

# **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/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
- 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