The ADA: How It Applies to Performance & Conduct Issues

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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
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 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
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/illicit 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

• 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?
Attendance Issues

• While reasonable accommodation may require extending leave or modifying schedule, it 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

• A violation of attendance/leave policies BEFORE employee requests accommodation is subject to employer’s usual disciplinary action for the infraction

• If employee entitled to reasonable accommodation to address attendance/leave problem, employer should provide accommodation to eliminate problem (unless undue hardship)
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!
• Indefinite Leave = No definite or approximate return date
• Extended leave can become indefinite leave (i.e., employee requests one or more extensions that, upon employer’s inquiries, reveals objective medical information cannot support a definite or approximate return date)
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