

September 2023 | VOL. 15 NO. 5

@work™

Official Publication of Disability Management Employer Coalition

A woman with glasses and a ponytail is seated in a wheelchair at a white desk in a bright office. She is focused on her laptop, which displays a bar chart. In the background, other office workers are visible at their desks. The scene is well-lit with large windows.

**Americans with
Disabilities Act**



AT THE CROSSROADS OF PERFORMANCE MANAGEMENT AND DISABILITY: USING THE RIGHT TOOL FOR THE JOB

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Managing performance issues at work can be challenging, and many managers say it can be an emotional or painful process. It gets more difficult when an employee states the performance deficiencies are due to a disability. Frustration on the part of the supervisor often ensues. Sometimes when an employee makes this claim, a supervisor immediately sees the missing link with what has been occurring with the employee at work. But other times, the claim may sound like an excuse to shield the employee from being held accountable.

Whether this claim comes at the beginning or in the eleventh hour of counseling, the employer must pause discipline and begin the Americans with Disabilities Act (ADA) interactive process. It is during this process that the employer can confirm or deny whether a disability really did have an effect on the employee's job performance.

Getting Started

The key to employing the interactive process in the face of disciplinary issues is twofold:

- Pinpoint performance deficiencies or issues the employee attributes to the disability.
- Obtain data from a healthcare provider to support and clarify the claim made by the employee.

Begin by having an open and honest conversation with the employee. Do not presume you know which performance issues are linked to a claimed disability (if there is more than one). If six performance areas are identified, have a conversation with the employee to understand which of these areas the employee believes have been affected by the disability. Any issues not attributed

to a disability can continue to be managed using performance management tools.

Once the performance areas that the employee believes to be related to the disability have been identified, prepare and send a detailed medical questionnaire to the employee's healthcare provider to understand:

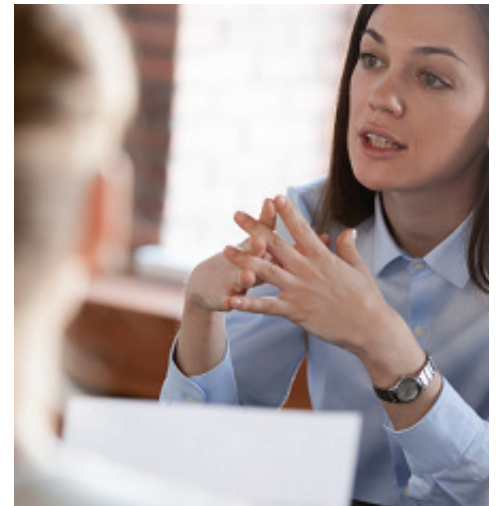
- if the employee has a disability that is covered by the ADA;
- if so, whether the specific performance areas were affected by the disability; and
- what underlining work restrictions or functional limitations caused the performance issues.

The questionnaire should ask detailed yes or no questions. For example, it should ask explicitly about an ability to communicate about and meet deadlines:

ABILITY TO COMMUNICATE MISSED DEADLINES

Does your patient have a medical condition that makes them unable to realize when they are behind schedule on a project?

- My patient does not have a medical condition that would impact the ability to know when they are behind schedule on a project.
- My patient has a medical condition that would impact the ability to know when they are behind schedule on a project. Their disability causes the following work restrictions/functional limitations. Please be as specific as possible in your response.
- I am not treating this patient for a condition that would allow me to answer this question.



ABILITY TO MEET DEADLINES

Does your patient have a medical condition that makes them unable to meet deadlines?

- My patient does not have a medical condition that would impact their ability to meet deadlines.
- My patient has a medical condition that would impact their ability to meet deadlines. Their disability causes the following work restrictions/functional limitations. Please be as specific as possible in your response.
- I am not treating this patient for a condition that would allow me to answer this question.

Next Steps

If the questionnaire is not returned and no medical documentation is submitted to support a disability, close the interactive process and continue with performance management.

If the questionnaire is returned and indicates the employee has a disability, then the employer should schedule a meeting with the employee to discuss and explore reasonable accommodations

that, if implemented, would fully mitigate the negative performance matter to help the employee meet performance expectations. Additionally, if the questionnaire is returned, but the employer is concerned the information is inaccurate or illogical, the employer can use a fitness-for-duty (FFD) process to obtain objective data and answers to the questions listed above.

The need for reasonable accommodations does not allow an employee to violate a workplace rule, as noted by the Equal Employment Opportunity Commission.¹ And the ADA notes that an organization may hold employees — those with and without disabilities — to the same performance and conduct standards.

The key is that employers have to use the right tool to try and remedy the issues.

Performance management and the interactive process have the same goal: to help employees be successful whenever possible. The key is to use the right tool. If a disability is the reason an employee was not meeting performance standards then employers will be expected to seek reasonable accommodations to help disabled persons succeed. The ADA does not require employers to accept lower levels of performance or allow employees to violate work rules. But if employers are aware that a performance issue could be related to a disability, they must begin the interactive process.

Case Study

The following example illustrates the value of using the appropriate tool. Sanvi Smith (name changed) was being counseled for performance. During this process, Smith indicated

that the deficiencies were due to a psychological disability and provided a medical note. At this point, disciplinary actions were paused, and the interactive process began.

First, Smith's personal medical provider was asked to complete an in-depth questionnaire to help the employer understand if Smith had a serious medical condition that affected her ability to meet performance expectations. The medical information requested was not protected health information and it was needed to help the employer understand if Smith had an ADA-covered disability. And, if she did, to clarify the work restrictions and functional limitations that may have caused her performance deficiency.

Subsequently, the parties were informed the personal medical provider would not complete the questionnaire. Since the provider was not able to provide clarifying information, the employer had two choices: Close the interactive process as the employee's claims were not substantiated or proceed with the process and use a third-party provider to gather the requested information. The employer chose to direct Smith to obtain a third-party fitness for duty (FFD) examination. The FFD examiner determined that though Smith had a disability, it would not have caused the performance deficiencies for which she was being disciplined. She was determined not to have any work restrictions. Smith was informed of these findings, her interactive process was closed, and her performance management process was restarted.

Sometimes an employee's performance is caused at least partially by a disability. In these cases, employers should identify accommodations that one or both parties believe will mitigate the negative performance or behavioral issue and start trial accommodations. If the trial is successful in improving performance, the accommodations should continue. If the trial reasonable accommodations plan fails and performance or behavior standards are still not met, alternative accommodations can be explored or a leave of absence may be appropriate while the alternative work search process begins.

In the end, the guidance employers get from the ADA and the courts is clear. If an employee is unable to meet performance or behavior standards and there is no way to mitigate the negative performance or behavior, the employee can be terminated. The key is that employers have to use the right tool to try and remedy the issues. For persons who are not disabled, the right tool is performance management or discipline for cause. For persons who are failing to meet performance standards due to a disability, the right tool is the interactive process.

If a disability cannot be reasonably accommodated to support successful performance in the employee's job or in an alternative position, the employee would be terminated without cause. Using the right process is essential to support employees and to protect employers from liability in these cases.

REFERENCES

1. Equal Employment Opportunity Commission. Applying Performance and Conduct Standards to Employees with Disabilities, U.S. Retrieved from <https://www.eeoc.gov/facts/performance-conduct.html>