

What You Should Be Telling Your Managers About the ADA, But May Not Be

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What Managers Need to Know About the ADA

- The hiring process
 - What the manager can and can't ask
 - What if the disability is obvious or the applicant self-discloses?
 - Reasonable accommodation during the application process
- Qualification standards
 - What are qualification standards under the ADA, how are they often presented to applicants, and what role do hiring managers play?
- Managing an employee with a disability
 - What the manager can and can't ask
 - Privacy
 - Production standards
 - Conduct standards
 - Reasonable accommodations and the role of the manager



The Hiring Process

What does Jane do?

Jane is the VP of accounting for a mid-sized manufacturing firm. She is interviewing applicants for an accounts payable analyst. The job involves reviewing billing, preparing payable reports and spreadsheets on the computer, and occasionally auditing purchases for accuracy at the receiving docks. Sue comes in for her interview. She is seeing impaired, and she walks with probing cane. The interview process typically involves having the applicant work through various accounting situations. The scenarios are written on sheets of paper. The interview process also involves a tour of the manufacturing facility, which is very noisy and has many large fabricating machines operating at high speeds.

What is the one
thing most
managers
remember
about the ADA
and hiring?

- 1) Don't ask

What should
they know?

- o Applicants may need reasonable accommodations just to go through the hiring process
- o They can ask if an applicant needs an accommodation to go through the **hiring process**
- o But, at this stage can Jane ask about Sue's ability to do the **job**?

Pre-Offer/Pre-Employment Can't Ask!!

- o Do you have a disability? (Exception for federal contractors and subcontractors (§503 of Rehabilitation Act) and other compliance with federal affirmative action programs)
- o What is the nature of your disability/condition/disease?
- o How severe is your disability/condition/disease?
- o Have you ever been hospitalized?
- o Have you ever been treated for mental illness?

Pre-Offer/Pre-Employment Can't Ask!!

- o Have you ever been addicted to drugs?
- o Are you, or have you ever been an alcoholic?
- o Have you ever filed a worker's compensation claim or suffered an injury on a previous job?
- o Will you need time off for medical treatment or other reasons associated with your disability?
- o Will you need an accommodation to perform this job?

Pre-Offer/Pre-Employment Can Ask!!

- o Can you perform the job with or without an accommodation?
- o Are you currently using drugs illegally?
- o Do you drink?
- o How many days did you take off from work last year?
- o Will you be able to meet the requirements of our work hours, overtime work, attendance policy?
- o The employer may test the ability of all applicants to perform the duties of the job (must be job-related and consistent with business necessity), such as aptitude tests, agility tests, job demonstrations

Pre-Offer/Pre-Employment

- Employer may ask applicant if he or she needs a reasonable accommodation to go through the job application process
- If the impairment is obvious, or if the applicant self-discloses an impairment, and the employer has reason to believe the impairment may affect the person's ability to perform the job, then the employer may ask the applicant if he or she will need a reasonable accommodation to perform the job
- But, the employer cannot ask further questions about the nature of the impairment

Post-Offer/Pre-Employment

- At this stage the employer may make medical inquiries or require individuals to take medical exams as long as the same inquiries or exams are required of every individual in the same job category. They do not have to be job related or consistent with business necessity



Qualification Standards

The short cut

- John is the manager of the City's groundskeepers. He is hiring groundskeepers. HR gave him a job description and job posting which listed the requirements of the job. One of those requirements states that groundkeepers must be able to lift 40 lbs.
- Bob is interviewed. He has a back impairment that keeps him from lifting more than 20 lbs. John shows Bob the job description and asks him if he can perform all the tasks listed. Bob says, no. John no longer considers Bob a viable candidate for the position.

What Are Qualification Standards

- Qualification standards are the “personal and professional attributes including the skill, experience, education, medical, physical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q).
- Should be distinguished from “essential functions” –
 - Essential functions are what an employee does on the job (e.g., lifts and carries packages; sells things; repairs, builds, or assembles things; pursues criminal suspects).
 - Qualification standards are requirements that are supposed to predict whether someone can do the job’s essential functions.

Examples of Qualification Standards

- Having a high school, college, or professional degree
- Possessing a valid commercial driver's license
- Having a certain number of years of experience in performing similar work
- A good attendance record in a previous job
- A good credit history
- Achieving a certain score on an employment test
- Satisfactory completion of a drug or alcohol screen

What Does the ADA Say About Qualification Standards

- 42 U.S.C. § 12112(b)6) says discrimination includes –
 - “using qualification standards, tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be **job-related for the position in question and is consistent with business necessity; . . .**”
- *See also* 29 C.F.R. § 1630.10(a)

What Does the ADA Say About Qualification Standards

- **Job relatedness**
 - The qualification standard fairly and accurately measures the individual's actual ability to do the essential functions of the job.
- **Consistent with business necessity**
 - The standard "substantially promotes the business's needs."
- **Cannot be reasonably accommodated**
 - No reasonable accommodation currently available would cure the performance deficiency,

Essential Job Functions

- John looks through the job notices listed in the newspaper. He sees a warehouse position posted. The posting says that lifting 30 lbs. is a valid qualification standard of the position.
- Is the posting correct?

Tips for Managers

- Check the job postings that are given to hiring managers
- And since most postings are prepared in consultation with managers, verify all qualification standards listed are job related and consistent with business necessity.
- Don't let hiring managers take "the shortcut"
 - It denies applicants with disabilities access to the interactive process



Managing an Employee with a Disability

Post- Offer/Post- Employment

- At this stage medical exams and inquiries are allowed only if they are job related and consistent with business necessity.

Post- Offer/Post- Employment

- o If the employee is having difficulty performing job due to medical condition
- o Needed to assist in determining reasonable accommodation
- o Medical condition may pose a threat to employee or others
- o Must be based on objective evidence
- o No fishing
- o Random drug testing ok

Medical Information

- o Must be kept confidential and out of personnel files
- o Only limited access
- o Supervisors and managers related to accommodation request
- o First aid personnel
- o ADA investigations, insurance carrier, workers compensation

Medical Information and Confidentiality

- A hair stylist, who has been unable to eat regularly because he is undergoing chemotherapy for melanoma, has lost 30 pounds. His co-workers and other clients are gossiping about whether he is HIV-positive or has AIDS.
- What do you do?

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 for 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 the problem

Performance Standards

- Employers establish job-related requirements
 - These include specific tasks or assignments
 - You may also designate critical and non-critical elements
- Employers establish methods to evaluate job performance

Performance Standards ADA

- Employee with a disability must meet the same performance standards as other employees in the same position
- “Production standards” refer to both
 - Quantitative Standards (e.g., produce 10 reports/month)
 - Qualitative Standards (e.g., annual performance review)
- Reasonable accommodation never requires lowering a production standard but may require accommodation to meet the standard

Scenario

- Company requires its sales staff to complete 10 sales each week. Jody's disability is worsening and causing increased fatigue, which in turn causes her increasing difficulty in meeting this standard. Jody's other job duties include training and contributing articles to a company newsletter.
- Can the company require Jody to complete 10 sales each week?
- What reasonable accommodations MAY be possible?

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
a medical condition
in response to a
lower performance
rating (or supervisor
raising a
performance
problem)

- Don't fixate on the medical condition/disability!
 - Focus should remain on why the employee earned the lower performance rating, or the nature of the performance problem, and what employee must do to improve performance
- BUT: In response to employee raising a medical condition, employer can (and should) inquire whether employee is asking for reasonable accommodation to help him/her improve performance

How to Have the Conversation (Performance and Reasonable Accommodations)

- Most employers are reluctant to talk to persons with disabilities about their impairments.
- When a person with a disability has a performance problem, most employers assume the problem has something to do with the disability.

Employee asks for
reasonable
accommodation in
response to a lower
performance rating
or supervisor raising a
performance
problem

- Acknowledge the request and state that you will address this issue with the employee
 - if reasonable accommodation required it will be provided
 - BUT remind employee she will need to address the performance problem, with or w/o reasonable accommodation
- Begin “interactive process” immediately in response to request for accommodation, pursuant to your company’s procedures
 - 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 is rarely relevant

When Disability Causes/Contributes to Misconduct

- An employer may apply a conduct standard to an employee with a disability, and administer appropriate discipline for violation of that standard, if the conduct standard 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 respectful treatment of clients, customers, and the public
- Prohibiting inappropriate behavior between coworkers
- Prohibiting alcohol/illegal drug use on agency premises

Ambiguous Conduct Rules: These May or May Not Meet the Business Necessity Test

Concern about saying all such rules are ok under the ADA. Act is that they may allow a manager to apply ad hoc rules that apply, essentially, only to the employee with a disability (eye of the beholder)

Prohibiting “disruptive” behavior: What do you consider disruptive?

Factors to consider:

- Specific conduct at issue
- Symptom of disability affecting conduct/Frequency of symptom
- Nature of job/work environment

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)

- Sue, who is blind, has been working as a customer service representative for ABC, Inc. for six months. ABC modified her workstation with devices designed to help Sue to have full access to her computer and be able to perform all the essential functions of her job. So, when Sue started coming into work late nearly every morning, Ben, her supervisor, did not know what to do. Considering all she had been through, confronting her about being late, seemed trivial to Ben. He felt uncomfortable about bringing it up to Sue.

What should Ben do?

- Speak with Sue and give her an honest appraisal of her performance
- Listen for any reasonable accommodation requests
- Identify obvious needs for reasonable accommodations
- If reasonable accommodation is requested or if need is obvious, bring situation to the attention of the appropriate person in HR to begin interactive process
 - Identify essential job functions
- Hold Sue accountable for her performance, consistent with past practice

- Ben consulted with Helen, the diversity manager, and she told Ben to not say anything and just consider it an accommodation. Sue continued to come in late. Once she got to work, her performance was above average.

What did Ben do wrong?

- Didn't give Sue a fair appraisal of her work performance
- Didn't contact HR and advise them that he is now giving Sue an additional accommodation
- Violated Sue's privacy but discussing Sue's disability/possible accommodation with Helen
- Didn't correct the performance issue

- However, Hannah, one of her co-workers, began to notice that Ben never said anything to Sue when she was late but was quick to point it out when Hannah was late. Hannah complained to Ben about the unfairness of the double standard.

How could Ben
mess up even
more than he
already has?

- Please, please Ben, don't further violate Sue's privacy...

- Ben told Hannah that allowing Sue to be late was a form of reasonable accommodation. Hannah challenged Ben to explain what being blind had to do with not being able to get to work on time.

Top reason for
promoting
Hannah to
Ben's soon to
be vacant
position

- Hannah has a better understanding of the ADA than Ben does

- After that incident, every time Sue was late, Ben became more agitated. Finally, one morning Sue was over thirty minutes late and Ben simply exploded. Sue was surprised and confused. She stated that the bus she takes to work changed its schedule recently and now leaves 20 minutes later than it had.
- Ben stated that he won't discuss any additional accommodations until Sue starts coming to work at her scheduled time. Sue then filed a Charge of Discrimination with the EEOC. Betty, head of HR, announced that she will personally investigate the matter. Hannah updated her resume and is considering how she will redecorate Ben's old office.

Tips for managing employees who have disabilities

- 1) **Be fair and well meaning**
 - This goes a long way
- 2) **Don't assume poor performance is always connected to disability, but also be aware of obvious accommodation needs**
 - Find an objective balance (see tip #1)
- 3) **Be honest, fair and consistent in appraisal of work**
- 4) **Keep confidential information confidential**
- 5) **Do not handle reasonable accommodation requests yourself**
 - That's what HR is for
- 6) **Remember that accommodations can often change**
 - Don't draw lines in the sand
 - When in doubt, start the interactive process



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