



Embracing the Neurodivergent Workforce

BY JULIA ACKEN & JOHN BALITIS

According to the U.S. Centers for Disease Control, in the year 2000, approximately 1 in 150 8-year-old children in the United States were diagnosed with an Autism Spectrum Disorder (“ASD”). That number more than doubled in 2010 to 1 in 68, and then nearly doubled again to 1 in 36 in 2020.¹ Despite the increased prevalence of ASD in our country, while the current domestic unemployment rate is just over 4.2 percent, estimates suggest that roughly 85 percent of adults with ASD are unemployed. This discrepancy has led to an increase in legal action against employers that discriminate against neurodivergent employees. In fact, the EEOC reports that the percentage of disability discrimination charges involving neurodiversity increased from 31 percent of the total disability charge pool in FY2016 to 41 percent in FY2022.

The message is clear. Employers are going to continue experiencing greater numbers of applicants and employees with ASD, in turn requiring more reasonable accommodations, when appropriate. But with proper training, and the help of new resources and research, employers can learn not only how to accommodate, but how to integrate this growing population of uniquely talented individuals into the workplace.

Terminology

The Autism Spectrum is exactly that—a spectrum or broad array of “neurological and developmental disorder[s] that affect[] how people interact with others, communicate, learn, and behave.”² Most people with ASD share certain characteristics, including but not limited to:

- Difficulty communicating and interacting with other people
- Restricted interests and repetitive behaviors
- Symptoms that affect their ability to function in school, work and other aspects of life

However, the way these characteristics present and the severity of the symptoms vary widely. For example, difficulty with social communication and interaction can manifest in adults with ASD in several ways, including: making little eye contact; having difficulties with back and forth conversations; displaying facial expressions or using gestures that do not appear to match what is being said; having unusual vocal intonation when speaking, and often speaking about a preferred topic of interest, without noticing that others are not interested or inviting them into the conversation.³

The repetitive behaviors that routinely are associated with ASD are the result of differences in how people with ASD process sensory information. For example, people with ASD often display repetitive “self-stimulation behavior,” or “stimming.” It can be mild, such as pacing, jiggling feet, biting fingernails or drumming fingers.⁴ Other repetitive activities can be more noticeable or appear socially inappropriate, such as hand flapping, repeating the same words or phrases over and over, turning a light on and off, rocking or twirling.⁵

In addition, many people with ASD also are diagnosed with other psychological or medical disorders, such as attention-deficit hyperactivity disorder (“ADHD”) (with 30-50 percent of people with ASD showing symptoms of ADHD), obsessive compulsive disorder, anxiety and intellectual disability.⁶ The stress of being in the workplace, which is likely to involve frequent social interaction and multiple sensory inputs, can exacerbate not only a person’s ASD symptoms, but also other disorders the individual may have, such as anxiety.

In spite of the atypical symptoms or behaviors listed above, people with ASD also prove to have unique traits and exceptionally strong capabilities in certain areas. In fact, according to recent data from the CDC, although nearly 40 percent of 8-year-old children with ASD under observation were classified as having an intellectual disability (with an IQ of 70 or less), roughly 38 percent of the same group had IQs in the average or higher range.⁷ In addition, a recent study found, “more than 70 percent of autistic children and adults had a special isolated

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skill in memory (52 percent of the sample), visuo-spatial abilities (32 percent), calculation, drawing or music (about 17 percent for each area).”⁸

The key to integrating individuals with ASD into the workforce, therefore, is learning how to accommodate symptoms that have a detrimental impact on the person’s ability to function on the job, while highlighting the special talents the individual can bring to the workplace and business.

Legal Protections for Employees with ASD

The Americans with Disabilities Act⁹ (“ADA”) and its state counterpart, the Arizona Civil Rights Act (“ACRA”), prohibit employers with 15 or more employees from discriminating against an “otherwise qualified” person with a disability (including ASD) in applying, hiring or employment in a position.¹⁰ An individual is “otherwise qualified” if they can perform the essential

functions of their job with or without a reasonable accommodation.¹¹ Given the differences in type and severity of symptoms among people with ASD, a number of cases under the ADA and similar state laws have addressed what, if any, accommodations the employer was required to provide an employee with ASD.

For example, several courts have found that an employer is required to permit an employee with ASD to have a job coach,



particularly during the beginning of the individual's employment, to use autism-specific training techniques to help the employee learn how to perform their job duties. In 2011, the EEOC filed a lawsuit against Comfort Suites for refusing to allow a front desk clerk with ASD to use job coach services, which were paid for by the state, and terminating him shortly thereafter. Comfort Suites ultimately settled the case with the EEOC for \$132,500.¹²

Similarly, the EEOC filed a discrimination lawsuit under the ADA against Party City Corporation after one of its locations in New Hampshire refused to hire a qualified applicant with ASD and severe anxiety as soon as the hiring manager learned that an individual attending the interview with the applicant was a job coach. The hiring manager also previously had made disparaging comments about employees who used job coaches.¹³ Party City ultimately settled with the EEOC for \$155,000. In addition, the consent decree required Party City to improve its reasonable accommodation procedure and conduct training for employees regarding the new policy.¹⁴

Courts also have found it unlawful for employers to discriminate against employees based on stimming, even where the employee was not diagnosed with ASD at the time of termination and had not requested an accommodation.

*Glaser v. Gap Inc.*¹⁵ involved a man with ASD who worked in a merchandise distribution center. The employee, who was not

formally diagnosed until after the lawsuit was filed, had worked successfully for several years, but began having issues after being assigned a new supervisor. On one occasion, the employee asked his supervisor for a new box-cutting knife. After he received it, the employee claimed he put it in his back pocket and started to apologize to his supervisor about an event that had occurred several days earlier.

The employee and supervisor both were standing close to a row of cubicles when the supervisor began yelling at the employee. In response, the employee began waving his hands and entered a cubicle occupied by a coworker. Both the supervisor and the coworker claimed they felt like the employee was trapping them in the cubicle. However, as soon as they told the employee that

interaction with coworkers on several occasions.¹⁶ In addition, it came to light during the lawsuit that the employee had brought a job coach with him to his original interview, but was told that she could not attend the interview with him and that he could not use a job coach if he was hired. Finally, the court determined that there was, at a minimum, a question of fact regarding whether Gap, Inc. regarded the employee as disabled.¹⁷

Leave for People with ASD or their Caregivers

In addition to protecting employees with ASD, several state and federal laws also safeguard family members who serve as caregivers for people with ASD. The Family and Medical Leave Act¹⁸ ("FMLA") requires

ASSISTANCE IN ACCOMMODATING WORKERS WITH ASD

The following are just some of the local and national resources available to employers who are interested in learning more about providing reasonable accommodations for employees and applicants with ASD:

- Division of Developmental Disabilities: <https://des.az.gov/services/disabilities/developmental-disabilities/individuals-and-families/supports-and-services/employment>
- Southwest Autism Research and Resource Center: <https://autismcenter.org/employment>
- Autism Speaks–Workplace Inclusion Now: www.autismspeaks.org/workplace-inclusion-now-employers

In addition, the U.S. Department of Labor, Office of Disability Employment Policy–Job Accommodation Network provides a number of online tools to assist employers in identifying and learning about workplace accommodations (www.dol.gov/agencies/odep/resources/jan).



they needed to leave for a meeting, he immediately stepped out of the way. In addition, two employees in the next cubicle who witnessed the incident confirmed that he had moved out of the way and then said hi to both on his way out of the office. Gap Inc. terminated the employee for his conduct, claiming that it had been threatening.

The employer filed a motion for summary judgment, claiming that the employee was not "disabled" under the ADA and they had no obligation to accommodate him because he had not requested an accommodation. The court disagreed and explained that the employer reasonably should have known that the employee was disabled because they had provided him with negative feedback or coaching regarding his



employers with 50 or more employees to allow eligible workers up to 12 weeks of unpaid leave per year to care for a loved one with a serious health condition. Employees also have the right to take FMLA leave intermittently or on a reduced-leave schedule to seek treatment for themselves or provide treatment to a spouse, parent or child with a serious health condition, including ASD.¹⁹

For example, in *Cheeks v. General Dynamics*,²⁰ an employee who lost her job because of a reduction in force sued her employer, alleging, in part, that her separation was in retaliation for taking FMLA leave every other Friday to attend treatment for her child with ASD. In its opinion, the court held, in part, that an email sent by the employee’s supervisor, expressing his dissatisfaction with her inability to work some Fridays, was sufficient to overcome the employer’s motion for summary judgment on the FMLA claim. In fact, courts have found it unlawful for an employer to deny leave or retaliate against an employee for taking leave to care for a child with ASD, even if the child was not yet diagnosed.²¹

In Arizona, employees also are entitled to use any accrued, unused paid sick leave to attend ASD-related therapies and treatments for themselves or a close family member. Arizona’s Fair Wages and Healthy Families Act²² provides that employees can use earned paid sick time to “[c]are for a family member with a mental or physical illness ... or health condition” or to “care [for] a family member who needs medical diagnosis, care, or treatment of a mental or physical illness ... or health condition.”²³

The variety and number of therapies available to treat ASD can cause confusion for human resources departments that are tasked with determining whether an appointment or therapy qualifies for protected leave. Just some of the therapies and treatments that may be used for a person with ASD include but are not limited to: speech-language therapy, cognitive behavioral therapy, occupational therapy, social skills training,²⁴ applied behavioral analysis, and sensory integration therapy.²⁵

It is important for employers to understand that although these therapies sometimes are used to treat less serious conditions, they also can be used to treat ASD.

Employers, particularly in certain industries, can benefit substantially from incorporating employees with ASD into the workplace.

For example, the employer in *Stroder* denied the employee’s request for leave, in part, because the employee had requested time off to attend speech therapy with her child twice per week, prompting the employer to conclude that the child’s speech delay did not constitute a “serious health condition” under the FMLA.²⁶ The court determined, however, that even though speech therapy was one of the only formal therapies the child engaged in at that time, the child also was experiencing increasing behavioral problems and special needs related to autism, which justified the need for leave, despite the fact that the child had not been formally diagnosed with autism at the time of the request.

The Advantages of a Neurodiverse Workplace

Although employers can face legal liability if they fail to abide by the various state and federal laws that protect employees with ASD, employers, particularly in certain industries, also can benefit substantially from incorporating employees with ASD into the workplace.

For example, national companies like Microsoft, Ernst & Young and Bank of America have developed specialized interview processes for neurodivergent candidates as part of their hiring initiatives.²⁷ The modified interviews occur over several days, during which candidates are allowed to perform many of their potential job duties and demonstrate their abilities, rather than being required to verbalize their accomplishments in a more traditional setting. By using these techniques, companies have been able to tap into some of the unique talents people with ASD can bring to the workplace, such as increased capacity to focus, exceptional long-term memory, and superior attention to detail.²⁸ In fact, some recruiting companies, like CAI Neurodiverse Solutions, have begun specializing in placing neurodivergent

individuals with employers.

So, while the law defines the minimum that employers are required to do to avoid discriminating against individuals with ASD, by shifting mindsets and adjusting certain traditional policies or practices to embrace neurodiversity, both employers and the ASD population can benefit.

As Paul Collins, an author and father of a son with ASD, has stated, “Autists are the ultimate square pegs, and the problem with pounding a square peg into a round hole is not that the hammering is hard work. It’s that you’re destroying the peg.”²⁹

endnotes

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17. *Id.* at 578-579 (citing *Brady v. Wal-Mart Stores Inc.*, 531 F.3d 127, 135 (2d Cir. 2008)).
18. 29 U.S.C. § 2601 *et seq.*
19. 29 C.F.R. § 825.202.
20. 22 F.Supp.3d 1015 (D. Ariz. 2014).
21. See *Stroder v. United Parcel Service Inc.*, 750 F. Supp. 2d 582 (M.D.N.C. 2010) (court found evidence sufficient to overcome defense motion for summary judgment where employer denied employee’s request for 10 weeks of FMLA leave to care for her autistic son, who was not able to attend regular daycare or preschool due to increasing behavioral problems.).
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