disabled. As you're doubtless aware another EEO law prohibits age discrimination against employees or applicants forty and over.

- *Normal pregnancy*. By itself, a woman could not file a disability complaint based on pregnancy. However, just like age, another EEO law, the Pregnancy Discrimination Act prohibits discrimination against pregnant women.

- "*Environmental Factors*" as EEOC calls them are socio-economic or cultural deprivations.

Certain Sexual Classifications

Congress grappled with how to handle sexual identifications, which, had they been characterized as disabilities, would have forced Congress to face the wrath of those with non-traditional sexual conventions by stating they are mentally ill. Its clever solution was to say that these identifications were not covered by the ADA, and excluded homosexuality, bisexuality, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders. The extent to which the Civil Rights Act does cover homosexuality, bisexuality, and transsexualism is a rapidly evolving area of EEO case law, and talk to a good agency counsel if you're dealing with allegations of discrimination on a basis other than disability.

Mental Disorders Inherently Criminal

Congress also excluded several mental disorders that are either criminal or excessively anti-social: compulsive gambling, kleptomania, pyromania, or any psychoactive substance use disorder resulting from current illegal drug use.