

Overview: The ADA and Employee Performance and Conduct Standards

The ADA clearly states that employees with disabilities must meet the same performance and conduct standards as other employees. However, employees with disabilities may require reasonable accommodations to do so, and the evaluation process itself may have to be changed somewhat depending upon the specific disability. This may cause some confusion among employers resulting in a hesitancy to hire individuals with disabilities due to a faulty belief that employees with disabilities don't have to follow the same performance and conduct standards as other employees. In order to provide clarity to the ADA's legal requirements regarding performance and conduct standards, the EEOC issued an excellent 26 page guide that provides numerous examples and practical guidance in a question and answer format. Following is a user-friendly summary of the key points of the guide and its examples.

Performance Standards

Employees with disabilities must meet the same production standards as other employees. This includes both the quantity and quality of the work expected. The EEOC advises employers to give clear guidance to employees with disabilities (as well as all other employees) regarding the quality and quantity of work expected along with timetables for production.

Employers have the right to discipline and terminate employees with disabilities for poor performance. If the employer refuses, however, to let the employee use an accommodation to assist in meeting a production standard, they are in violation of the ADA. The only exception to providing a requested accommodation is if the accommodation would cause an undue financial or administrative burden or change the fundamental nature of the business.

Evaluating Performance

Employers should use the same evaluation criteria for all employees performing the same job regardless of disability. In some instances, however, the employer might need to modify the way performance is evaluated to accommodate a specific disability or accommodation.

Example: *One of Rhoda's essential functions is providing training. Because she is deaf and, as a result, has difficulty speaking, Rhoda uses a sign language interpreter to voice for her. Generally, Rhoda's supervisor evaluates his employees on the use of their voices – whether they speak with a monotone or use their voices to show interest and enthusiasm. Rhoda's presentation cannot be measured in this way. However, there are alternative ways to measure how she conveys her message, including body language, facial expression, and the words she uses.*

The employee in the previous example is still held to the same performance standard, even though her evaluation has been modified slightly. Since many employees with disabilities use accommodations

or alternate methods to perform their jobs, the employers must keep in mind that they are evaluating performance outcomes (quality and quantity) rather than the methods used to get the job done.

Disclosure of a Disability in Response to Low Performance Reviews/Ratings

An employer may first learn of an employee's disability after giving a poor performance review or while discussing poor performance. Because an accommodation request had not been made and the employer had no knowledge of the disability when evaluating performance, the employer does not have to change or take back the low performance rating.

However, the employer should use this as an opportunity to identify accommodations that may improve performance by asking why the employee believes the disability is affecting performance. If the employee does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level.

Example: *A county government employee does not disclose her chronic fatigue syndrome, even when she begins having performance problems that she believes are disability-related. Her supervisor counsels her about the performance problems, but they persist. The supervisor warns that if her work does not show improvement within the next month, she will receive a written warning. At this point, the employee discloses her disability and asks for reasonable accommodation.*

The supervisor should discuss the request and how the proposed accommodation will help improve the employee's performance. The supervisor also may ask questions or request medical documentation that the employee has a disability. The supervisor does not need to take back his oral warning or his requirement that the employee's performance must improve. The evaluation period may be delayed, however, until the employer can evaluate the employee's performance using the reasonable accommodation.

Whenever the employee requests an accommodation, the employee must engage in the interactive process of reasonable accommodation. While waiting until a poor performance review to make an accommodation request is not optimal timing for either party, the employer still has a legal obligation to engage in the interactive process of reasonable accommodation to determine: If the employee is covered as a "qualified person with a disability" under the ADA.

If the accommodation is "reasonable", in other words, does not create an undue hardship or change the fundamental nature or operation of the business.

The request for reasonable accommodation should be handled promptly, in particular because unnecessary delays in determining or providing an effective accommodation may violate the ADA.

Withdrawing or Changing Accommodations Due to Poor Performance

Employers should not automatically assume that because performance is unsatisfactory, the employee's reasonable accommodation is not working.

There could be a variety of reasons for poor performance that have nothing to do with either the accommodation or the employee's disability. However, it makes common sense to explore the effectiveness of the accommodation and identify any changes or additions that may be more effective.

Employers should never take away a reasonable accommodation simply as a punishment for unsatisfactory performance.

This may seem obvious in situations such as providing an amplified phone for a hard of hearing employee or giving breaks to an employee with diabetes to administer insulin. But in cases of modified policies and procedures, such as letting an employee work from home or use a modified schedule, the accommodation is sometimes viewed as a "privilege" rather than a reasonable accommodation. It is important that employers treat all types of reasonable accommodations equally in their implementation and review of performance.

Conduct Standards

The ADA generally gives employers wide latitude to develop and enforce conduct rules for all employees. Generally, conduct problems are not related to disability and the employer may apply the same standards and consequences, regardless of disability. Sometimes, however, the conduct problems are directly related to the worker's disability. In these cases, the ADA only requires that conduct rules be job related and necessary for the operation of the business in order to be enforced. The following examples below illustrates this requirement.

Example: A telephone company employee's job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's

code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example: *Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is*

disruptive. Although the coworkers may feel some discomfort, under these circumstances it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct.

While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself.

Note that the employer and employee should explore if there is a reasonable accommodation available that could help the employee better follow conduct rules. If there is no reasonable accommodation available, the employer may follow disciplinary procedures as they would with any other employee.

Also, the employer cannot "force" an employee to use a reasonable accommodation. If the employee refuses to try an accommodation, such as taking a break in a quiet room to relieve stress, the employee must face the consequences of their on-the-job behavior without the accommodation.

Alcoholism and Illegal Use of Drugs

Employers have the right to forbid the alcohol use or the illegal use of drugs in the workplace for all

employees. Employees who have alcoholism or drug addiction face the same discipline as any other employees if they break those rules.

An employee whose poor performance or conduct is due to the current illegal use of drugs is not covered under the ADA. Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it believes appropriate. However, nothing in the ADA would keep the employer from offering the employee leave of absence or other assistance that may enable the employee to receive treatment.

In contrast, an employee whose poor performance or conduct is due to alcoholism may be entitled to a reasonable accommodation (unless the employee has already been terminated for the conduct.)

If the employee only mentions the alcoholism but doesn't make a request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed to correct the problem. This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program. An employer is not required by the ADA to a "firm choice" or "last chance agreement" to an employee who otherwise could be fired for

poor performance or misconduct that is the result of alcoholism or drug addiction. However, there is nothing in the ADA that would keep an employer from implementing this type of policy. Generally, under a "firm choice" or "last chance agreement" an employer agrees not to terminate the employee in exchange for an employee's agreement to receive substance abuse treatment, stop using alcohol or drugs, and avoid further workplace problems. Failure to follow this agreement is usually grounds for termination because the employee failed to meet the conditions for continued employment.

Example: *An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to take back the written warning and does not have to provide an accommodation that supports the employee's drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, unless there is an undue hardship, the employer must grant the employee's request to take leave for the next month to enter a rehabilitation program.*

The information in this article is taken from the EEOC Guidance *Applying Performance and Conduct Standards to Employees with Disabilities*.