




WELCOME


Equal Opportunity Programs

The Americans With Disabilities Act
"Keys to Employment Success"





The content of this training is provided for informational purposes only and should not be construed as legal advice.



INTRODUCTIONS

Name

Position

Department

TRAINING OBJECTIVES

- Provide supervisors and managers with practical guidance regarding performance and conduct issues in an ADA context

Definition

Performance Standards

Conduct Standards

Attendance Standards

Alcoholism & Illegal Drug Use

Confidentiality

AN ADA DEFINED DISABILITY

- **Physical or Mental Impairment**
- **Substantially Limits**
- **Major Life Activity**
- **“Record Of”**
- **“Regarded As”**

MENTAL OR PHYSICAL IMPAIRMENT

“Per Se” Disabilities

- Deafness
- Blindness
- Intellectual disability
- Missing Limbs
- Mobility Impairments
Requiring the use of
Wheelchair
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV
- Multiple Sclerosis
- Muscular Dystrophy
- Major Depressive Disorder
- Bipolar Disorder
- Post-Traumatic Stress
Disorder
- Obsessive Compulsive
Disorder

A Qualified Employee with a Disability Is

- **One who satisfies the requisite skills, experience, licenses etc. for the position (whatever those requirements are); and**
- **Can perform the essential functions of the job with or without a reasonable accommodation**



SUBSTANTIALLY LIMITS


- **Significantly or Severely Restricted Language Gone**
- **Analyze According to Certain Rules of Construction**
- **Rejects durational minimum**
- **Condition, manner or duration – no longer a rigid standard**

SUBSTANTIALLY LIMITED: RULES OF CONSTRUCTION

- 1) Construe broadly
- 2) Compared to “most people in the General Population
- 3) Focus is on compliance
- 4) Make an individual assessment
- 5) Request documentation where appropriate
- 6) Don't consider helpful measures
- 7) If episodic or in remission –can be a disability
- 8) Doesn't have to limit more than one major life activity
- 9) Impairment may be less than six months



A MAJOR LIFE ACTIVITY

- **List is not exhaustive**
 - **“Major” not strictly interpreted**
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“RECORD OF”

- **Having a history of, or misclassified as having an impairment that substantially limits a major life activity**
- **Same rules of construction apply**
- **Protected even if they are no longer substantially limited**

“REGARDED AS”

- **An actual or perceived impairment**
- **Not entitled to a reasonable accommodation**
- **Intended to eliminate unfounded concerns, fears and prejudices**

"REGARDED AS" (CONT.)

- **Refusal to hire because of skin graft scars**
- **Termination of employee with hand wound that employer mistook as HIV**

REASONABLE ACCOMMODATIONS


Reasonable
Accommodation

Essential Functions

Marginal Functions



ESSENTIAL FUNCTIONS

- **Things to consider:**
 1. Employer's judgment
 2. Written job descriptions – prepared before advertising or interviewing applicants
 3. Amount of time spent on job performing function
 4. Consequences of not performing the function
 5. Current work experience of incumbent in similar jobs
- 

REASONABLE ACCOMMODATION

- Generally employee requests
- Absent undue hardship accommodation must be provided
- Cannot refuse just because it involves some cost
- Must be reasonable

UNDUE HARDSHIP

- Significant difficulty or expense
- Considers the overall resources of the University
- Impact of the accommodation on the operations of the business
 - Disruption to other employees ability to work
 - You do not have to modify work hours if doing so would prevent other employees from performing their jobs

DIRECT THREAT

- Presents a significant risk to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation;
- If no accommodation exists which would either reduce or eliminate the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat;
- Direct threat determination must be based on reasonable medical judgment and/or best available objective evidence;



DIRECT THREAT

FACTORS FOR CONSIDERATION

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur;
and
4. The imminence of the potential harm;

PERFORMANCE STANDARDS

- Meet the same production standards
- Lowering or changing a production standard is not a reasonable accommodation

Practical Guidance:

- *Be clear about the quantity & quality of work to be produced*
- *Provide clear timetables for production*

PERFORMANCE STANDARDS

- Evaluate performance the same way you evaluate any other employee's performance

Practical Guidance:

- Accurate assessment of performance may alert the employee that his/her disability is contributing to a performance problem;
- This may lead the employee to request reasonable accommodation and improve performance;
- Both the employee and the employer benefits;


PERFORMANCE STANDARDS

Question:

Can a supervisor require that an employee with a disability perform a job in the same manner as a non-disabled employee?



Answer

- Not necessarily.
 - An essential function can be performed in different ways (including with reasonable accommodation).
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PERFORMANCE STANDARDS

Question

- If an employer gives a lower performance rating to an employee and the employee responds by revealing she or he has a disability that is causing the performance problem, may the employer still give the lower rating?

Answer

Practical Guidance:

- Clearly defined performance requirements
- Give the employee the Intake form and refer them to EOP

- Yes, continue with the performance rating
- The rating reflects the employee's performance regardless of what role, if any, disability may have played.

PERFORMANCE STANDARDS

Question

May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?

Answer

- No.
- You may not withdraw a reasonable accommodation as punishment for an unsatisfactory performance rating

CONDUCT STANDARDS

May I discipline an employee with a disability for violating a conduct standard?

Yes.

If an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees. In most instances, an employee's disability will not be relevant to any conduct violations.

CONDUCT STANDARDS

If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, if

- the rule is job-related
- consistent with business necessity
- all employees held to the same standard.

Then

- Disabled employee not protected from consequences

CONDUCT STANDARDS

What if an employee discloses a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?

- discipline the employee for the misconduct

If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.

CONDUCT STANDARDS

What if the conduct requires a disciplinary action less than termination?

- Assess the disability's relevance to the misconduct
- Give the employee the intake form and direct them to schedule an appointment with the Office of Equal Opportunity Programs.

CONDUCT STANDARDS

- You should never require an employee receive or change medication and/or treatment for a disability to comply with a conduct standard?
- Decisions about medication and treatment often involve many considerations beyond the employer's expertise.

ATTENDANCE STANDARDS

Employees with disabilities are entitled to whatever forms of leave the employer generally provides to its employees. This means that when an employee with a disability seeks leave under an employer's regular leave policy, he or she must meet any eligibility requirements for the leave that are imposed on all employees

ATTENDANCE STANDARDS

If requested, employers may have to modify the application of attendance policies as a reasonable accommodation, absent undue hardship.

ATTENDANCE STANDARDS

ADA may require an employer modify the application of time and attendance requirements as a reasonable accommodation; but you need not completely exempt an employee from:

- *time and attendance requirements,*
- *grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or*
- *accept irregular, unreliable attendance.*

ATTENDANCE STANDARDS

You do not have to grant indefinite leave as a reasonable accommodation

It can impose an undue hardship on an employer's operations.

ALCOHOL & ILLEGAL DRUG USE

- The ADA may protect a “qualified” alcoholic who satisfies the definition of “disability”.

- It may protect a recovered drug addict who is no longer using, but who satisfies the definition of “disability”

It does not protect the employee currently engaging in illegal use of drugs

ALCOHOL & ILLEGAL DRUG USE

An employee who is an alcoholic or who engages in the illegal use of drugs must meet the same standards

Poor job performance, or unsatisfactory behavior:

- absenteeism,
- tardiness,
- insubordination, or
- on-the-job accidents – related to an employee's alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

ALCOHOL & ILLEGAL DRUG USE

An employee whose poor performance or conduct is attributable to the **current illegal use of drugs** is not covered under the ADA.

An employee whose poor performance or conduct is attributable to **alcoholism** may be entitled to a reasonable accommodation, separate from any disciplinary action the employer chooses to impose and assuming the discipline for the infraction is not termination.

CONFIDENTIALITY

Respond that you do not discuss one employee's situation with another in order to protect the privacy of all employees.

MEDICAL INQUIRIES

ABSENT AN EMPLOYEE REQUEST FOR A REASONABLE ACCOMMODATION, WHEN MAY AN EMPLOYER OR REQUIRE AN EMPLOYEE TO SUBMIT TO A MEDICAL EXAMINATION?

1. It must be job related and consistent with business necessity;
2. You must have a reasonable belief based on objective evidence ; that
 - a) an employee will be unable to perform the essential functions of his or her job because of a medical condition; or
 - b) The employee will pose a direct threat because of a medical condition.

Is this Gattaca?

<http://www.youtube.com/watch?v=XSBBob7bSoQ&feature=related>

GINA AND THE ADA

- GINA prohibits discrimination on the basis of genetic information
- Restricts the collection of genetic information (including family medical history) by employers
- Can create double coverage under GINA and ADA “regarded as” prong