




Performance and Conduct Standards

*Application to Employees with
Disabilities*

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There are two fundamentally differing views of human nature and work. The “objective view” sees work as a source of economic means. The “subjective view” is concerned with the effects of work on the person. By the early twenty-first century, quality will become a commodity, and companies will be distinguished by the wholeness of their people.”

Bill Brien, former CEO, Hanover Insurance Company



ADA: Performance and Conduct

ADA BASICS

LET'S MAKE IT EASIER



THE ADA Amendments Act has made it easier for employees to prove they have a disability

Definition of Disability

- “a physical or mental impairment that *substantially limits* one or more of the *major life activities* of such individual”
- a record of such impairment
- being regarded as having such an impairment, if the actual or perceived impairment is not both transitory and minor



The Effect of the ADAAA

- The question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis
- The primary object of attention should be whether covered entities have complied with their obligations



Anti-Discrimination and Duty to Reasonably Accommodate

The ADA prohibits discrimination against a qualified individual with a disability and requires an employer to provide *reasonable accommodation* to qualified individuals with disabilities, except when such accommodation would cause an *undue hardship*



Interactive Process

“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”



Prima Facie Case

- (1) Disabled individual
- (2) Otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and
- (3) The employer either refused to make a reasonable accommodation for the plaintiff's disability or made an adverse employment decision against the plaintiff because of his disability



Two Areas of Concern: Performance v. Conduct

- Performance Issues – how the employee fulfills his job requirements
- Conduct Issues – how the employee behaves or conducts himself at work or in relation to company rules



Key Concepts to Remember

- The employee must possess the requisite skill, experience, education and other job related requirements that are job related and consistent with business necessity
- The employee must be able to perform the essential functions of the position with or without reasonable accommodation



The Employer must KNOW

In the performance and conduct arena the employer must KNOW about the disability. Sudden revelations of a disability do not necessitate raising an evaluation score, retracting discipline or termination. However, such revelations can give rise to the interactive process for future accommodation.



ADA: Performance and Conduct

PERFORMANCE



Billy Bumbles

Billy Bumbles has worked for ACME for five years in the shipping department. His job consists of preparing goods for shipping and he is subject to a production quota. Billy has not been meeting his quota and gets written up. He discloses at the disciplinary meeting that he has chronic fatigue syndrome.



Is Billy a qualified individual with a disability?

- Identify the impacted major life activities
- Is he substantially limited?
- Can he perform the essential functions with or without accommodation?
- Is there any way his qualifications can be attacked?
- Assemble your medical proof

Is Billy a qualified individual with a disability? cont'd

Can he perform the essential functions?

- Job functions refer to tasks or duties the employer expects to be performed
- The ADA focuses on *essential* functions
 - Essential functions are the tasks necessary for the job to be completed. Removal of an essential function would fundamentally change a job.
 - Non-essential functions are all other tasks associated with the job

Is Billy a qualified individual with a disability? cont'd

Essential functions considerations include:

- Whether the position exists to perform the particular function;
- Whether only some employees can perform the function; and
- Whether expertise or ability to perform the function is the reason for hiring.

29 C.F.R. 1630.2(b)(2)(i)-(iii)



Is Billy a qualified individual with a disability? cont'd

Sources of essential functions:

- Job descriptions
- Policy and procedure manuals
- Production standards
 - Quantitative or qualitative standards an employee must meet
 - Examples include monthly sales quota or quality customer service



Don't take the job description at face value!

- How often does the employee perform the function?
- What are the consequences of the incumbent not performing the function?
- Is there a collective bargaining agreement that may have an affect?
- What about the work experience of past incumbents and incumbents in similar jobs?



Was Billy subjected to an adverse action?

- Identify the adverse action.
- Under the case law has it been held to be adverse?
 - i.e. negative performance evaluations that don't impact salary; written warnings



Was it because of Billy's disability?

- Determine your comparable scope.
 - Individuals in the same department?
 - Individuals under the same manager?
 - Is there any justification to make the group larger?
- Determine your comparable qualities
 - What actions would be considered comparable to the performance or conduct issues for which the employee was disciplined and/or terminated?



But Wait! What about KNOWLEDGE

ACME didn't know about Billy's disability until after it implemented the discipline. Therefore, can you really prove that it was **BECAUSE OF** his disability.



ADA and Performance Issues

An employee with a disability must meet the same performance standards as other employees; however, once the disability is known, a reasonable accommodation may be required to assist the employee with reaching specific standards.



Essential Functions and Reasonable Accommodation

An employer never has to modify essential functions *but* may need to provide a reasonable accommodation to enable the employee to perform the essential function




Production Standards and Reasonable Accommodation

- An employer is not required to lower production standards
- An employer may have to provide a reasonable accommodation to enable an employee to meet the standard such as eliminating marginal functions, reassignment, etc.



Production Standards and Reasonable Accommodation cont'd

- Standards may have to be prorated if an employee requires leave or a reduced schedule as a reasonable accommodation
- An employer cannot necessarily require that a disabled employee perform a job in the same manner as a non-disabled employee



Performance Evaluations and Reasonable Accommodation

- An employer should evaluate the job performance of a disabled employee the same way that it would evaluate any other employee's performance
- An employer does not have to raise an employee's performance rating because the employee reveals a disability
- However, after a revelation and/or request for accommodation the employer should engage in the interactive process
- An employer should not retract a reasonable accommodation as a result of an unsatisfactory evaluation



ADA: Performance and Conduct
ATTENDANCE



Billy can't make it to work

After Billy disclosed the chronic fatigue syndrome during the disciplinary meeting, he begins to miss work. When questioned by his supervisor about his sketchy attendance he states that he's having trouble waking up in the morning due to his condition.



Attendance Issues

- An employer can discipline for problems that occur prior to a request for accommodation
- Although an employer may have to modify attendance policies as a reasonable accommodation, it does not have to completely exempt an employee
- Employers do not have to accept irregular, unreliable attendance or grant open-ended schedules



Billy requests an accommodation

Billy brings in documentation from his doctor regarding his condition and its affect on his ability to get up in the morning. He says “This is what my doctors says. What can we do?” His supervisor says that he will alert HR and Billy hears nothing else. He shows up in your office.



Reasonable Accommodation

- Was a request for accommodation made?
 - An employee does not have to mention the ADA or use the term “reasonable accommodation”
 - Employee can use plain English
 - Some courts have found that an employee doesn’t have to clearly ask as long as the employer knew of the disability and that assistance was needed



Analyzing a Failure to Reasonably Accommodate Claim

- Was the interactive process engaged in?
 - Were there any meetings?
 - What records are there of communication?
 - Who proposed an accommodation?
- What is the basis for any assertion that an accommodation was unreasonable?
 - Was it facially practicable?



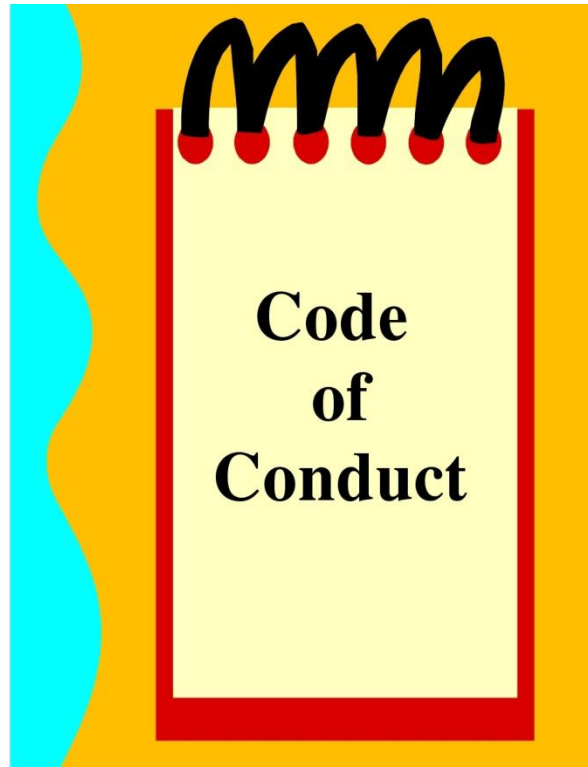
Examples of Reasonable Accommodations

- Leaves, flexible work schedules, telecommuting, job restructuring
- Behavioral accommodations - calls to support groups, training supervisors to approach an employee in a less confrontational manner, reducing work area distractions, mentoring



Examples of Reasonable Accommodations

- Leave for treatment, modified break schedules
- Management techniques – positive praise and reinforcement, day to day guidance, procedures to evaluate the effectiveness of the accommodation, training on strategies to deal with conflict



ADA: Performance and Conduct
CONDUCT



Billy's issues continue

Billy has finally gotten his performance and attendance together, when another issue arises. He starts having loud, verbal outbursts at work where he berates his co-workers and acts belligerently toward his supervisors. Events culminate when Billy curses and is physically aggressive toward some of his co-workers. As a result, Billy's employment is terminated. ACME finds out that Billy has been diagnosed as bipolar.



Conduct Issues

An employer may discipline an employee even if the misconduct is related to the disability as long as the conduct rule is job-related and consistent with business necessity and is applied consistently.



Discipline and Termination

- If the conduct warrants termination and the disability was unknown, an employer does not necessarily have to engage in the interactive process once the disability is disclosed
- If the conduct warrants discipline, accommodations may need to be considered to assist the employee in avoiding future misconduct once the disability is revealed



Conduct and Reasonable Accommodation

- Second chances are not required
- Actions such as violence, permanent or unknown duration leave requests or intermittent and unpredictable sleeping on the job can't be accommodated
- Consider
 - The specific conduct
 - The nature of the work environment



ADA: Performance and Conduct

THINGS TO CONSIDER WHEN ANALYZING THE CLAIM



Some things to consider

- Can you proceed under one, two or all three prongs of the definition of disability?
- Can you couple the ADA claim with an FMLA claim?
- Has the employee maintained good relations with former co-workers?
- Has the employee taken steps to mitigate damages?



Discovery

- Job descriptions
- Personnel file
- Personnel files of comparable employees
- Policy and procedure manuals
- Employee's medical file
- Personal files kept by managers and other decision makers
- Emails



Discovery cont'd

- Job postings during the relevant time period
- Job descriptions for other vacant positions the employee may have qualified for
- Other employees who have requested accommodation
- Questions regarding the interactive process



Discovery cont'd

- Deposition preparation of your medical witnesses and the plaintiff is critical
 - Key terms like “substantially limited” and “major life activity” need to be understood



Employer's Response

The Essential Functions

- Is there a job description?
 - Review with the employee
- Are there any other written documents that list the job duties?
- Are other employees in the job required to perform the same functions?
- Has there been a time when the functions weren't performed, i.e. while the employee was on leave



The Employer's Response

Undue Hardship

Significant difficulty or expense when considered in light of the factors such as:

1. The nature and net cost of the accommodation;
2. The overall financial resources of the facility, the number of persons employed at such facility, and the effect on expenses and resources;
3. The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;



The Employer's Response

Undue Hardship cont'd

4. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

5. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

The Employer's Response

Undue Hardship cont'd

- Did the employer perform any analysis or did it just summarily make the decision?
- Is there any financial documentation that supports the employer's position?
- Resource: Job Accommodation Network
askjan.org – for examples of alternative accommodations

Employer's Response

Direct Threat Defense

- The risk must be significant, specific and current (not speculative or remote)
- The risk assessment must be individualized
- The risk must be one that cannot be eliminated or reduced

Don't assume it applies based on generalizations!



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