

# I. Mental Health Issues in the Workplace

## III. Managing the Mentally Ill Employee

## II. Mental Illness, Discrimination and Accommodation

### ADA/ADAAA

## IV. The ACA and Mental Illness Coverage

Any questions?

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## V. Mythbusting


Myth: People with mental health issues are violent.
   
 Fact: Most people with mental health issues are not violent.

# Mental Health Will Drive You Mad

**Mental Health Issues in the Workplace, and Possible Effects of Expanded Insurance Coverage for Mental Health Treatment**

Cynthia L. Effinger  
Anne-Tyler Morgan





**“Stigmatization of people with mental disorders has persisted throughout history. It is manifested by bias, distrust, stereotyping, fear, embarrassment, anger, and/or avoidance.”**

**- Surgeon General’s Report on Mental Health, 1999**



Employees with mental health issues may be reluctant to seek treatment out of fear that they might jeopardize their jobs, but this can lead to lost productivity and increased health costs.



Workers with depression spend \$2000 more in annual healthcare costs than those without depression.

Treating depression saves companies \$2000 annually per employee in productivity and health costs.

Source: Partnership for Workplace Mental Health



26 out of every 100 employees need mental health care.

Source: NIH

12 out of every 100 employees abuse alcohol and drugs

Source: SAMHSA



# **I. Mental Health Issues in the Workplace**

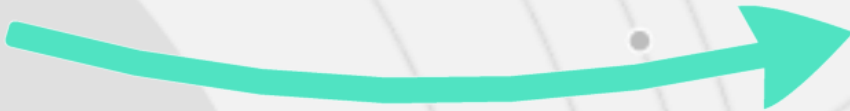
## Things to remember:



- All employees will face ups and downs
- Just because an employee exhibits certain signs or symptoms does not mean that she or he is facing a long-term mental illness.
- Employees experience difficult times in their lives, but these are often temporary
- Patterns that emerge over longer periods are potentially indicative of a mental health problem

# Most common types of mental illness in the workplace:

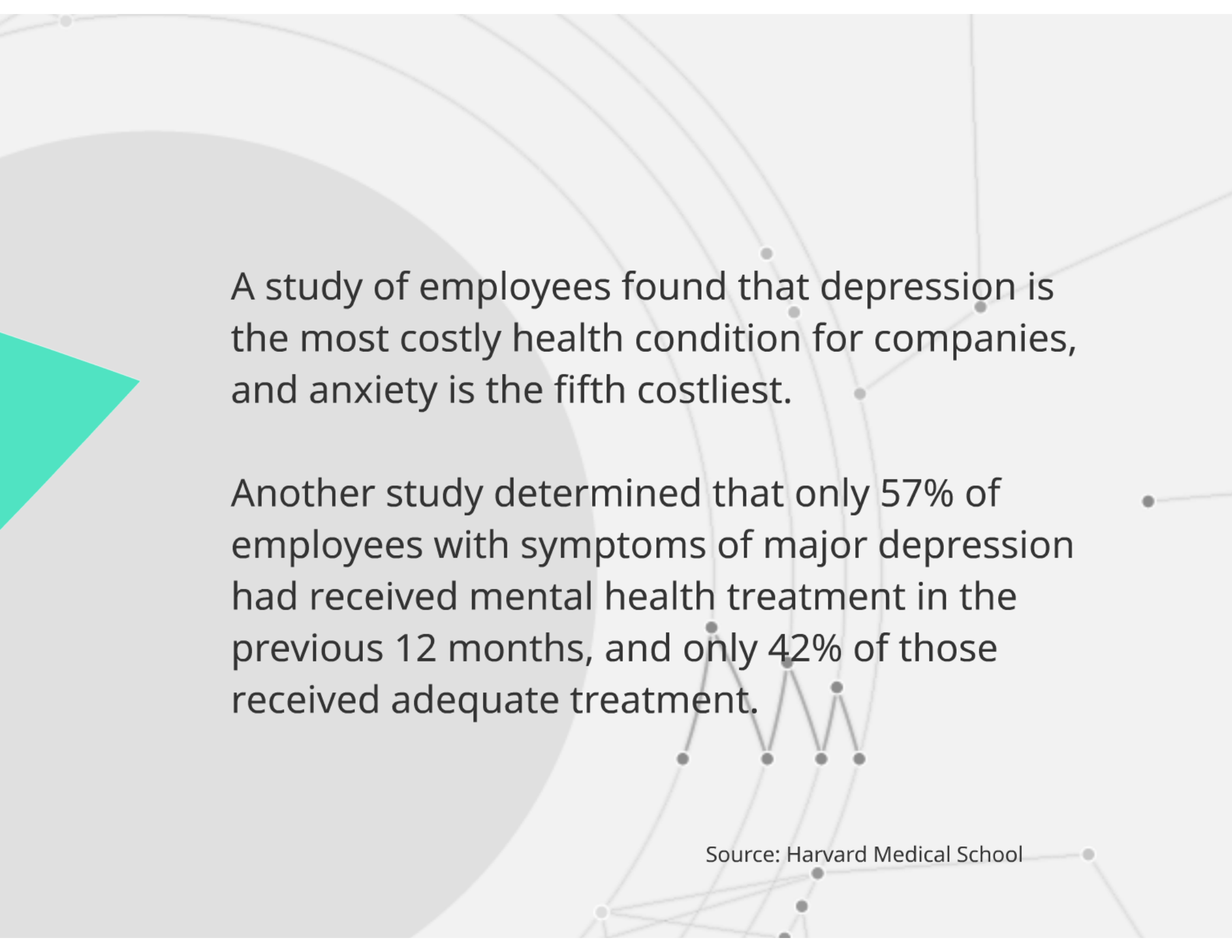
- Depression
- Bipolar Disorder
- Anxiety Disorders
- ADHD
- Stress?



A study of employees found that depression is the most costly health condition for companies, and that 1 in 5 employees with depression had missed work in the previous 12 months, and 1 in 10 had those missed work days reported.

Source: Harvard Medical School





A study of employees found that depression is the most costly health condition for companies, and anxiety is the fifth costliest.

Another study determined that only 57% of employees with symptoms of major depression had received mental health treatment in the previous 12 months, and only 42% of those received adequate treatment.

Source: Harvard Medical School

## Meet Bob and Jim

Bob's work has been suffering for months, and Jim, his manager, believes something is wrong. Bob's job is going to be in jeopardy soon if his performance doesn't improve. Jim goes down the checklist of warning signs and comes to the conclusion that Bob is experiencing some form of mental illness. He considers talking to Bob about it, possibly suggesting that he seek some form of treatment for his obvious mental health issue.

**Do you approach an employee you suspect may have a mental health issue?**

**What can you do?**

**What should you do?**





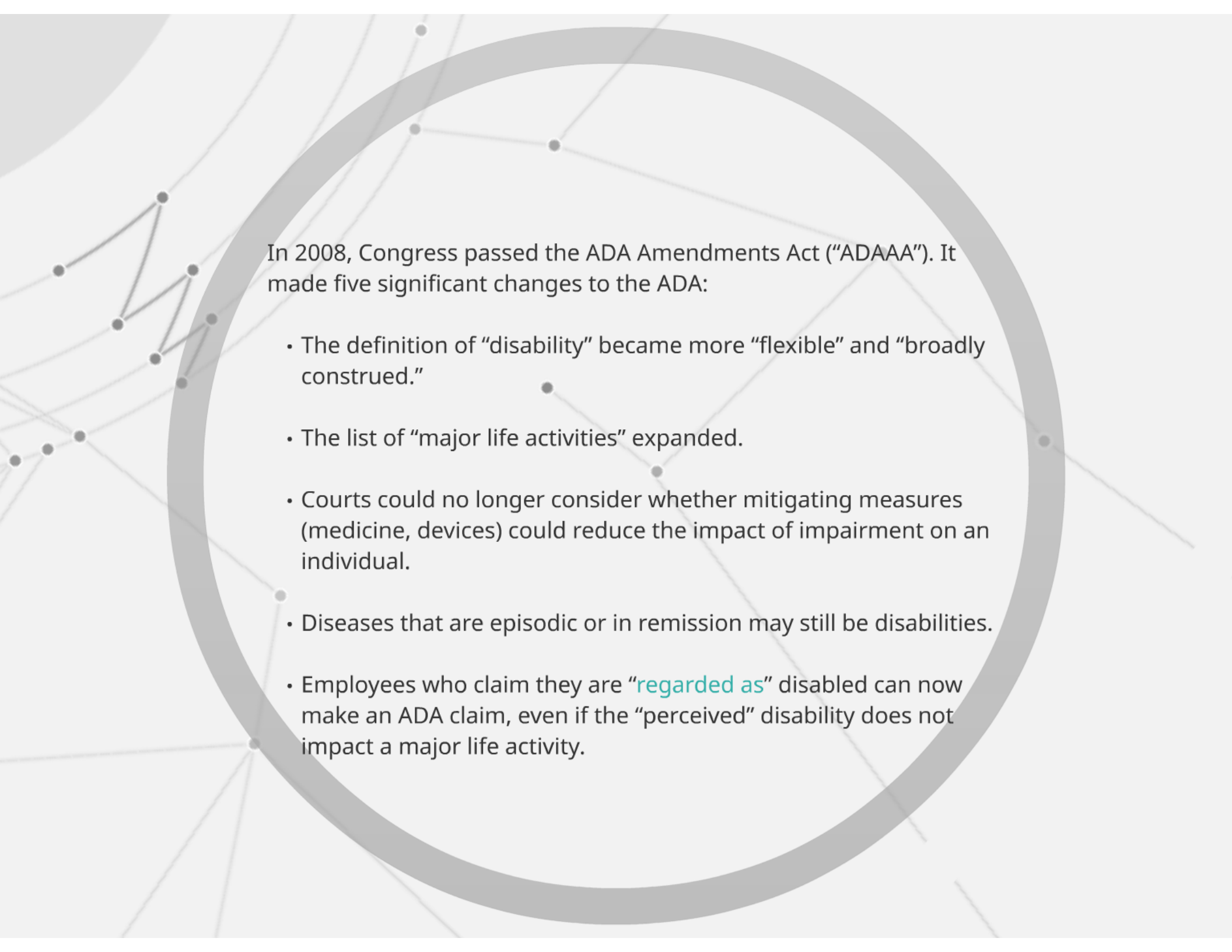
## **II. Mental Illness, Discrimination and Accommodation**

# ADA/ADAAA

The Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act (ADAAA) prohibit employers from discriminating against applicants and individuals with disabilities.

These laws require employers to provide **reasonable accommodations** to applicants and employees who are qualified for a job, with or without reasonable accommodations, so that they may perform the essential job duties of the position.

As passed the ADA Amendments Act (ADAAA) is  
most changes to the ADA.  
of "disability" became more "broad" and "loosely"  
after "disability" expanded.  
no longer consider whether mitigating measures  
would reduce the impact of impairment on an  
are up to date or in remission may still be disabilities.  
do not in they are "regarded as" disabled can now  
clearly, even if the "perceived" disability does not  
or the activity.



In 2008, Congress passed the ADA Amendments Act (“ADAAA”). It made five significant changes to the ADA:

- The definition of “disability” became more “flexible” and “broadly construed.”
- The list of “major life activities” expanded.
- Courts could no longer consider whether mitigating measures (medicine, devices) could reduce the impact of impairment on an individual.
- Diseases that are episodic or in remission may still be disabilities.
- Employees who claim they are “regarded as” disabled can now make an ADA claim, even if the “perceived” disability does not impact a major life activity.

The ADA applies to a person who has a physical or **mental** impairment that substantially limits one or more major life activities (like sitting, standing, or sleeping).

The ADA also protects a person with a record of a substantially limiting impairment.

And the ADA protects a person who is **regarded** (or treated by an employer) as if s/he has a substantially limiting impairment.

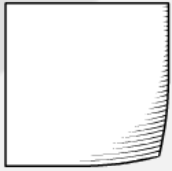


**Note: Is**

*Huiner v*

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**Note: Is job-related stress a "disability" under the ADA?**

*Huiner v. Arlington School District*

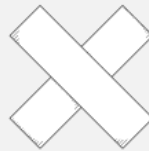
A poor-performing teacher was diagnosed with anxiety and depression stemming from her concerns about being fired. Her healthcare provider requested accommodations on her behalf, some of which were accepted by the administrators, but her contract was not renewed. She sued.

**Court: job-related stress from fears of being fired ARE a disability for purposes of the ADA**



The ADA prohibits employers from:

- Making medical inquiries or requiring medical examinations unless they are job-related and consistent with business necessity.
- Taking adverse employment action based on an individual's perceived or actual disability.
- Including confidential medical health information in employee files (employee medical files must be kept separate)





What is an **essential function** of the job?

“The fundamental job duties of the employment position the individual with a disability holds or desires. The term...does not include marginal functions of the position.”

An employee must be able to perform essential functions, with or without an accommodation. Thus, the duty to accommodate an individual’s disability relates directly to the description of an employee’s essential job duties.



What is **undue hardship**?

Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense, based on your resources and the operation of your business.

## **The ADA Bottom Line**

Employers must provide reasonable accommodation for all employees with disabilities as long as they don't cause undue hardship and the employee can perform the essential functions of the job.

Employers cannot discriminate against employees with mental illness - they cannot ask about it in an interview, and they cannot make adverse employment decisions based on mental illness, either real or perceived.

**With two notable exceptions:**

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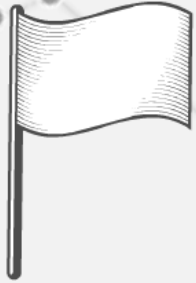
## With two notable exceptions:

1. The ADA allows an analysis of whether the impairment will pose a direct threat to the employee or others. It cannot be reliance merely on the "common sense" fears of the employer, but must be an individualized determination of how the applicant/employee's disability may endanger others, using current scientific or medical knowledge.



### Fear of "going postal"

In other words, an employer cannot discriminate against an employee with a mental illness out of fears of risk of violence by the employee unless an individualized assessment shows that there is an objective and tangible risk.



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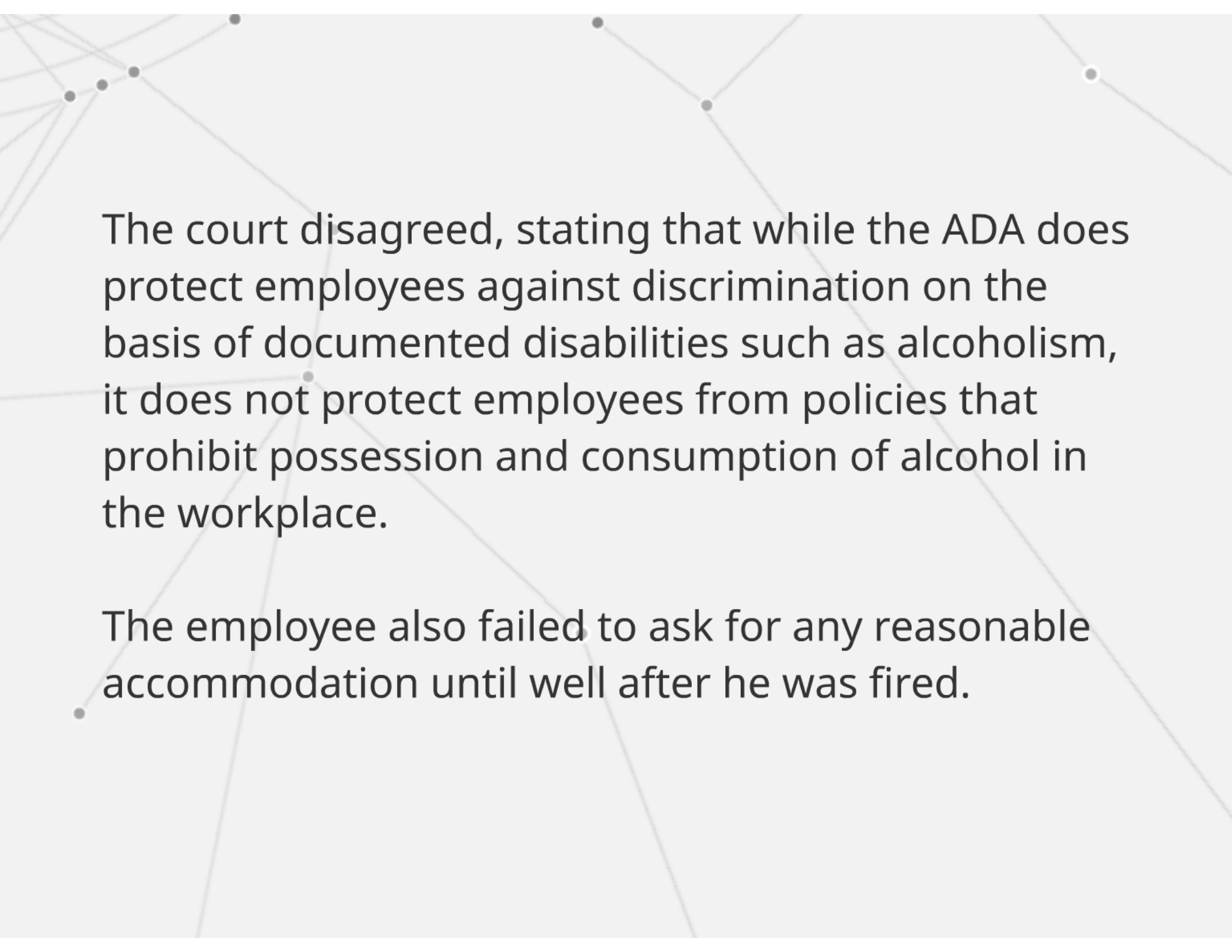
2. The ADA does not protect illegal drug use, even if that person has a documented substance use disorder. Treatment and perceived use are protected by the ADA, however.

• *Blazek v. City of Lakewood (6th Cir. 2014)*

An employee with the city drank a 21 oz. bottle of whiskey on his lunch break - the equivalent of 14 shots. He then drove a city vehicle until a supervisor at a meeting noticed something was "off" and took him to a police station, where he blew a 0.132 BAC. He later admitted to being drunk at work several times and was fired by the city.

• He sued the city for disability discrimination because the city fired him because of, and failed to accommodate, his alcoholism.





The court disagreed, stating that while the ADA does protect employees against discrimination on the basis of documented disabilities such as alcoholism, it does not protect employees from policies that prohibit possession and consumption of alcohol in the workplace.

The employee also failed to ask for any reasonable accommodation until well after he was fired.

# GINA

The Genetic Information Nondiscrimination Act of 2008 prevents employers from discriminating on the basis of genetic information or acquiring such information, except in limited circumstances.

- Family history (inquiries into family mental health conditions, for example)
- Blood tests

# HIPAA

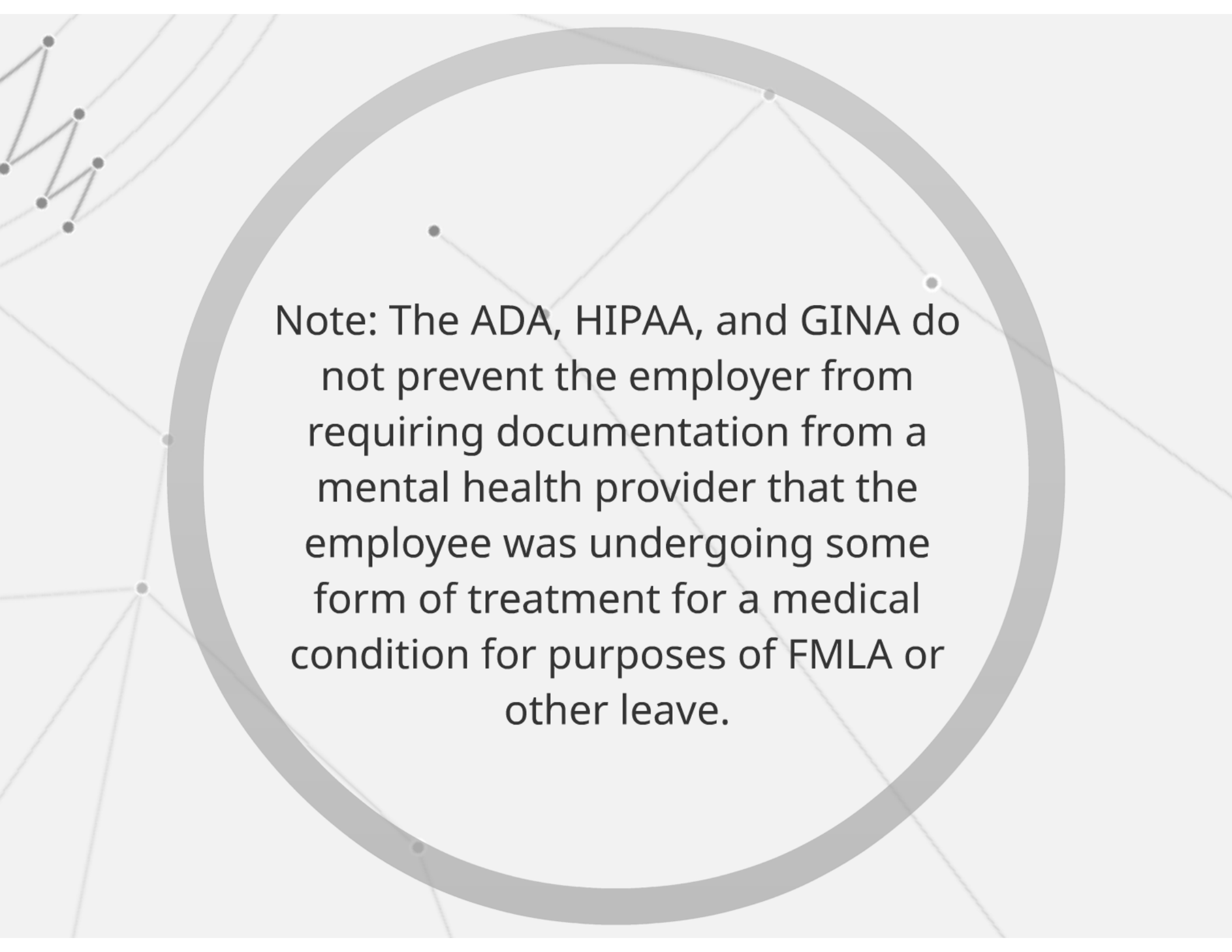
HIPAA does not apply to most employers directly, but employers with health plans will still handle protected health information ("PHI") and must abide by the protections of HIPAA's Privacy Rule.

- This can arise in the context of employee insurance records - if an employee files an insurance claim for mental health therapy or substance use disorder treatment.

# FMLA

The Family and Medical Leave Act entitles employees of covered employers to take unpaid, job-protected leave for specific reasons. During this time, employees also receive a continuation of group health coverage under the same terms and conditions as if they hadn't taken leave.

- FMLA is an employee entitlement, not a right - the employee must be eligible AND the employer must be covered by the FMLA.
- Employee must provide medical documentation to support a leave claim



Note: The ADA, HIPAA, and GINA do not prevent the employer from requiring documentation from a mental health provider that the employee was undergoing some form of treatment for a medical condition for purposes of FMLA or other leave.

## Bob and Jim again...

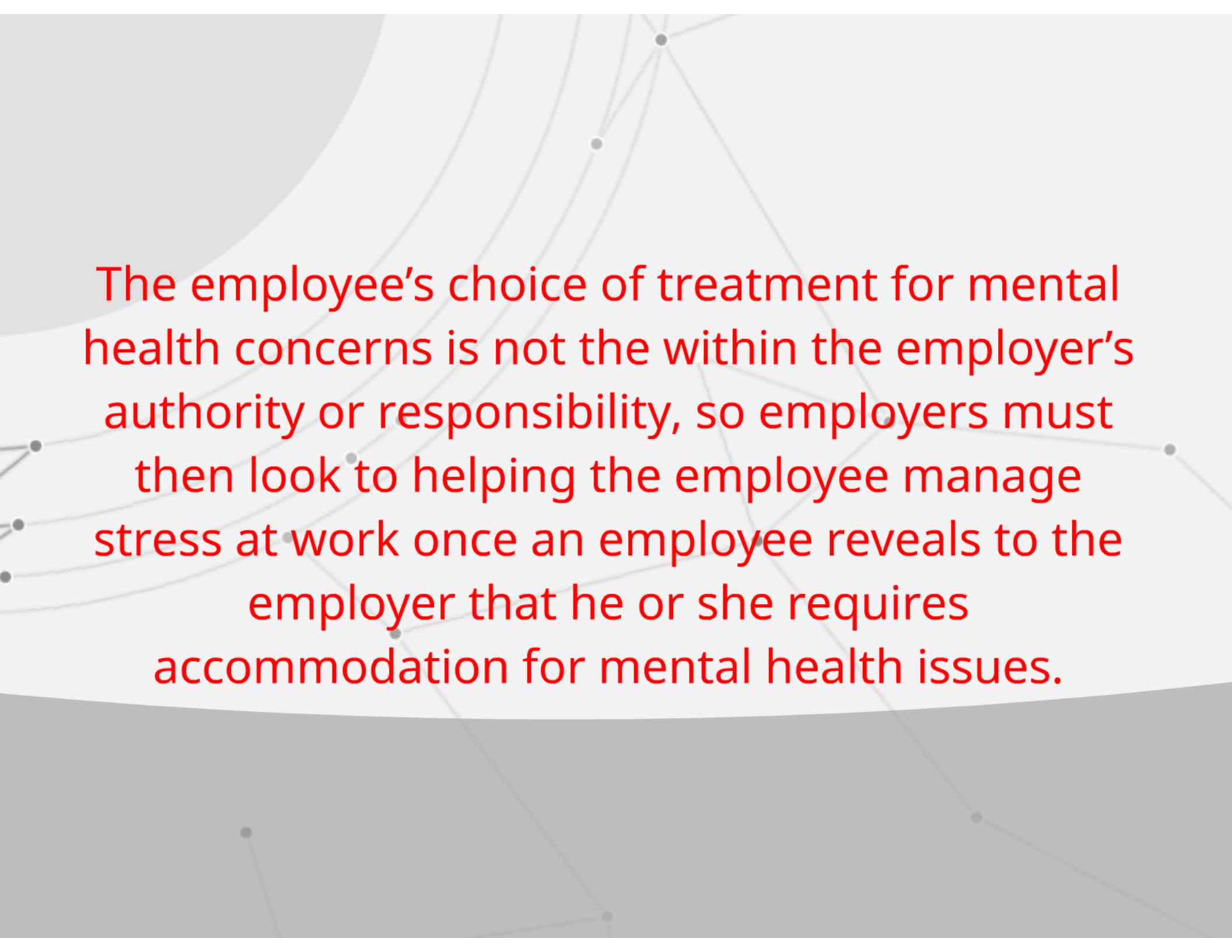
Jim decides not to approach Bob directly about his potential mental illness, but he fires an email off to Joe in HR, saying, "I think Bob is severely depressed or bipolar, and his work is atrocious. I've talked to him about his work performance, but he hasn't done anything to fix it. It may be time to let him go."

What has Jim done wrong here, and why?

# III. Managing the Mentally Ill Employee

The employer's duty of treatment for mental health concerns is not the same as the employer's duty for physical disability, as employers that have failed to help the employee to manage their mental health are more likely to be held responsible for the employee's mental health issues.





The employee's choice of treatment for mental health concerns is not the within the employer's authority or responsibility, so employers must then look to helping the employee manage stress at work once an employee reveals to the employer that he or she requires accommodation for mental health issues.



## Help the employee identify workplace stressors

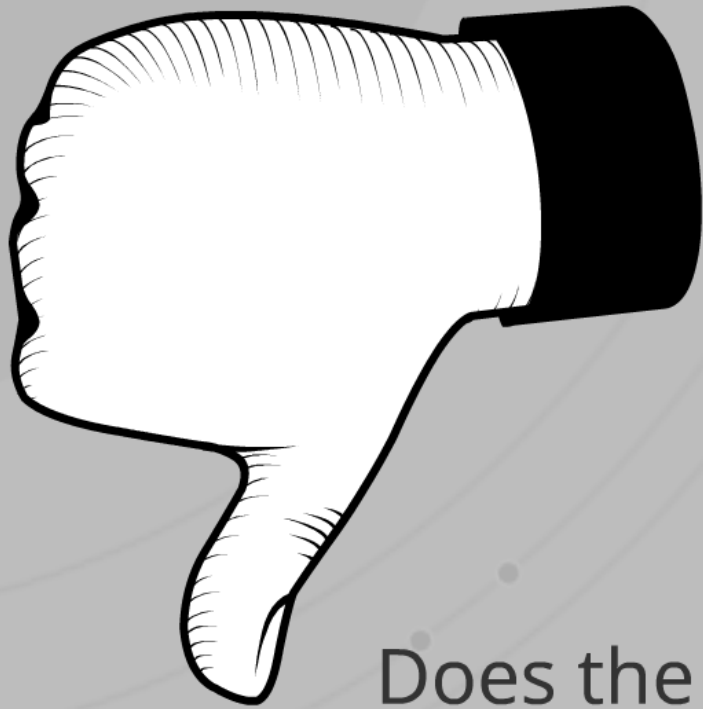
What is the hardest part of the work day?

What tasks does she or he find stressful?

How well does the employee receive negative feedback?



Does the employee experience stress with:  
The way he or she is given instructions?  
The expectations of the job?  
Work relationships?



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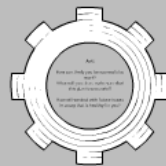
Work relationships?

## **Collaborate on solutions**

After identifying the issues, give the employee a chance to come up with solutions on her or his own.

Work to reach a compromise if the employee's solution is not practical.

Solutions should be unique and tailored to each employee.





**Ask:**

How can I help you be successful at work?

What will you do to make sure that this plan is successful?

How will we deal with future issues in a way that is healthy for you?

# Clarify expectations

Set clear tasks, deadlines and quality goals.

Discuss appropriate workplace behaviors where relevant.

Expectations should apply equally to all employees.



## **Articulate expectations and goals:**

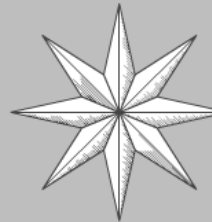
- Make them measurable
- Give guidelines
- Periodic reviews
- Agree on processes that will be followed if expectations aren't met

## **Act on concerns**

- Help the employee prioritize tasks
- Help the employee reduce stressors
- Help the employee find tasks that energize him or her

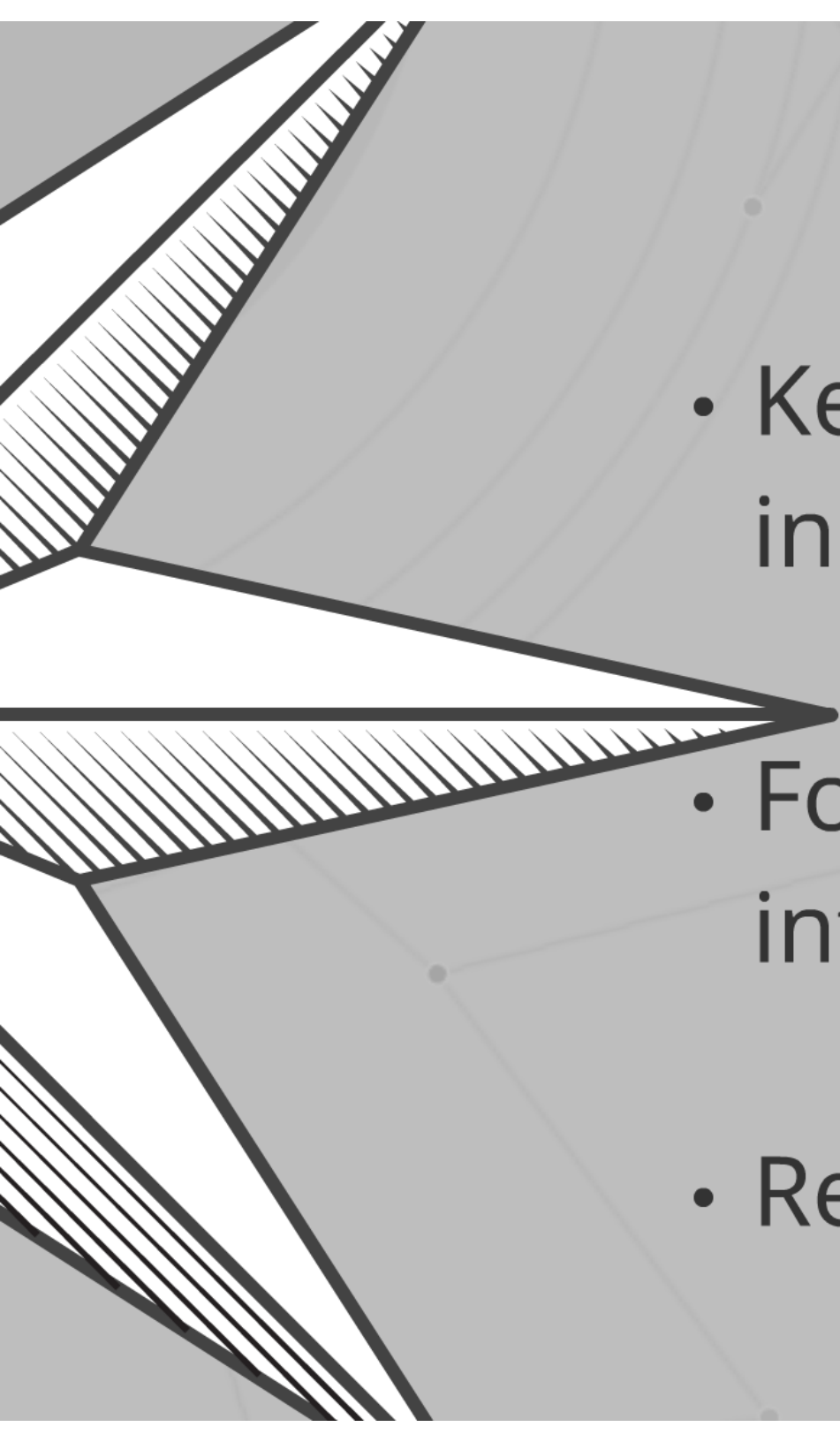
# Follow up

It may be tempting to consider the matter closed after addressing it and moving forward, but mental illness is not a one-and-done proposition. Old problems can resurface and new problems can arise, so follow-up is a necessity.



- Keep communication in writing
- Follow up at regular intervals
- Review measurements



- 
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## **IV. The ACA and Mental Illness Coverage**

# ACA

The Patient Protection and Affordable Care Act of 2010 ("ACA") now requires that health plans offer "essential health benefits" in 10 categories, including mental health and substance use disorder services.

- Some employer-sponsored plans are grandfathered in and are not required to include this coverage.

The full name of this law is the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), and it was designed to prevent insurance plans from limiting mental health treatment in a more restrictive fashion than other medical conditions. Mental and behavioral health treatment cannot be covered in a different manner than other health problems.

The ACA builds on the Mental Health Parity Act of 2008, which requires that insurance plans, if they offer coverage of mental health, must cover mental and behavioral health services in the same manner and amounts that medical and surgical benefits are covered.

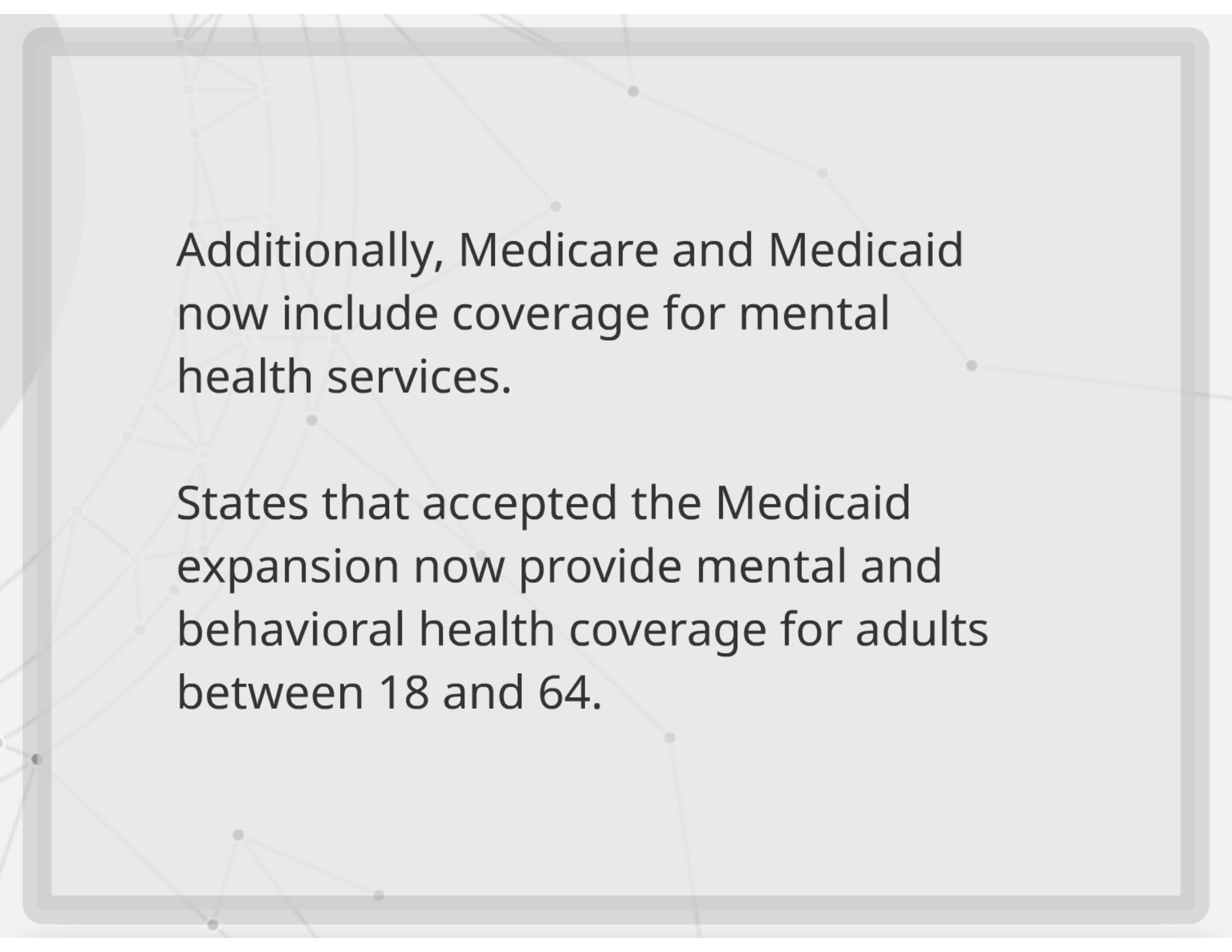


Treatment for mental health issues cannot be more expensive or limited to the patient than medical or surgical procedures or visits.

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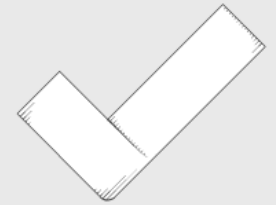
# th Parity Act





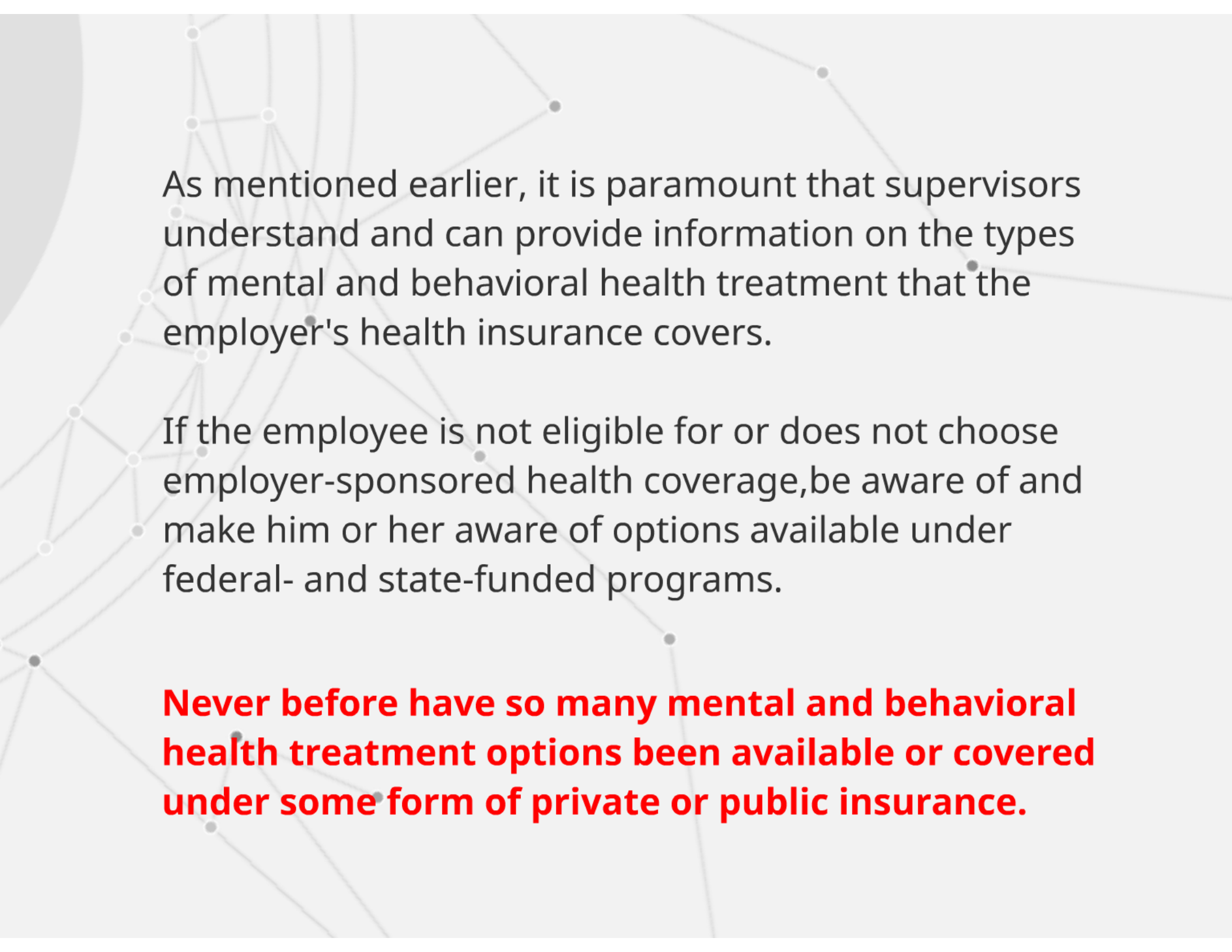
Additionally, Medicare and Medicaid now include coverage for mental health services.

States that accepted the Medicaid expansion now provide mental and behavioral health coverage for adults between 18 and 64.



Mental health services that now must be covered in most private insurance plans:

- Screening for depression (at no cost)
- Behavioral assessments for children (at no cost)
- Substance use disorder treatment
- Mental and behavioral health treatment



As mentioned earlier, it is paramount that supervisors understand and can provide information on the types of mental and behavioral health treatment that the employer's health insurance covers.

If the employee is not eligible for or does not choose employer-sponsored health coverage, be aware of and make him or her aware of options available under federal- and state-funded programs.

**Never before have so many mental and behavioral health treatment options been available or covered under some form of private or public insurance.**





# Hypothetical #1

John recently took an extended leave (but not FMLA) from his job, and his manager, through word of mouth of other employees, discovered that the leave was for substance use disorder treatment. He works for the county as a school bus driver. His manager brought the substance abuse disorder treatment to the higher-level management, which is considering firing John in the interest of safety. What may, or should, they do in this situation?

# Hypothetical #2

During an interview for a position as an armed security guard at a hospital, when asked if there are any physical limitations that might prevent her from serving in the role, Jane offers that she was diagnosed with bipolar disorder after a suicide attempt two years ago. She then says she is undergoing successful treatment and does not see any reason that this would affect her in the performance of her duties. She has a sterling employment record, several commendations from past law enforcement work and is the best applicant in an otherwise mediocre pool. The hospital administrators are concerned about her illness, however, and fail to hire her.

Jane hears through a friend on staff that her disorder is the sole reason she was not hired and considers a lawsuit. Does she have a case? What are the considerations here?

# Hypothetical #3

Nick has an employee, Dave, who frequently butts heads with him. Dave often yells at meetings, gets short with co-workers and frequently swears out loud in frustration. This behavior became more acute over time, and in one incident, Dave stood up at his cubicle and shoved his computer monitor and multiple stacks of files off of his desk before letting loose a frustrated yell and storming out of the office. Nick had a conversation with him the next day in which Dave apologized and promised to keep his cool. A month later, Dave once again stood up at his desk, shoved all of the desk's contents onto the floor and screamed, "I can't take it! I can't take this anymore!" loudly enough for everyone in the office to hear. He then stood at his desk until Nick came over and suggested that he go home for the rest of the day to calm down and to come back when he thought he could control himself. Dave stormed out, furious.

stormed out, furious.

Several other employees then came to Nick, expressing fear that Dave might retaliate against them. One coworker explained that Dave usually carried a loaded handgun in his car. They requested that Nick invalidate Dave's keycard so that he could not enter the building. Nick declined to do so then, but called Dave at home and told him he needed to seek mental health treatment for his obvious mental illness. Dave hung up on him without a word. When Dave came to work the next morning, he was unable to enter the building and found out that the HR department, on receiving Nick's report of the incident, had terminated him.

Dave sued his former employer for discrimination based on his disability of mental illness. Should he win? If he does, where did Nick go wrong?

# Conclusion

- 1. Be compassionate and understanding of employees dealing with mental health issues.**
- 2. Be prepared to discuss these issues with them, focusing on solutions and setting measurable goals, but wait until the employee brings the mental health issue to the forefront.**
- 3. Treatment of mental health issues is up to the employee, so employers should focus on the employee's role in the workplace.**
- 4. Do not take adverse actions against the employee on the basis of potential mental health issues. Seek legal counsel for assistance in such cases.**
- 5. Be aware of the extent of treatment and coverage options available to employees by law and through public and private insurance.**

# Any questions?



**Cynthia L. Effinger**

✉ [ceffinger@mmlk.com](mailto:ceffinger@mmlk.com)

in [www.linkedin.com/in/cindyeffinger](http://www.linkedin.com/in/cindyeffinger)

📞 (502) 327-5400, ext. 316



**Anne-Tyler Morgan**

✉ [atmorgan@mmlk.com](mailto:atmorgan@mmlk.com)

in [www.linkedin.com/in/atmorgan](http://www.linkedin.com/in/atmorgan)

📞 (859) 231-8780, ext. 108

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