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Accommodating Employees with Mental Impairments: An Empirical Study of Employer Practices

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Abstract
This paper discusses ADA workplace accommodations, particularly those for individuals with mental impairments, from the perspective of employers. Respondents from fourteen companies were asked to describe the firm’s accommodation process in response to hypothetical scenarios involving possible physical and mental disability issues in the workplace. Their responses were driven more by company culture, nature of the job and work environment, and the employee’s work history than by a desire to comply with legal mandates. Moreover, accommodations were frequently granted without regard to whether individuals met the legal definition of “disabled” under the recently amended ADA. In other words, most firms were at or “ahead” of what the law required, without being motivated by the law itself or fears of litigation. This research also supports and expands prior findings that small employers utilize an informal process to assess and grant accommodations; in this research, employers of varying sizes tended to use an informal process if disability benefits or Family Medical Leave Act (FMLA) protection were not being sought.

I. Introduction
Recent amendments to the Americans with Disabilities Act (ADA) have made it easier for plaintiffs with mental illnesses or disorders to prove that they have a “disability” under the Act. Most large companies, however, have had little experience providing accommodations for mental impairments, and this is even more true for smaller employers.¹ The paper seeks to uncover whether employers are aware of their obligations under the (amended) ADA to provide accommodations to those with mental impairments, what motivates employers in the handling of...
such accommodation requests, and whether employers see the requirements changing as a result of the recent ADA amendments.

These questions are important because employers have fairly wide latitude in deciding how to deal with the problems posed by workers with mental disabilities.\(^2\) Possible – indeed reasonable -- responses range from the bare minimum required by law (or even less than this) to much more than the law requires. Perhaps the law could even be counter-productive, suggesting to employers that the required level of compliance is actually \textit{less} than they would have undertaken voluntarily. Moreover, there are important questions about what motivates whatever level of compliance employers choose. Are they worried about threats of litigation by the employee? By coworkers? Or are they affected more by a corporate culture, reputation or other factors which guide how employees are treated?

There is very little prior research that directly examines workplace accommodations. Much of the research focuses on “employer attitudes toward applicants and workers with disabilities and toward disability itself,”\(^3\) rather than on accommodation practices. A 2002 business-sponsored study focused on employers’ knowledge and utilization of resources “to assist people with disabilities to participate in the workforce.”\(^4\) This study reported that employers appear willing to grant accommodations that are “perceived as straight forward,

\(^2\) There is considerable subjectivity involved in determining whether an individual with a disability, particularly a mental disability, continues to be “qualified” to perform a position, and if so, whether he/she can perform the essential functions of that position “with or without reasonable accommodation,” as required under 42 U.S.C. § 12111(8).


inexpensive, one-time only, not too time consuming, or easy to make as opposed to requests for accommodations that require a sustained effort or permanent change in work arrangements. 5

A 2006 study which looked at employer accommodation practices concluded that smaller companies were significantly less likely than larger companies to have made accommodations, however this difference appeared to be due to smaller companies not having faced the need for accommodations. 6 Another possible explanation given by the authors is that the accommodation process is more informal in smaller companies, so the accommodations made are less likely to be reported. 7 However, the study concluded that when faced with “a need” for accommodation, smaller companies and larger ones alike were very likely to make requested accommodations, doing so between 95% and 100% of the time. 8

In a study in 2000 which reviewed managers’ responses to informal accommodation requests, the authors looked at characteristics of employees with disabilities, and concluded that past performance, though clearly not a factor to be considered in the accommodation process as prescribed by the ADA, is nonetheless an important factor in encouraging managers to grant accommodation requests. 9 Another study published in 2006 found similar results, concluding that study participants grant more and costlier accommodations to employees with excellent work histories than for employees with average work histories. 10

The existing research presents mixed findings regarding employers’ willingness to make workplace accommodations that require a “sustained effort” or long term changes in work

5 Id.
6 Id., at 15.
7 Id. at 16.
8 Id. at 8.
arrangements. This could easily be the case for mental disabilities, which may necessitate long-term changes in management of employees and ongoing flexibility in work schedules. The research also suggests that employee performance and work record factor into an employer’s willingness to make accommodations. If an employee’s mental disability affects his/her work performance, or creates a history of challenging workplace relationships, this could suggest employers will be less willing to make accommodations for such a person.

This paper examines how employers respond to disability accommodation requests, and whether they tend to respond differently when the accommodation request concerns worker mental health. Based on face-to-face interviews with Human Resources and business managers at fourteen Connecticut/Massachusetts firms, I find that while most respondents did not appear to be familiar with the requirements of the ADA Amendments Act and had limited experience with accommodations for mental disabilities, their practice was to grant accommodations they felt were reasonable, whether or not the individual’s impairment met the definition of “disability” under the ADA. In other words, most firms were at or “ahead” of what the law required, without being motivated by the law itself or by fears of litigation. For most of my respondents, accommodating those with a disability was not a response to a legal mandate, but rather a part of the corporate culture; accommodation was seen as a reward to good employees with a strong work record for their loyalty and contributions to the company. Those without a strong work record, or who needed more significant accommodations, would be more apt to have their disabilities evaluated through a formal process requiring doctors’ certification. But even then, accommodations may be made without regard to whether the employee meets the ADA definition of disability. This research suggests that for many companies, the ADA does not drive employer behavior with regard to granting accommodations, and the recently enacted
amendments are unlikely to affect employer practices for existing employees, particularly those with good work records.

The paper proceeds as follows: Section II briefly describes the ADA as recently amended, particularly as it relates to mental health claims and requirements to provide disability accommodations. Section III explains the research methodology used in this study. Section IV presents and discusses the research findings on how employers make accommodation decisions, and Section V offers conclusions based on those findings.

II. ADA

In 2008, Congress passed the ADA Amendments Act (ADAAA) to make it easier for individuals with physical or mental impairments to establish themselves as disabled within the meaning of the ADA. To prevail in an ADA claim, however, plaintiffs must not only prove that they are disabled, but also show that they are qualified to hold the position. A “qualified individual” is defined as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position.”

There is considerable subjectivity involved in determining whether an individual with a disability, particularly a mental disability, continues to be “qualified” to perform a position. Reasonable accommodations generally require that the employee and employer work together interactively to determine whether there exists an accommodation which is not an undue hardship to the business and which will enable the individual to perform the essential functions.

\[^{11}\] 42 U.S.C.A. §12111(8).

\[^{12}\] Because so many ADA plaintiffs were held not to be disabled under the pre-ADAAA statutory scheme, there have been relatively few decisions defining the meaning of “qualified” or of what constitutes “reasonable accommodations.” The law is as yet very unsettled in this area. See Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 358 (7th Cir. 1995) and Borokowski v. Valley Central School District, 63 F.3d 131 (2nd Cir. 1995).
of the position. An undue hardship refers to an accommodation that would be unduly costly (given the company’s resources) or disruptive to the workplace.

Employers have fairly wide latitude in deciding how to deal with the problems posed by workers with mental disabilities, because “reasonable accommodation” is based on a problem-solving approach, looking at all of the specific facts of an individual situation. While employers are encouraged to consider the disabled employee’s preferences, they are free to choose among effective accommodations, and to select one that is easier to provide, creates less of a burden on the employer, or is less expensive. Whether a particular accommodation is reasonable depends not just on the individual’s abilities or illness, but also on the business setting. For example, providing a quiet workspace free of distractions may be a reasonable accommodation in an office setting, but not in a factory.

Employers have often been unwilling to accommodate those with mental disabilities by granting transfers to a new supervisor or reductions in hours, even though these options are frequently provided in other disability cases. Employers’ unwillingness to provide these accommodations for mental health disabilities may be due to their suspicions that employees are faking or exaggerating symptoms to achieve preferred working conditions, since there is often less evidence of mental disability than in the case of a physical impairment such as a broken leg or surgery. Alternatively, it may be due to a lack of understanding of how supervisory behavior

13 29 C.F.R. §1630.2(o)(3) describes this interactive process.
14 U.S. Congress, Office of Technology Assessment, Psychiatric Disabilities, Employment, and the Americans with Disabilities Act, OTA-BP-BBS-124 (Washington, DC: U.S. Government Printing Office, March 1994). Also see Vande Zande v. Wisconsin Dep’t. of Admin., 44 F.3d 538 (7th Cir. 1995), where the court held that costs enter in the analysis of disability accommodation claims in two regards – reasonableness in terms of both the cost compared to the expected benefit as well as the costs relative to the employer’s financial resources.
15 5-140 Labor and Employment Law § 140.03 [1].
16 Zuckerman, at 37.
17 Id., at 35.
or other working conditions affect the mental health of workers, a general discomfort with handling mental illness in the workplace, or simply a fear that if such an accommodation is granted, many employees will begin asking for these types of accommodations for mental health reasons and this will make it more difficult to run the business. Whatever the reason, courts have generally agreed that these accommodation options (e.g., transfer to a new supervisor, reduction in hours, telecommuting) are not required to accommodate mental disabilities.\(^{19}\)

However, in enacting the 2009 ADA amendments, Congress sent a clear message that the courts have interpreted the ADA in a much more restrictive way than Congress intended.\(^{20}\) The recent amendments set the stage for a new wave of accommodation requests and the possibility that the courts may take a different approach in applying the law to these upcoming cases.

### III. Research Method

To study employer responses to mental health issues in the workplace, I conducted 14 interviews with Human Resources and business managers from firms located in the Greater Hartford, CT area during March 2010. I sampled firms from the Business & Company Resource Center, a research database available through the University of Connecticut Law Library.

Based on company profile information, my initial sample consisted of 32 private sector firms with more than 15 employees (to ensure coverage under the ADA). I chose firms with a range in size (based on number of employees) and industry, so this was not a true random sample.

\(^{19}\) Stefan, at 805.

\(^{20}\) For example, Congress specifically rejected the Supreme Court holdings in 1) *Sutton v. United Air Lines* and its companion cases, where the Court determined that the ameliorative effects of mitigating measures should be taken into account in determining whether an impairment substantially limits a major life activity; and 2) *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, where the Court held that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled”, instead emphasizing that the definition of “disability” should be interpreted broadly. 42 U.S.C. §12101(b)(1), (2), (4) & (5).
Employers were sent a letter describing the research project, and then follow-up phone calls were made to discuss the project in more detail, to determine the most appropriate person to interview (which was generally the local Human Resources representative), and to schedule interviews. Of the 32 employers originally contacted, in-person interviews were conducted with 14 companies on their premises. To encourage candor, interviews were not audio recorded. Instead, I took copious notes of the interview and created summary charts of company responses.

In addition to general questions about their role and the firm, interviewees were also asked how their firm would respond to four hypothetical scenarios. (See Appendix I for the hypothetical scenarios.) Hypothetical scenarios were selected to guide the discussion for several reasons. First, hypotheticals enabled us to avoid privacy concerns over discussing actual cases. Second, since I expected that many employers would have had limited experience with accommodations for mental health disabilities, the scenarios allowed me to present situations they may never have faced, and asked them to predict their responses.

The purpose of the first scenario was to get a baseline understanding of the firm’s accommodation process for a physical disability. Using a physical disability accommodation request enabled me to understand the firm’s process using an example with which most, if not all companies, would be familiar, and to compare the process described for physical accommodations with that described in later scenarios for mental accommodations.

The second scenario presented a situation involving a serious mental health issue, one which would very likely be considered a disability under the ADA. The goal was to see how the employer treats these issues, and whether there were any differences between the approach for physical versus mental disabilities. The third scenario described a situation where the employee’s behavior might or might not indicate the presence of a mental disability. The point
here was to test whether the employer was motivated primarily by adherence to the requirements of the ADA, or whether a more generous corporate culture or other factors influenced how these situations were addressed. Also of interest is how the employer views its responsibility to the possibly mentally ill employee as compared to the impact the behavior may have on his/her coworkers.

The last scenario was a situation involving potential workplace bullying by a supervisor. The scenario is intended to help determine whether the interviewee recognizes that the work environment may contribute to mental health issues and to employee performance issues, and whether the company offers employees resources or support to help address these problems.

Follow up questions were asked to gain a clear understanding of the company’s ADA accommodation process, company culture, and other relevant information. Eight firms also agreed to provide copies of their company policies concerning the accommodation process, Family & Medical Leave and attendance (three of them provided their entire personnel handbooks). Six firms declined to share this information. This research was conducted pursuant to a human subjects protocol approved by the Institutional Review Board of the University of Connecticut.

IV. Findings

A. Respondent Characteristics

Participants represented nine different industries, including insurance, financial services, manufacturing, healthcare, office furnishings, electrical wholesale, auto parts, food distribution and computer software. Thirteen of fourteen participants were non-union companies. All had a sufficient number of employees to be covered under both ADA and FMLA statutes; 15 and 50,
respectively, ranging in employee population from 70 to 40,000. Two of the fourteen were very small companies (less than 100 employees); five companies were small companies (100-499 employees); three companies were medium-sized companies (500-999 employees); and the remaining four were large companies, with 1000 or more employees.  

Six out of the fourteen companies participating in the study had been acquired in the previous five years, generally being purchased by larger companies with more formalized processes for handling workplace accommodations. The impact of these changes will be discussed in section B2. Respondents at ten of the fourteen firms had access to in-house counsel; in the others, access was to outside counsel only, and was somewhat limited.

Twelve of the fourteen interviewees were in Human Resources, with titles ranging from Administrator/Coordinator to Senior Vice President. HR Functions represented included Staffing, Benefits, Employee Relations, and generalist positions. The other two interviewees were in business management roles. The average length of service of the interviewees was eleven years, with a range from two to twenty.

B. Factors Influencing Disability Accommodation

Interviewees at the fourteen firms raised six factors that influenced whether and how they responded to disability accommodation requests from employees. These factors were: (1) company culture & the nature of the workforce; (2) company policies & benefit plans; (3) nature of the physical workplace and jobs; (4) the individual’s work record; (5) individual

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21 For employers who were a subsidiary or division of a larger organization, employee count of the local entity was used to determine employer size, unless the entity to whom I was speaking was the corporate headquarters. In that case, employee count of the larger corporate entity was used to categorize employer size. The four large companies are all insurance companies, based in Hartford.

22 When contacting the companies, I explained that I wanted to speak with someone who would handle employee workplace issues and whose office was in the local area. This generally resulted in me being connected with Human Resources staff, unless the company did not have a Human Resources function, or this person was unavailable.
characteristics of the “gatekeeper;” and (6) concern for the employee and potential threats to self or others.

Interestingly, not a single one of the interviewees spontaneously raised the ADA or other legal requirements in their discussion of what actions they would take and why, although one respondent did refer generally to supervisory training on “HR law issues such as ADA, FMLA, discipline and harassment” in discussing whether disciplinary measures would be taken against an employee with disruptive outbursts in the workplace. 23 As I argue at greater length below, the failure to mention law is significant because it suggests that factors other than the ADA requirements may guide corporate response to accommodation requests, and that changes in the law may make little difference in how employers approach these issues.

I. Company Culture & Nature of Workforce

Generally, employers who value long service and loyalty to the company tend to have more generous benefits, and are more willing to accommodate temporary or permanent impairments. Although lifetime employment has become somewhat of an anomaly in the American work world, a number of respondents talked about the fact that they have a large number of very long service employees who will likely stay until retirement, and a company practice of promoting from within. One small company reported that their President started in the warehouse and worked his way up. 24

One large employer described their employee philosophy as “we pay well, we have good benefits, we put a lot into training and mentoring, but we expect a lot of employees in return.” 25 This interviewee described her company as a niche company, with a workforce that has long

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23 Interview 13, a 350-person wholesale electrical company.
24 Id.
25 Interview 9 with 2200-person insurance company.
tenure, specialized technical knowledge and a strong work ethic. She also described the company as “a business that acts like a family, or a family that’s in business.” New employees are provided several months of training, followed by an apprenticeship and close supervision for one to two years before they can operate independently and be fully productive. There is substantial turnover in this first one to two years, but once employees reach that point, they generally stay until retirement. The company values its tenured employees, and will make every effort, perhaps significantly beyond what the law requires, to attempt to accommodate an individual with an impairment. For example, the company has staffed an “Inspection Hotline” with experienced inspectors who were no longer able to perform physical inspections in the field; these individuals are retained and deployed to offer telephonic services to their customers.

The handbook of another firm in my sample, an office furnishings retailer, describes their work environment as “productive, cohesive and team-oriented” and calls upon employees to bring their “energy, creativity and diligence” to work. The work environment is very creative and eye-appealing, informal yet professional, with free coffee, sitting areas and workspace that doubles as a showroom, where customers tour their workspace as part of the marketing experience. This informal culture also carries over into the accommodation process. This is one of the few companies whose process is completely informal, with no forms or specific timeframes for temporary accommodations.

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26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Interview 4, with 340-person office furnishings company.
33 Id.
My respondent at one large company mentioned two distinct cultures that exist within the firm due to a recent acquisition.\textsuperscript{34} The traditional company culture was one with professional positions, low turnover and long tenured employees. In this work environment, accommodations were made informally, and they attempted to support employees whenever possible. The newly acquired company culture is very different, permeated by lower paid operations staff, who have much shorter tenure, higher turnover, are less professional and less dedicated to the company. In the new culture, more formal processes are followed, requiring medical documentation prior to the granting of accommodations.

A small company described a rigorous review of performance and attendance during the initial 90-day probationary period, where 30\% of the staff left (voluntarily or involuntarily).\textsuperscript{35} During this period, there is limited tolerance for absence, lack of commitment or behavioral issues.\textsuperscript{36} However, once employees have demonstrated they can assimilate into the company culture, there is a little more flexibility, and the opportunity to move up in the company.\textsuperscript{37} Both the large and small employers’ processes and degree of flexibility in making accommodations were somewhat different among the shorter and longer-tenured groups, with a greater degree of willingness to make accommodations provided to the more tenured workforce who had demonstrated good work performance.\textsuperscript{38}

Another small company, which had been family owned and run prior to being acquired in 2005, is still a family run business and reported that “employees are treated like family.”\textsuperscript{39} The interviewee stated that, in fact, “what gets us into trouble more often than not is we really try to

\textsuperscript{34} Interview 10, with 7500-person insurance company.
\textsuperscript{35} Interview 12, with 342-person auto parts distributor.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Interviews 10 and 12.
\textsuperscript{39} Interview 3, with 150-person produce distribution company.
accommodate peoples’ personal situations,” which can result in lack of consistency in administering policies such as attendance.\textsuperscript{40} This business has high turnover in their warehouse operations evening shift, where people leave quickly if it’s not a good fit. However, their average tenure overall is 15 yrs, and for long-service employees they reportedly would do what they can to accommodate any type of impairment.\textsuperscript{41}

At a computer software company, 18% of its workforce telecommutes full-time, and all employees have laptop computers and the ability to work from home on an occasional or part-time basis.\textsuperscript{42} The respondent at this firm explained that the company encourages telecommuting to support “being green” (to save gas and office space). Most employees are exempt\textsuperscript{43} “knowledge workers,” often working more than 40 hours in a week and/or being on call 24x7. Most managers are comfortable with the “virtual world,” making it fairly easy to grant an accommodation to work from home, for most jobs. This enables the company to get people back to work sooner than if they did not offer a work-at-home option. For example, an employee who had a broken foot was able to begin working from home soon after the break, but was unable to drive for six weeks, so may have been out of work for at least that long if she had been required to come into the office. The respondent commented that “people who the company works with through life’s challenges (e.g., illness, dying parent) are the ones you’ll get 150% from later, especially if they were good employees before the problem arose.”\textsuperscript{44} This respondent commented that there are a lot of considerations that go into making an accommodation when someone cannot do parts of their job due to disability, but what’s best for the employee weighs

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Interview 6, with a 500-person computer software company.
\textsuperscript{43} “Exempt” refers to those employees who are exempt from Fair Labor Standards Act requirements which regulate work hours and require payment of overtime pay for working more than 40 hours in a work week.
\textsuperscript{44} Interview 6.
most heavily in their decision.\textsuperscript{45} For example, employees who need time off for medical appointments are often not charged PTO (paid time off), unless they need a substantial amount of time off. In that case, they are allowed to work part-time and may be covered by disability insurance for the portion of time they cannot work, receiving full pay for their work hours. Many of the companies interviewed were not as flexible with part-time work schedules.

The manufacturing companies who participated in the study had each been in business for fifty or more years, and had a large population of employees who had worked at the company for their entire careers. The respondent at one of these companies commented that “we try to treat people like people, not like a machine sitting behind a desk.”\textsuperscript{46} That firm also emphasizes entrepreneurial spirit and decentralized decision making. Their employee handbook specifically states that “written job descriptions hold back individuals and the organization.”\textsuperscript{47} This philosophy allows the company to be very flexible in assigning work to an individual and to change duties to accommodate an injury or illness, even though most jobs are quite physically demanding. Such flexible work practices are not what one would expect in a traditional heavy metal manufacturing facility such as this.

The HR Administrator at one small firm described the personality of their typical customer as “laid back”, and explained that they needed to treat their employees in an easy going fashion to reinforce the manner in which they want employees to treat customers.\textsuperscript{48} Many employees in this company (as was the case with several others in the study) have thirty or more years of service, and she said the firm has a strong tradition of promotion from within.\textsuperscript{49} In fact, their

\textsuperscript{45} Id.
\textsuperscript{46} Interview 2, at a 95-person manufacturing firm.
\textsuperscript{47} \textit{Fastenal Company and Subsidiaries New Employee Orientation Packet}, p. 6.
\textsuperscript{48} Interview 13, a 350 person wholesale electrical company.
\textsuperscript{49} Id.
company President started in the warehouse and worked his way up.\footnote{Id.}{50} Lifetime employment is “not unusual” in this company and in several others, and this influences the way they approach the accommodation process.

Not surprisingly, employers tend to use their own expertise to address workplace accommodation issues. For example, an employer in the office furniture and workplace design business indicated they would be quick to provide an accommodation involving redesigning a workspace, even if it required expert designers to design and develop a unique concept to accommodate a disability.\footnote{Interview 4, a 340-person office furnishings company.}{51} This would not only help the individual, the respondent noted, but might also help provide a new marketing opportunity for the company. Another example was found among the two interviews I conducted at healthcare companies. These firms appeared willing to help disabled employees perform functions in a different manner to enable the person to continue working. These companies would call upon in-house occupational therapists or other resources to assist in evaluating and training a disabled employee in techniques (such as using detailed job instructions, notes and checklists to compensate for problems with concentration) to enable the individual to perform the essential functions of the job.\footnote{Interviews 5, a 450-person healthcare company, and 7, a 500-person healthcare company.}{52} These examples illustrate that when accommodations are particularly low cost or relatively easy to accomplish given the company’s resources or expertise, accommodation is more likely to occur.

Overall, I found company culture and the percentage of long service employees in the workforce to be key factors in employers’ willingness to provide accommodations. Generally, company cultures that valued lower turnover, long service and loyalty to the company were more willing to make accommodations, even if they were inconvenient for the employer. Since the ADA requires the same response from all employers, the fact that employer responses vary

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50 Id.
51 Interview 4, a 340-person office furnishings company.
52 Interviews 5, a 450-person healthcare company, and 7, a 500-person healthcare company.
significantly lends credence to the theory that factors other than the law have a large degree of influence on accommodation practices.

2. Company Policies & Benefits Plans

Six out of the fourteen companies participating in the study had been acquired in the previous five years.\(^{53}\) This generally meant that they operate under parent company policies and guidance in handling disability accommodations. However, in all but one of those six firms,\(^{54}\) the former company HR/management still exercise discretion over more informal accommodation requests. Additionally, one of the small companies\(^{55}\) and one of the medium-sized companies\(^{56}\) are part of larger firms whose policies (particularly in the “formal” accommodation process) influenced the manner in which accommodation requests were handled.

There appears to be a sharp divide between formal and informal requests for accommodation. Informal requests – those which do not involve the individual taking an extended absence, applying for Short-Term Disability or leave under the Family & Medical Leave Act (FMLA) – seem to be handled locally and by a different set of internal rules, as compared to the more formal processes outlined in company handbooks and often managed by the parent company. This finding supports assertions made in earlier research that the accommodation process is more informal in smaller companies,\(^{57}\) but it may also be true of larger organizations as well.

\(^{53}\) Interview 2, a 95-person manufacturing company, acquired December 2009; interview 3, a 150-person produce distribution company acquired in 2005; interview 5, a 450-person healthcare company acquired in October 2009; interview 6, a 500-person computer software company acquired in 2008; interview 9, a 2200-person insurance company acquired in 2000, and sold again in 2008; and interview 13, a 350-person electrical wholesaler acquired in 2006.

\(^{54}\) The exception to this is a 450-person healthcare company, where their accommodation process appears to be slightly more formal and aligned more with the parent company practices, from the time the initial accommodation request is made.

\(^{55}\) Interview 12, a 342-person auto parts distributor.

\(^{56}\) Interview 7, a 500-person healthcare company.

\(^{57}\) Unger & Kregel, at 47.
In these “informal” accommodation situations, the companies rarely attempt to determine whether an illness or impairment is covered by the ADA before agreeing to an accommodation. At most, in these situations, the employer may request a doctor’s note which indicates the employee’s limitations, and the accommodations considered are very dependent on what the doctor requests in the note. For example, the respondent from one small firm reported that they were “very flexible regarding work hours.” She explained that they would try to accommodate an individual by changing breaks, allowing late arrivals/early departures, or part-time schedules with very little documentation required from the employee or his/her medical provider. With regard to reliance on doctors’ notes, the respondent from another small firm reported that “it’s better when a doctor says you can’t do it [rather than that an individual should minimize performing a particular task], because there’s no wiggle room.”

Even companies that employ a more formal accommodation process frequently require only that the accommodation request be supported by medical documentation, not that the condition qualify as an ADA disability. At one large company, their “job modification process” begins when the employee applies for an accommodation online or by calling the HR Service Center. The employee has his/her physician complete the required medical information, restrictions/limitations and requested accommodation. A company physician then reviews the medical documentation to ensure the requested accommodation is medically supported, and if so, HR works with the manager to make the accommodation, regardless of whether the impairment meets the ADA definition of a disability. This interviewee, an Employee Relations Investigator who was also an attorney, commented that it was “not necessary to establish disability under the

58 Interview 13, a 350-person electrical wholesaler.
59 Id.
60 Interview 12, a 342-person auto parts distributor.
61 Interview 11, a 35,000-person insurance company.
ADA,” that the employee just needed to have a medical condition, and that the company did not apply “as stringent a standard as [the] ADA.”

Another large company described a very similar process, with a nurse in the Benefits department determining whether the request for accommodation is aligned with the medical information provided, but not restricting accommodations to those with ADA-covered disabilities. Whether an informal process or a more formal process are employed, the participants in this study focused on the medical need for an accommodation rather than the legal requirement to provide one, resulting in worker protections beyond what the law requires.

All of the participating companies provide health insurance to their employees; with mental health parity laws, this means companies who offer health benefits must offer mental health benefits at the same level as physical health benefits. Thirteen out of the fourteen participating employers also provide short-term disability (STD) insurance; three of the respondents specifically gave unsolicited information about STD benefits paying out for partial disability situations (i.e., if an employee works reduced hours due to disability). In most instances, the disability carrier provides both STD claim management services as well as FMLA administration. The provision of these benefits gives individuals with disabilities greater levels

62 Id.
63 Interview 14, a 33,000-person insurance company.
64 On January 29, 2010, the Departments of Health and Human Services, Labor and the Treasury jointly issued new rules providing parity for consumers enrolled in group health plans who need treatment for mental health or substance use disorders. These rules prohibit group health insurance plans—typically offered by employers—from restricting access to care by limiting benefits and requiring higher patient costs than those that apply to general medical or surgical benefits. The rules implement the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). MHPAEA greatly expands on an earlier law, the Mental Health Parity Act of 1996 which required parity only in aggregate lifetime and annual dollar limits between the categories of benefits and did not extend to substance use disorder benefits. The new law requires that any group health plan that includes mental health and substance use disorder benefits along with standard medical and surgical coverage must treat them equally in terms of out-of-pocket costs, benefit limits and practices such as prior authorization and utilization review.
65 Company 2, a 95-person manufacturing company, provides long-term disability, but not short-term disability coverage to its employees.
of protection than that required by the law. The ADA and FMLA may require companies to allow employees to take protected time off work, but they do not require employers to pay disability or other benefits during that time.

Particularly in the medium-sized and large companies, STD carriers are very involved in accommodations, working with HR and managers on potential accommodations which will enable employees to return to work after a disability leave. For example, the respondent at one large firm explained that their STD insurance carrier completed disability assessments, determined employees’ disability status, paid disability claims, and determined when an employee could work part-time (with or without an accommodation) versus being disabled full time.66

Respondents also discussed their disciplinary procedures in the context of how they might address performance or behavioral issues in the workplace. The ADA does not require that employers lower their work standards for individuals with disabilities, but it is not uncommon for individuals struggling with disabilities to have difficulty meeting performance or attendance standards, or to exhibit behaviors that are not acceptable in the workplace, such as emotional outbursts. Most respondents have a multi-step procedure, typically consisting of informal coaching, verbal warning, written warning (which outlines the changes required and gives a timeline for improvement), final written warning (about half of the companies included this step) and finally termination. They generally also reserve the right to skip steps given the severity of the infraction. In most companies, interviewees reported that managers are instructed that if they initiate this process and the employee raises medical issues, they are to stop, and go to HR for assistance. Several respondents reported that they would delay initiating the formal disciplinary process or would give the employee more time to meet the outlined goals if they

66 Interview 9, a 2200-person insurance company.
were aware that the employee was struggling with a physical or mental impairment that could be affecting his/her work performance.

In addition, most companies have a disciplinary policy for “no call/no show” situations where the employee does not report to work, and fails to inform his/her supervisor or designee on or in advance of the day of absence. The policy typically consists of a warning for the first instance, and termination for the second; however most companies indicated that in situations where it was unusual behavior (i.e., the individual had a track record of good attendance and being reliable) or where they were alerted something may be wrong (such as hypothetical scenario number two which involves a possible psychiatric illness), they would encourage the manager to call the employee on the second day of absence, and they would not likely take disciplinary action if they became aware of any type of disability issue.

Although company policies typically require that employees initiate requests for time off, disability and accommodations, one large company reported that when a disability situation is likely, they would mail out an FMLA form and instructions to the employee, and may even initiate a disability claim on the employee’s behalf. Another company said they rarely terminate employees under their “no call/no show” policy, but that if they think there is a problem and the employee refuses to seek help, they could “use this hard line policy as leverage” (i.e., tell employee he/she could be terminated, but encourage them to get professional help instead).

These examples illustrate that although the ADA does not require employers to lower their standards as an accommodation for disability, employers are generally willing to make exceptions to company disciplinary policies to give employees with physical or mental

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67 Interview 14, a 33,000-person insurance company.
68 Interview 9, a 2200-person insurance company.
impairments more time to meet company performance goals and some latitude in complying with attendance standards. Many employers seem prepared to go beyond what the law requires, for example by offering benefits to cover treatment of physical/mental impairments and disability coverage for work time lost due to disability leaves.

3. Nature of Physical Workplace & the Job

The nature of the physical work space will often influence the extent to which an accommodation can or will be granted. For example, if the request is for a quiet or distraction-free environment, employers whose workplace is a factory floor or warehouse will find it difficult to comply. Only if the employee has multiple skills, and can be placed in an office job, could these companies provide an accommodation that comes close to the request, and even then, the office space may still not be very quiet or private, given the layout of the building. On the other hand, many of the other participating companies have office environments where such an accommodation would not present nearly as much of a challenge.

The nature of the job goes hand in hand with the nature of the workplace. The companies mentioned earlier with warehouse operations and those in the manufacturing sector typically have very physically demanding jobs and limited “light duty” roles. In these businesses, employees who are restricted from lifting are generally unable to work at all. Such prohibitions are not only for the employee’s own safety, but to avoid additional injuries for which the employer would be responsible. These jobs are very different from computer software engineers, for example, whose work is not physically demanding, and does not typically require the individual’s physical presence in the workplace; these jobs can be done working from home and with a great degree of scheduling flexibility. The ADA implicitly recognizes that the nature
of the workplace and of the job are factors in its reasonable accommodation and undue hardship analysis, which calls for an individualized (firm-specific) analysis, and the courts have concurred.\textsuperscript{69}

4. Employee’s Work Record

Another factor companies frequently use to determine the extent to which they are willing to accommodate a disabled employee is the employee’s work record at the company. If an employee has been with the company for many years and has a history of good performance and attendance, employers I spoke with seem to be much more likely to move the employee to a vacant position or make accommodations regarding work schedule, even if they are inconvenient for the employer. This finding is also consistent with prior research.\textsuperscript{70}

While it may seem logical that employers are more willing to grant accommodations to employees who have a good work record and have shown they are valuable to the company, prior work performance is decidedly \textit{not} a required (or even permissible) factor in determining the presence of a disability or the need for an accommodation under the ADA. In fact, in the case of employees with mental impairments which have an ongoing negative impact on work relationships, failure to consider accommodations because of a history of prior “run-ins” may not be compliant with the law.\textsuperscript{71} Such an employee may be disabled under the law, and therefore entitled to be considered for an accommodation.

\textsuperscript{69} 29 C.F.R. §1630.2(o)(3). Also see \textit{Vande Zande}, 44 F.3d 538.
\textsuperscript{70} Florey & Harrison, at 230. Also see Mitchel & Kovera, at 733, which found the employers granted more and costlier accommodations to employees with excellent work histories than to those with average work histories.
\textsuperscript{71} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 3-25-97, available at \url{http://www.eeoc.gov/policy/docs/psych.html}, last viewed 10/31/2009, at Q.9. This document states that “[a]n individual would be substantially limited … if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.”
Six companies in a variety of industries specifically mentioned the employee’s tenure and work record (performance, attendance, behavior) as a factor they would seriously consider in the accommodation process. In response to the scenarios regarding behaviors that may be associated with a mental disability, respondents said they would consider whether the employee had a “history of run-ins with staff,” whether the individual had “previously received coaching on the same issue,” or whether this behavior was “uncharacteristic for the employee.” If the behavior was atypical for the employee, companies were much more apt to take a more gentle approach, assuming there was a problem (either in the workplace or a personal issue which was affecting the employee’s ability to concentrate on work performance).

One small company indicated they would hold the employee’s job open as long as they could while the employee was out on leave, “especially if the employee is a good worker.”

Similarly, the respondent from a medium-sized company explained that long service employees with a good work record “have been loyal to the company, and deserve loyalty in return,” in explaining that they would try to do all they could to accommodate a long-service employee and allow them to remain employed at the firm. One large company commented that if an employee has “a good track record”, they will go out of their way to accommodate the individual if he/she is facing difficulties, including personal situations or physical or mental impairments. On the other hand, another large company commented that although they had previously made accommodations for long service employees without going through the formal accommodation process which required medical documentation of the need for the accommodation, this was

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72 Interview 1, a 70-person manufacturing company.
73 Interview 9, a 2200-person insurance company.
changing and managers were now requiring all employees to go through the formal process to request an accommodation. 74

This is not to say that companies won’t accommodate a short service employee or those who are not strong performers, but they may require stronger documentation and/or may be less willing to make non-traditional accommodations for these employees. One respondent commented that they allowed an employee with a physical illness to work a part-time schedule, even though he was not a strong performer, in the hopes that the accommodation would improve his performance. 75 In this same firm, the respondent explained that she would try to accommodate a request for a new supervisor if there were multiple units performing similar work, commenting “what’s the harm if it would improve the person’s performance”? 76

In many of the firms in my sample, the company’s disciplinary procedures for performance, attendance and misconduct varies based on years of service, and sometimes on the employee’s work record. For example, if the employee has a track record of good performance, the company would consider this in determining how to address performance and/or behavioral issues, which may have a significant impact on how behavior which may be associated with a mental impairment is handled. Several of the fourteen firms also have probationary periods for new hires (typically 90 days, but can be extended up to an additional 90 days), during which time any attendance, performance or behavioral problems can result in termination without use of the formal disciplinary steps. Termination of such a probationary employee could thus occur before the employee even has a chance to realize that the performance or behavior may be disability-related and to request an accommodation. Another example of how tenure affects

74 Interview 14, a 33,000-person insurance company.
75 Interview 10, a 7500-person insurance company.
76 Id.
accommodations is a leave policy in one company where the length of approved leave is limited to one half of the employee’s length of service within the first year.

Employees’ past work record greatly influences the willingness of employers to make accommodations. The fact that prior work history is not a required (or even a permissible) factor in the ADA accommodation process suggests the law is not a primary consideration for employers when making accommodation decisions. It also suggests that the recent ADA amendments will have little influence on employer practices in determining and granting disability accommodations.

5. Individual Characteristics of “Gatekeeper” (usually HR)

In most companies, managers tend to defer decisions regarding disability and accommodations to the gatekeeper (most often someone in Human Resources). Especially where the process is informal (or during the informal stage of a more formal process), the degree to which companies accommodate people can be dependent, in large part, on the individual managing the process, as illustrated by the following examples.

The HR Manager at one small firm\(^ {77}\) encourages employees to share personal information if they need help or want this to be taken into account in employment actions; this is not the case in many companies. If the gatekeeper is very focused on the employee’s wellbeing, such as is the case with the HR Manager at an office furnishings company, the process will likely make use of the Employee Assistance Program\(^ {78}\) and other company resources to a greater degree. If the

\(^{77}\) Interview 12, a 342-person auto parts distributor.

\(^{78}\) Twelve of the fourteen companies in the sample offer an Employee Assistance Program (EAP) for handling personal issues such as family conflict, drugs/alcohol problems, and childrearing or eldercare pressures. This service appears to be utilized somewhat differently from one company to the next. Generally, an EAP is viewed more as a support for employees, their families (and often household members); employers tend to rely more on guidance from their workers’ compensation, short-term disability and/or FMLA service providers (insurance companies). EAPs
individual is focused on loss prevention, such as was the case with the Vice President and CFO at a manufacturing company, the process will reflect this; at this company, employees who are known to be injured before they begin work are prohibited from working until their injury/impairment can be evaluated by a physician to ensure they are not placing themselves or anyone else in danger, or are not risking further injury which would be the company’s responsibility (as a workers’ compensation injury).  

The gatekeepers in some companies not only played a significant role in the granting of accommodations, but also had considerable discretion in making accommodation decisions. At a healthcare company, the Director of HR explained that “I never doubt when an employee is telling me he/she is injured. We try to work with them to try to avoid future injuries. He could be protecting himself from getting injured further on the job.” The interviewee went on to explain that “sometimes the managers hate me during this process because I make them do everything they can to accommodate the person. Once they see it’s working, they become less resistant.”

In other companies, such as a small electrical wholesale firm, it appears that the gatekeeper’s informal, laid back style more closely fit the temperament and work style of managers, and the outcome (work accommodations, particularly those involving work schedule may also provide employer support for critical incidents and for addressing behavioral issues in the workplace, although none of the employers in this sample appear to take advantage of these services. One company uses the EAP provider to complete an evaluation (independent medical exam which the company pays for) to ensure the employee is ready to return to work; employees are placed on paid leaving pending the results of the evaluation.

Over half of the companies have a “mandatory referral” feature, where the employee is told they must talk to someone in the EAP, and that failure to do so and to comply with the treatment plan could result in termination of employment. This approach is most often used when the individual has serious performance, attendance or behavioral issues due to a known or suspected problem such as alcohol/drug dependency, and the mandatory referral is a “last chance” of sorts - a way for the company to attempt to preserve the individual’s job. Typically, if the individual seeks treatment and is following the treatment regimen, they are given more time to resolve the performance/behavior problem.

79 Interview 1, with a 70-person manufacturing company.
80 Interview 7, a 500-person healthcare company.
81 Id.
changes, in situations where the individual is still able to perform many job functions) was that managers would give accommodations a try.\textsuperscript{82} In another small company, where the workforce and culture were more gruff and “in your face,” the gatekeeper had to match this style to be effective.\textsuperscript{83} In this company, this style translated into less tolerance for employees missing work, and greater requirements for specific medical documentation.\textsuperscript{84} This HR Manager reported calling employees with attendance problems at home, and telling them to “get your head out of your ass, and start coming to work!”\textsuperscript{85}

The gatekeeper’s conflict resolution skills also influence the ability of the organization to manage interpersonal issues which may be associated with mental illness. Approximately half of those interviewed mentioned that they would regularly mediate discussions between coworkers or employees and their supervisors in order to improve interpersonal interactions. The respondent at one healthcare company said “I’m a work coach. I want people to do their jobs well.”\textsuperscript{86} The gatekeepers are usually managing the informal accommodation process, and their ability to understand both the employee’s perspective and business needs are critical to a successful accommodation.

The nature of the gatekeeper clearly affects the extent to which companies are willing to seek and implement accommodation solutions. This is another example of a factor outside of the law which greatly influences the outcome of the accommodation process in many companies. An employee’s legal rights are what they are, regardless of the personality or disposition of the accommodation gatekeeper; if the law really mattered, it should make no difference what the HR person’s attitude toward accommodation is. This is clearly not the case.

\textsuperscript{82} Interview 13, a 350-person wholesale electrical company.
\textsuperscript{83} Interview 12, a 342-person auto parts distributor.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Interview 7, a 500-person healthcare company.
6. Concern for Employee & Threat to Self or Others

In discussing how they would react to the scenario with a serious mental health problem, five of the fourteen companies mentioned their workplace violence policy, explaining that any outbursts or behavior viewed as threatening to others would not be tolerated, nor would aggressive or abusive behavior, or an individual’s retaliation toward coworkers for having raised a concern about his/her outbursts. All managers at these companies are trained to look for escalating behavior, which is a warning sign of the potential for workplace violence. This focus on workplace civility was a universal theme among all employers, who talked about harassment training for supervisors and often for all employees, and the desire for all employees to feel safe at work. Employers contrasted this with “the old days, when people were never fired for bad behavior” or unprofessionalism. This means that individuals who exhibit disruptive or unprofessional behavior due to a mental illness may be more likely to be disciplined or even terminated than they would have in the past, unless they are directed to resources to assist and/or accommodations are granted.

In addition, several of the companies had many safety sensitive positions (e.g., people operating overhead cranes, forklifts or other heavy machinery or driving company vehicles), in which it was imperative for the individual’s own safety and that of his/her coworkers that they are not sleepy or distracted. Even prescription medication which has the effect of reducing alertness could be a big problem for these employers, and they naturally tended to make greater use of “fitness for duty” exams than other employers. These employers are less likely to make
accommodations that would enable employees to continue working, if the impairment (or medication taken for an impairment) are thought to make it unsafe to do so.\textsuperscript{87}

Another safety-related reason employers may hesitate to grant an accommodation is to prevent further injury. This came up particularly when discussing a non-work-related injury in a physically demanding job, where the company was afraid if they allowed the employee to work (e.g., with a back injury), he/she could exacerbate the original injury, and the employer would then “own” the injury (i.e., the employee would then have a workers’ compensation claim).\textsuperscript{88} This was another situation where an employer would be reluctant to make an accommodation which would enable the employee to continue working, for fear it would result in a more serious (and costly to the company) work-related injury.

V. Conclusion

Based on interviews with knowledgeable HR and business officials at a sample of fourteen Hartford, CT-area firms, this article found that employers are not all that familiar with the ADA amendments, or how these changes may affect their rights or obligations under the statute. The research also suggests that employers have somewhat limited experience with accommodating mental health disabilities, beyond providing time off work. However, the research also found that most of the firms (eight out of fourteen) are doing more than the statute would require without regard to whether a disability meets the ADA definition. Additionally, all fourteen companies provide at least some benefits (disability, health, Employee Assistance Programs) which are not legally required, and can assist individuals with disabilities.

\textsuperscript{87} The ADA allows employers an affirmative defense for discriminatory actions if based on job-related qualification standards, including the requirement that the individual not pose a direct threat to the health or safety of coworkers (42 USCS 12113(b)). The Supreme Court extended this direct threat defense to individuals whose disability may pose a “direct threat to their own safety” in Chevron v. Echazabal, 536 U.S. 73 (2002).

\textsuperscript{88} Interview 1, a 70-person manufacturing company.
This article has several limitations. First, it was a very small sample size in a single geographic area. Second, there may be some bias in the results in that the employers who are more aware of ADA accommodation issues and have policies which support compliance may have been more likely to have agreed to participate in the study. Third, self-reported methods of handling a hypothetical situation may tend to reflect the employers’ aspirations more than their actual behavior. Particularly since most employers have had limited experience handling mental disability accommodations (other than time off), they may be less likely to accurately predict how they would handle such situations. And lastly, the responses are all reported from the perspective of employers – employees who have requested accommodations may have a very different point of view.

Notwithstanding these limitations, this research provides valuable information about a number of variables that factor into employers’ response to an employee’s need for an accommodation, including company culture, company policies, nature of the physical workplace and jobs, the employee’s prior work history, characteristics of the accommodation “gatekeeper”, and threats to safety. Every employer I spoke with seemed fairly well versed in employees’ legal protections, but spoke more in terms of compliance with company policy and doing what is consistent with company culture. Not one employer listed the prospect of getting sued when explaining their process and reasons for it, although all of them were clearly aware of this possibility. From this one could infer that the law was not a primary motivation for those employers.
Appendix I

Hypothetical Scenarios for Employer Interview Discussions

Hypo 1: Jose has worked for your company for six years as a cleaning worker, and has been a good performer. He takes pride in the fact that the part of the building for which he is responsible is always clean, and the floors in this area are always waxed. Several weeks ago, Jose hurt his back playing basketball on the weekend, and he missed a couple of days of work. Since his return, he has been moving more slowly, and has been unable to complete some of the more physically demanding tasks. Jose initially said he just needed to take it easy for a week or so to let his back recuperate, but he is now telling you the doctor says this back problem may be chronic, and he can no longer clean and wax floors (which is 20% of his duties). He is still able to perform 80% of his tasks (e.g., emptying trash, sweeping floors).

Hypo 2: Beth has worked as a bookkeeper at your company for two years. Beth is rarely late for work; she has called in sick only twice in the two years she has worked here. She has had satisfactory performance until recently, when she has missed several deadlines and has made some errors. Several days ago, Beth didn’t show up for work. The next day, she was out again, and didn’t call in. On this day her coworkers noticed that work had been moved from the drawers where they had placed pending files the night before, and they saw food wrappers on Beth’s desk and in her trash. This seemed unusual, because all of the other waste baskets had been emptied by the early evening cleaning crew. The supervisor got a call from Beth’s family, saying they had received a call from Beth at 2am the night before from the office phone number. They were concerned because she appeared to think she was working her regular shift, and they wanted her to seek treatment for her bipolar disorder right away, so she wouldn’t end up homeless again, like last time.

Hypo 3: Jennifer has worked for the company for several years, and from time to time, is very moody and hard to get along with. Her disruptive outbursts have resulted in some coworkers not wanting to sit near her, and others have expressed that they are afraid of what Jennifer is capable of, because she is unpredictable and can be explosive. Yesterday, Jennifer told one of her coworkers that she should just take all of her pills at once and end it all. The supervisor has repeatedly suggested that Jennifer call the Employee Assistance Program. No performance deficiencies have been noted. How would you handle Jennifer’s situation?

Hypo 4: Andrea’s performance had been very good for the past two years, since she transferred to the accounts receivable department. However, lately, her productivity and accuracy have dropped off. When she was counseled about her performance, she confided in the Human Resources representative that she was having trouble concentrating, was feeling overwhelmed by stress and dreaded coming to work since the new supervisor in her department started. She says he watches everything she does, picks on her incessantly, admonishes her in front of her coworkers for the littlest mistakes, and has been pressuring her to work many hours of overtime. Andrea asks for a transfer to another supervisor. Do you accommodate her request? Is the fact that she is having performance problems factored into your decision? Are there other resources for Andrea to help manage the situation?