

The ADA: Performance & Conduct

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How Does ADA Apply to Performance/Conduct Issues

- An employee's disability typically has no bearing on performance or conduct problems
- Performance/conduct issues generally should be addressed in the same manner as done with employees without disabilities
- Role of reasonable accommodation in addressing disability-related performance or conduct problems is to assist employee to meet performance goals and avoid conduct problems, not to excuse or tolerate problem

What We Will Cover

- Performance Standards
- Conduct Standards
- Seeking Medical Information
- Attendance Issues
- Alcoholism and Illegal Use of Drugs

Performance Standards

- Employers establish job-related requirements
 - These include specific tasks or assignments (essential and marginal functions)
 - *Production Standards*
- Employers establish methods to evaluate job performance

Production Standards

- Employee with a disability must meet the same production standards as other employees in the same position
- Production standards refer to both
 - Quantitative Standards
 - Qualitative Standards
- Reasonable accommodation never requires lowering a production standard but may require accommodation to meet the standard

Practical Guidance

- ✓ Supervisors should always give clear guidance to all employees, including those with a disability, regarding the quantity and quality of work that must be produced and the timetables for producing it

Providing accurate feedback and evaluations

- Supervisors should evaluate the job performance of an employee with a disability in the same manner that it would evaluate any other employee's performance
 - Failing to provide an accurate evaluation leaves the employee at a disadvantage to improve performance and, if necessary, request reasonable accommodation

Employee discloses disability in response to a lower performance rating (or supervisor raising performance problem)

- Don't fixate on the disability!
- Make clear that the employee earned the lower performance rating, regardless of whether the disability played a role
- Important that supervisor reiterate what employee must do to improve
- In response to employee raising disability, employer can ask why the employee believes that disability plays a role in performance problem and whether employee is asking for reasonable accommodation

Employee asks for reasonable accommodation in response to a lower performance rating/performance problem

- Proceed with discussion of evaluation/performance problem
- But also begin “interactive process” in response to request for accommodation
- Cannot refuse to consider or to provide reasonable accommodation because there is a performance problem

Conduct Standards

- Employer may discipline employee with disability for violating a conduct standard if the disability does not cause the misconduct (disability completely irrelevant)
- Holding employee to same standard as all other employees
- Disability rarely is relevant

When Disability Causes/Contributes to Misconduct

- An employer may discipline an employee with disability if the conduct standard at issue is job-related and consistent with business necessity AND if other employees are held to the same standard

Conduct Rules that are job-related/ consistent w/ business necessity

- Prohibiting violence/threats of violence
- Prohibiting stealing/destroying property
- Prohibiting insubordination
- Requiring respect for clients, customers, and the public
- Prohibiting inappropriate behavior between coworkers
- Prohibiting alcohol/illegal drug use

Ambiguous Conduct Rules

Prohibiting “disruptive” behavior: What do you consider disruptive?

Factors to consider:

- Specific conduct at issue
- Symptom of disability affecting conduct
- Nature of job/work environment

Disclosure of Disability/Request for Reasonable Accommodation

Timing of Request is Critical

- After misconduct that warrants termination: May proceed with termination
- After misconduct that warrants other discipline: May impose discipline but ask why disability being raised/begin interactive process

Performance or Conduct Problem

- Focus on what employee is doing wrong (be specific), what employer expects employee to do to improve, and consequences if no improvement
- Don't focus on disability (except if reasonable accommodation is requested) because that could lead to "regarded as" claim under the ADA Amendments Act

Seeking Medical Information

- Employer cannot seek medical info or require medical examination solely because employee's behavior is annoying, inefficient or otherwise unacceptable
- Greater the number of reasons to explain conduct, less likely ADA would permit medical inquiries/examination

Seeking Medical Information

- Even if ADA permits medical inquiries/examination, what would medical information provide?
- Why does employer think this info is necessary?
- If discipline is warranted, why would having medical information change disciplinary action?

Attendance Issues

- While reasonable accommodation may require extending leave or modifying schedule, does not require complete exemption from time/attendance requirements
- Chronic, frequent AND unpredictable tardiness or absences don't have to be tolerated

Attendance/Leave Issues and Reasonable Accommodation

- Violations of attendance/leave policies BEFORE request for accommodation subject to employer's usual disciplinary action for infraction
- If employee entitled to reasonable accommodation to address attendance/leave problem, employer should provide accommodation to eliminate problem

Indefinite vs. Extended Medical Leave

- Employers may have to grant extended leave as a reasonable accommodation, absent undue hardship
- Don't have to grant indefinite leave
- Know the difference!
- No known or anticipated return date vs. approximate date of return
- Extended leave can become indefinite leave

Alcoholism/Illegal Drug Use

- ADA may protect a “qualified” alcoholic
- ADA does not protect employee currently engaging in illegal use of drugs
- ADA may protect a recovered drug addict who no longer engages in illegal drug use and who is “qualified”

Alcoholics and Drug Users: Applying Perform./Conduct Rules

Performance: Apply same standard as applied to other employees

Conduct:

- If alcoholic/drug addict: Same standard applied to other employees
- If any other disability: Same standard applied to other employees as long as it is job-related and consistent with business necessity

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The ADA: Applying Performance and
Conduct Standards to Employees with
Disabilities

[www.eeoc.gov/facts/performance-
conduct.html](http://www.eeoc.gov/facts/performance-conduct.html)