The Americans with Disabilities Act:
How It Applies to Performance and Conduct Issues

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What We Will Cover

- Performance Standards
- Conduct Standards
- Seeking Medical Information
How Does the 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 handled 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
Performance Standards

• Employers establish job-related requirements

➢ These include specific tasks, job duties, or assignments (that is, the essential and marginal functions)

➢ A job may also contain requirements that ensure appropriate performance of job duties or related assignments (for example, specific hours to be worked, overtime)

• Employers establish methods to evaluate job performance
Production (or Performance) Standards

- Employee with a disability must meet the same 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 why the employee earned the lower performance rating, or why supervisor must focus on performance problem, 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 whether employee is asking for reasonable accommodation to help him/her improve performance
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
  – This discussion focuses on how accommodation will help employee to improve performance

• Cannot refuse to consider or to provide reasonable accommodation because there is a performance problem
Employee requests removal of essential function or changing performance/production standard

- Not required by the ADA
  - Temporary removal of an essential function or lowering a quantitative standard generally not recommended except if clearly done only for a short, definite period of time because of temporary medical issue(s) that should soon be resolved
  - Employers often provide these temporary measures due to short-term medical or other issues (e.g., pregnancy, heart attack)
- Should focus on accommodations that will enable satisfactory performance of essential functions and ability to meet performance/production standards
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
Employee requests that you withhold disciplinary action or change a conduct rule

• Not required by the ADA
• Should focus on accommodations that will enable employee to meet the conduct standard
Request for Reasonable Accommodation
Timing of Request is Critical

- After performance issue/misconduct that now warrants termination: May proceed with termination
- After performance issue/misconduct that warrants discipline other than immediate termination: May impose discipline but begin interactive process
- Important to handle request for accommodation expeditiously b/c ability to hold employee accountable in the future may depend on whether you provided a reasonable accommodation (assuming one is possible)
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

• Employer should not raise disability but only respond if employee raises disability because employer raising it could lead to “regarded as” claim (i.e., imposed disciplinary action based on employee’s impairment)
  – Might have to defend discipline to EEOC
Seeking Medical Information

• Employer cannot seek medical info or require medical examination solely because employee’s behavior is annoying, inefficient or otherwise unacceptable

• Job-related and consistent with business necessity

• 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 (i.e., there is business necessity), 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?
Requiring Medical Information: Does it mean employer regards employee as having a disability?

- If there is objective evidence to justify seeking medical information, agency cannot be found to have *regarded the employee as having a disability* when it seeks medical information.

- If there is no objective evidence to justify seeking medical information, agency may be found to have *regarded the employee as having a disability* when it seeks medical information.
Concerns About Possible Violence

• Distinguishing real threats from someone who behaves outside the norm
  – Precisely because it is hard to tell if someone’s threats really signal an intent to be violent, EEOC’s Guidances make clear that an agency can handle these as conduct issues, not direct threat issues
  – Most people who make a threat will never be violent, but making threats is misconduct that can be punished

• Do not assume employee known to have a particular mental illness will likely become violent

• If behavior is causing concern, then deal with it as a “personnel” issue and, if appropriate, as a conduct issue, but not necessarily as a potential violence issue

• Seek advice from HR and mental health experts
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The ADA: Applying Performance and Conduct Standards to Employees with Disabilities

www.eeoc.gov/facts/performance-conduct.html