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Tackling Mental, Emotional, and Psychological Disabilities in the Work Place

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Knoxville

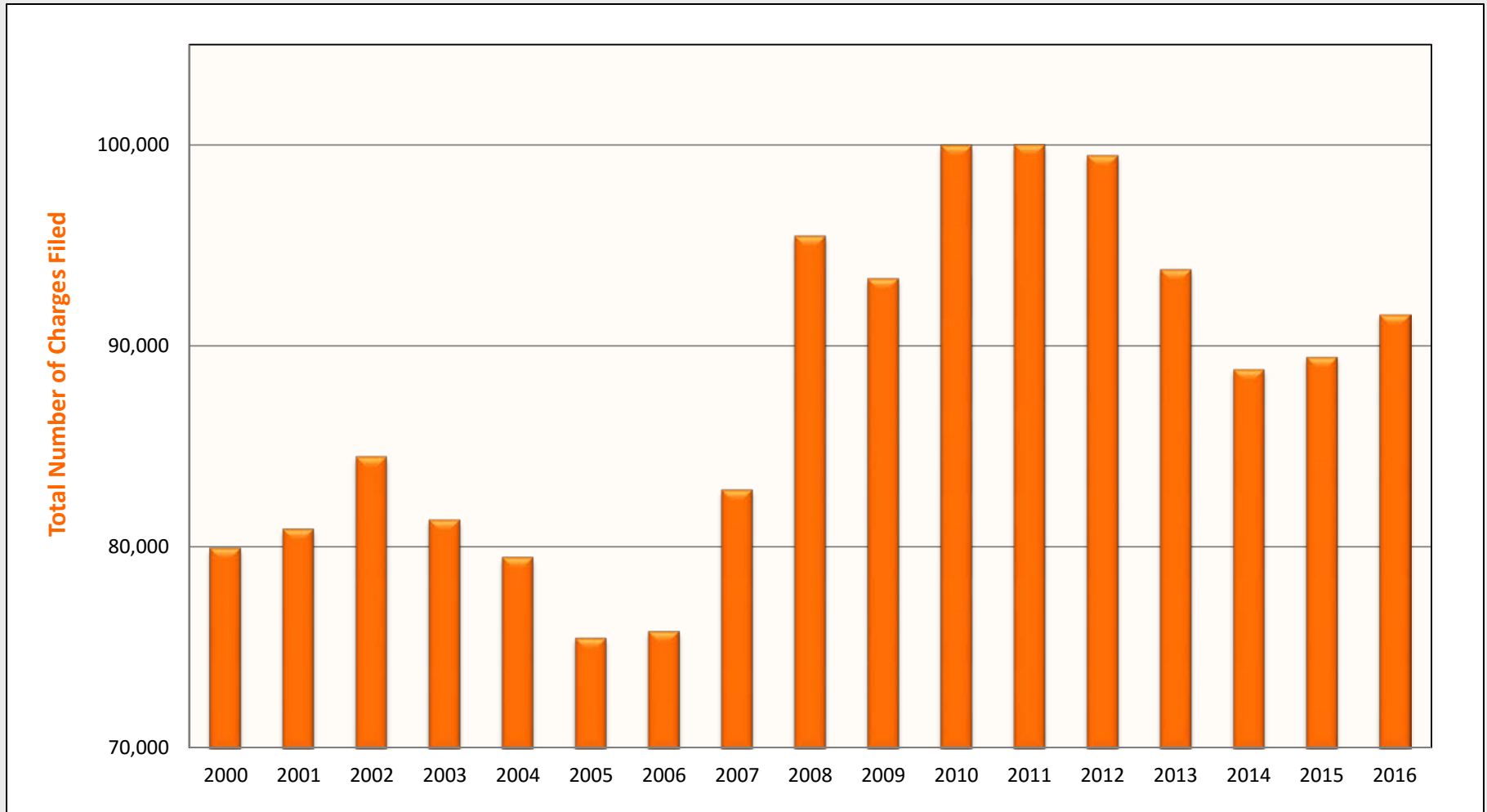
Morristown

Cookeville

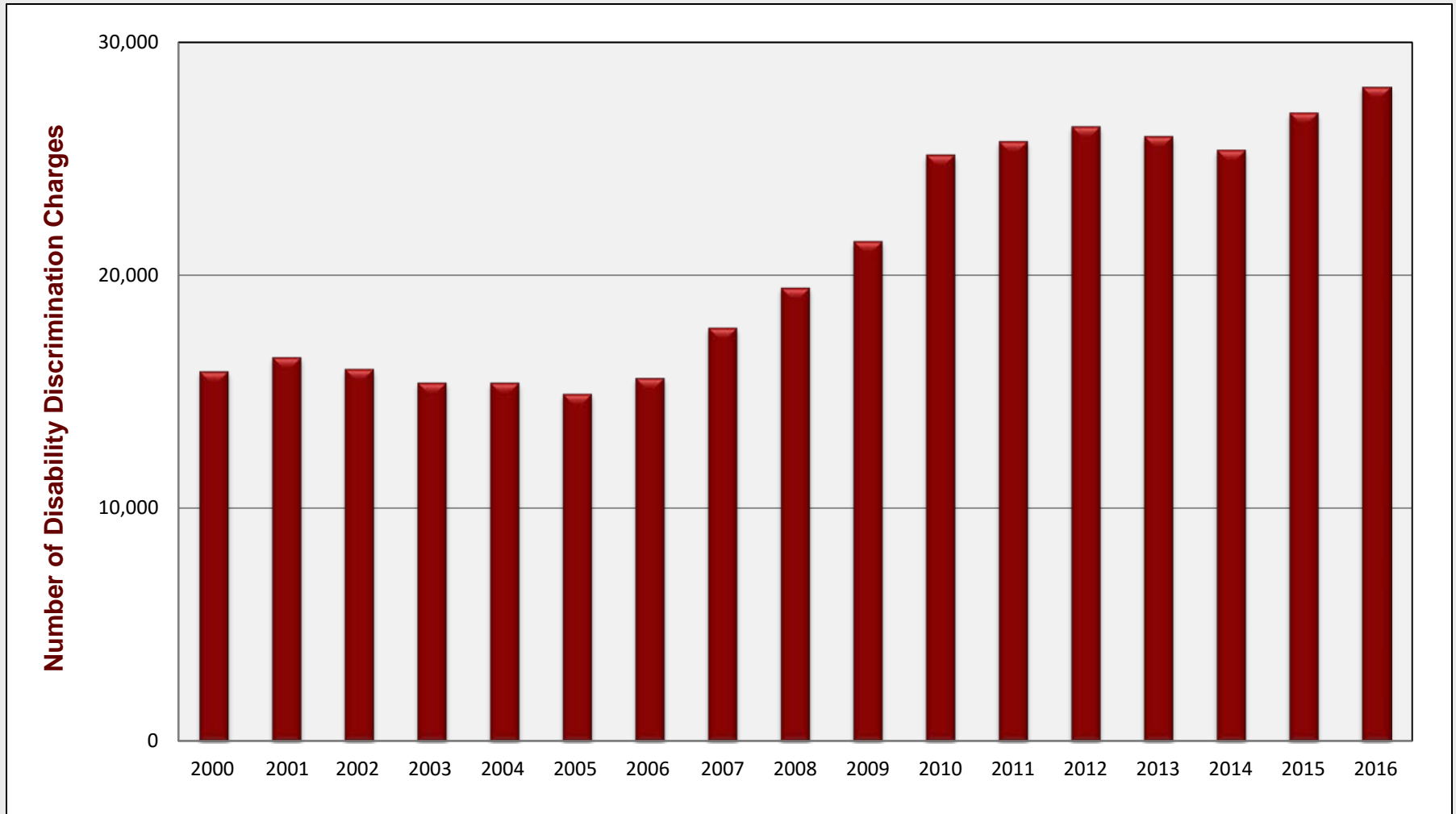
Nashville

Chattanooga

Total Number of Charges Filed



Disability Discrimination



Real Life Examples

- EE asleep onsite during break period
- EE comments regarding building



ADAAA - Definition

- A **physical or mental impairment** that substantially limits one or more major life activities;
- A **record of** such an impairment; or
- Being **regarded as** having such an impairment



Disability – Prima Facie Case

- **Disabled** within the meaning of ADA;
- **Qualified**, with or without reasonable accommodation, to perform the essential functions of the position held or desired;
 - **Skills, training, education, certifications, etc.**
 - Can EE perform essential functions – with or without RA; and
- Has suffered an adverse **action because of his/her disability**



Defenses

- Undue Hardship
- Direct Threat

***Not Qualified*



EEOC Enforcement

- Generally not interested in arguments over whether EE is disabled;
- Instead, EEOC's focus is on whether ER engaged EE in Interactive Process
- And, basis for ER's decision regarding Reasonable Accommodation



ADAAA Check-Down List

- RA in current position
- RA in open position / same level
- RA in open position / lower level
- LOA **** (ADA and FMLA)



Cases where ER is Liable:

- Throughout the early 2000s, the U.S. 9th Circuit Court of Appeal, which has jurisdiction over California, ruled that **disciplinary action targeting disability-caused conduct could be construed as being directed toward the disability itself and** therefore implicate disability discrimination laws.



Cases where ER is Liable:

- In three cases, the federal court overturned the lower court and either allowed the trial to proceed or ordered a new trial on Americans with Disabilities Act (ADA) disability discrimination claims.



Cases where ER is Liable:

- The cases were filed by:
 - (1) A medical transcriptionist terminated for tardiness and absenteeism due to her obsessive-compulsive disorder (*Humphrey v. Memorial Hospitals Association*);



Cases where ER is Liable:

- (2) A heavy-equipment operator terminated for suffering an epileptic seizure while driving a county vehicle (*Dark v. Curry County*); and
- (3) A clerk with bipolar disorder terminated for outbursts that frightened coworkers (*Gambini v. TotalRenal Care, Inc.*)



Cases where ER Won:

- In *Wills v. Superior Court*, the California Court of Appeals reached a different result in 2011. The court upheld the termination of a court clerk who yelled and swore at coworkers, told them she would add them to her *KillBill* hit list, and sent numerous threatening e-mails.



Cases where ER Won:

- The court questioned whether the 9th Circuit's decisions blurring the lines between “conduct” and “disability” were as unassailable as they first appeared, and it noted that all three decisions relied on an overly simplistic—and in some cases nonexistent—analysis.



Cases where ER Won:

- **Therefore, the court ruled that when a workplace violence policy is violated, the employer may distinguish between disability-caused misconduct and the disability itself.**



Cases where ER is Won:

- In 2015, the U.S. 6th Circuit Court of Appeal (which includes Tennessee), held in *Yarberry v. Gregg Appliances, Inc.* that **an employer could terminate the employment of an employee who engaged in misconduct even if it was caused by a disability.** In that case, the employer terminated the plaintiff's employment after he exhibited bizarre behavior over the course of two days...



Cases where ER is Won:

- ...The plaintiff had an argument with a co-worker and engaged in other disruptive and bizarre behavior. After experiencing a mental breakdown, plaintiff was admitted to a psychiatric hospital.
- After the employer terminated plaintiff's employment, his doctor submitted a letter stating that plaintiff had experienced a manic episode stemming from his bipolar disorder.



Cases where ER is Won:

- The Sixth Circuit affirmed the district court's granting summary judgment to the employer on the plaintiff's ADA claim. The Sixth Circuit found that **“Employers not only have latitude to discipline employees for threats of violence, stealing, or destruction of property, but also may prohibit inappropriate behavior between co-workers”.**



Cases where ER is Won:

- *Walz v. Ameriprise Fin., Inc.*, 779 F.3d 842, 31 A.D. Cas. 573 (8th Cir. 2015) – Plaintiff fired for spate of erratic and disrespectful actions – no disability claim since bipolar disorder wasn't apparent to employer and plaintiff failed to inform the company of her condition or the work limitations it caused her – ability to work well with others was essential job function.



Cases where ER is Won:

- *Stevens v. Rite Aid Corp.*, 851 F.3d 224, 33 A.D. Cas. 557 (2d Cir. 2017), *pet. for cert. docketed by* ___ U.S. ___ (Aug. 11, 2017) – Award of \$2.6 million to terminated pharmacist who had a phobia that prevented him from giving injections reversed – giving injections was an essential function of job – ...



Cases where ER is Won:

- ...plaintiff suggested that a reasonable accommodation would be de-sensitization therapy – employers aren't obliged to offer medical treatment as a reasonable accommodation – plaintiff suggested that other employees could give the injections – a reasonable accommodation “can never involve the elimination of an essential function,” 851 F.3d at 230.



Cases where ER is Won:

- *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 31 A.D. Cas. 1149 (7th Cir. 2015) - Terminated chief psychologist unfit for position-subordinates noted cognitive problems similar to Alzheimer's - independent third party concluded that plaintiff "definitely had cognitive issues" typical of early Alzheimer's - ...



Cases where ER is Won:

- ...court bothered by termination without interactive process – however, plaintiff did not demonstrate how disabilities could be accommodated – not sufficient to suggest delegating essential job functions – summary judgment affirmed.



Bottom Line

- **1) Unless you know or should know about an employee's disability, you don't have to treat the employee any differently with respect to discipline.**
 - You should, however, document when you first learned of the disability and, in some instances, request an explanation from the employee if you reasonably suspect performance issues are caused by a disability.



Bottom Line

- **2) You should engage in an interactive process with all employees, including disciplined employees, to identify reasonable accommodations that could prevent future misconduct.**



Bottom Line

- **3) If you later become aware that misconduct was caused by a disability, you don't have to retract an otherwise proper disciplinary action.**
 - You still may move forward with discipline if the misconduct violates a job-related rule that applies to all employees, such as requirements that employees deal appropriately with customers or work cooperatively with others.



Opioid/Heroin Addiction Epidemic

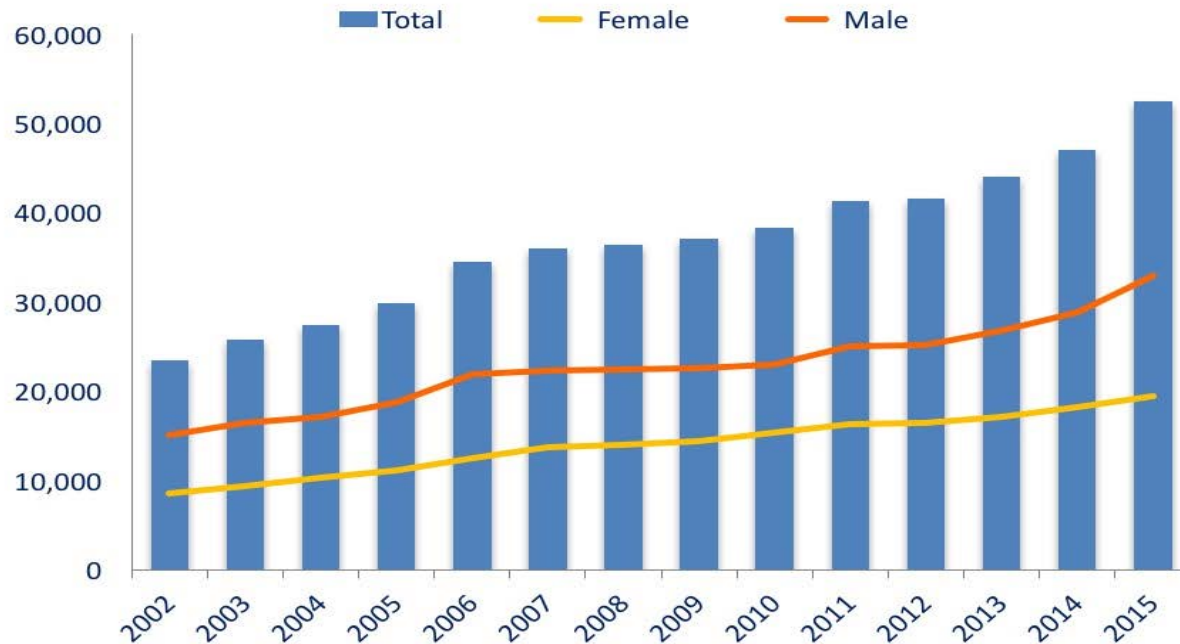


National Statistics

NIH National Institute on Drug Abuse



National Overdose Deaths Number of Deaths from All Drugs

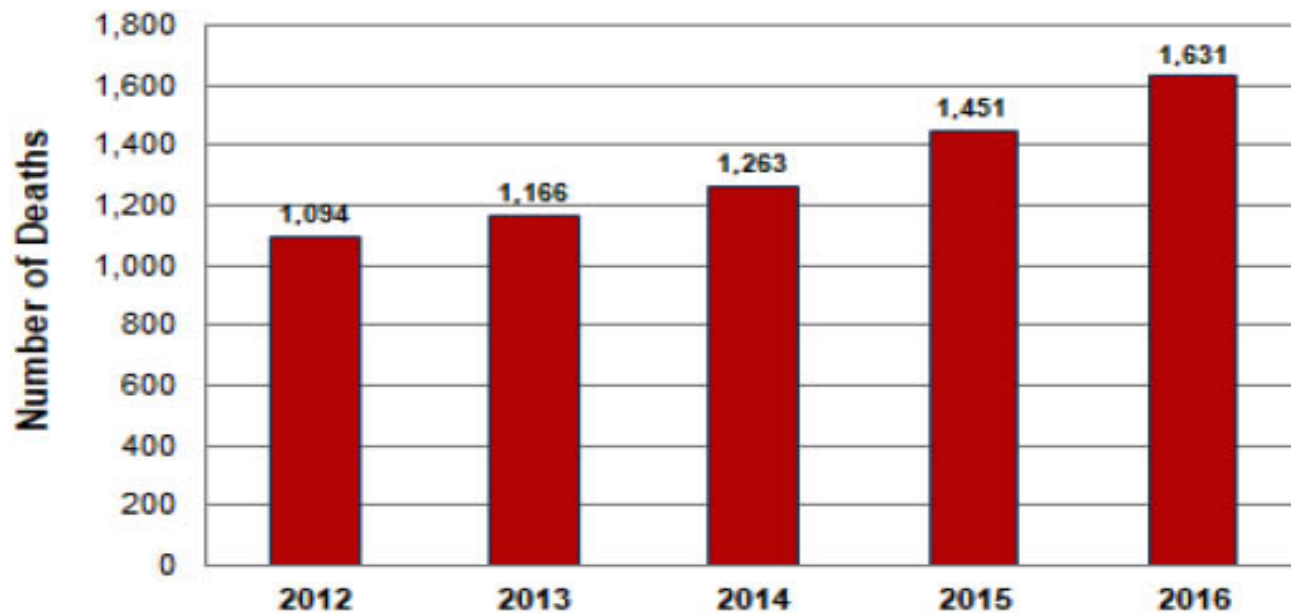


Source: National Center for Health Statistics, CDC Wonder



Tennessee Statistics

Drug Overdose Deaths in Tennessee, 2012-16



Source: Tennessee Department of Health, Office of Informatics and Analytics



Tennessee Statistics

- In 2016, a record 1,631 Tennesseans died of drug overdoses according to the Tennessee Department of Health.
- According to the Centers for Disease Control and Prevention, in 2016 Tennessee had the third-highest rate of opioid prescriptions in the country, behind only Alabama and Arkansas.



VA's Change of Direction Regarding Opioids



Drug Addiction and the ADA/FMLA

- ADA:
 - Disability does not include illegal drug use
 - Current use v. someone who is sober
- FMLA: Need for LOA for treatment



29 CFR 1630.16(b) Regulation of alcohol and drugs. A covered Entity:

- (1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
- (2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; and



29 CFR 1630.16(b) Regulation of alcohol and drugs. A covered Entity:

- (4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism.



29 CFR 1630.16(c) Drug Testing

- (1) General Policy - For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination.



29 CFR 1630.16(c) Drug Testing

- However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.



Conclusion

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