

Applying Performance Standards to Employees with Disabilities

1. May an employer apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that it applies to employees without disabilities?

Yes. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation. However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard.

Practical Guidance: It is advisable for employers to give clear guidance to an employee with a disability (as well as all other employees) regarding the quantity and quality of work that must be produced and the timetables for producing it.

Example: A computer programmer with a known disability has missed deadlines for projects, necessitating that other employees finish his work. The employee is placed on a Performance Improvement Plan, but his performance does not improve and he is terminated. At no time does the employee request a reasonable accommodation (i.e., inform the employer that he requires an adjustment or change as a result of a medical condition). The termination is justified as long as the employer holds the employee to the same performance standards as other programmers.

2. May an employer use the same evaluation criteria for employees with disabilities as for employees without disabilities?

Yes. An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.

Practical Guidance: An accurate assessment of the employee's performance may, in some cases, alert the employee that his disability is contributing to the problem. This may lead the employee to request reasonable accommodation to address the problem and improve performance, which can benefit both the employee and the employer.

Example: Last year Nicole received an "above contributor" rating at her annual performance evaluation. During the current year Nicole had to deal with a number of medical issues concerning her disability. As a result, she was unable to devote the same level of time and effort to her job as she did during the prior year. She did not request reasonable accommodation (i.e., inform the employer that she requires an adjustment or change as a result of a medical condition). The quantity and quality of Nicole's work were not as high and she received a "contributor" rating. The supervisor does not have to raise Nicole's rating even though the decline in performance was related to her disability.

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

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

4. What should an employer do if an employee requests an accommodation for the first time in response to counseling or a low performance rating?

When an employee requests a reasonable accommodation in response to the employer's discussion or evaluation of the person's performance, the employer may proceed with the discussion or evaluation, but should also refer the employee to the Office of Fair Practices (OFP) to begin the "interactive reasonable accommodation process." OFP will discuss with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it.

OFP may request appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem. The employer may also suggest possible accommodations.

When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

- tolerate or excuse the poor performance;
- withhold disciplinary action (including termination) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance.

Example: Odessa does not disclose her learning disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels Odessa about them. At this point, Odessa discloses her disability and asks for a reasonable accommodation. The supervisor denies the request immediately, explaining, "You should not have waited until problems developed to tell me about your disability." Odessa's delay in requesting an accommodation does not justify the employer's refusal to provide one. If a reasonable accommodation will help improve the employee's performance (without posing an undue hardship), the accommodation must be provided.

Practical Guidance: An employer may need to determine what happens to an employee while it is handling a request for accommodation. For example, an employer might require an employee to perform only those functions of the job for which accommodation is not needed while processing the request. In other situations, it may be appropriate for an employee to take leave.

5. 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?

No. An employer may not withdraw a reasonable accommodation as punishment for the unsatisfactory performance rating. Simply withdrawing the telework arrangement or a modified schedule is no different than discontinuing an employee's use of a sign language interpreter or assistive technology as reasonable accommodations.

Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation is not working. The employer can proceed with the unsatisfactory rating but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation.

Information for this fact sheet is excerpted from guidance prepared by the Equal Employment Opportunity Commission at <https://www.eeoc.gov/facts/performance-conduct.html>.

For additional information, contact the Office of Fair Practices at 703-323-3284 or ada@nvcc.edu.