



ADA: Frequently Asked Questions (3)

Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](https://www.mtas.tennessee.edu)). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

Table of Contents

ADA: Frequently Asked Questions (3).....	3
--	---

ADA: Frequently Asked Questions (3)

Reference Number: MTAS-1080

Q22. 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. If the reasonable accommodation is not assisting the employee in improving his performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted. (Source: www.eeoc.gov [1])

Q23. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability. The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Similarly, employers may prohibit insubordination toward supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:

- prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work);
- prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (e.g., pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work; and
- require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts); and prohibit drinking or illegal use of drugs in the workplace.

Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be especially critical when the violation concerns "disruptive" behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable. The following examples illustrate how different results may follow from application of these factors in specific contexts.

Example A: Steve, a new bank teller, barks, shouts, utters nonsensical phrases, and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve and he explains that he has Tourette Syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics sufficiently during the job interview, he cannot control them throughout the work day; nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more

complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.

Example B: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics that do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

Example C: Assume that Steve has all the severe tics mentioned in Example A, but he now works in a noisy environment, does not come into contact with customers, and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers. Steve's condition would not necessarily make him unqualified for a job in this environment.

Example D: A telephone company employee's job requires her to spend 90 percent of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful toward coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example E: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself. (Source: www.eeoc.gov [1])

Q25. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?

If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still 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. If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct, or if the employee thinks there is an accommodation that could help her avoid future misconduct. If an accommodation is requested, the employer should begin an "interactive process" to determine whether one is needed to correct a conduct problem, and, if so, what accommodation would be effective. The employer may seek

appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting the employee's conduct, and what accommodations may address the problem.

Employers cannot refuse to discuss the request or fail to provide reasonable accommodation as a punishment for the conduct problem. If a reasonable accommodation is needed to assist an employee with a disability in controlling his behavior and thereby preventing another conduct violation, and the employer refuses to provide one that would not cause undue hardship, then the employer has violated the ADA.

Example A: Tom, a program director, has successfully controlled most symptoms of his bipolar disorder for a long period, but lately he has had a recurrence of certain symptoms. In the past couple of weeks, he has sometimes talked uncontrollably and his judgment has seemed erratic, leading him to propose projects and deadlines that are unrealistic. At a staff meeting, he becomes angry and disparaging toward a colleague who disagrees with him. Tom's supervisor tells him after the meeting that his behavior was inappropriate. Tom agrees and reveals for the first time that he has bipolar disorder. He explains that he believes he is experiencing a recurrence of symptoms and says that he will contact his doctor immediately to discuss medical options. The next day Tom provides documentation from his doctor explaining the need to put him on different medication, and stating that it should take no more than six to eight weeks for the medication to eliminate the symptoms. The doctor believes Tom can still continue working, but that it would be helpful for the next couple of months if Tom had more discussions with his supervisor about projects and deadlines so that he could receive feedback to ensure that his goals are realistic. Tom also requests that his supervisor provide clear instructions in writing about work assignments as well as intermediate timetables to help him keep on track. The supervisor responds that Tom must treat his colleagues with respect and agrees to provide for up to two months — all of the reasonable accommodations Tom has requested — because they would assist him to continue performing his job without causing an undue hardship.

Practical Guidance: Ideally, employees will request reasonable accommodation before conduct problems arise, or at least before they become too serious. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including termination) warranted by misconduct. Employees should not assume that an employer knows that an accommodation is needed to address a conduct issue merely because the employer knows about the employee's disability. Nor does an employer's knowledge of an employee's disability require the employer to ask if the misbehavior is disability-related.

Example B: An employee informs her supervisor that she has been diagnosed with bipolar disorder. A few months later, the supervisor asks to meet with the employee concerning her work on a recent assignment. At the meeting, the supervisor explains that the employee's work has been generally good, but he provides some constructive criticism. The employee becomes angry, yells at the supervisor, and curses him when the supervisor tells her she cannot leave the meeting until he has finished discussing her work. The company terminates the employee, the same punishment given to any employee who is insubordinate. The employee protests her termination, telling the supervisor that her outburst was a result of her bipolar disorder which makes it hard for her to control her temper when she is feeling extreme stress. She says she was trying to get away from the supervisor when she felt she was losing control, but he ordered her not to leave the room. The employee apologizes and requests that the termination be rescinded and that in the future she be allowed to leave the premises if she feels that the stress may cause her to engage in inappropriate behavior. The employer may leave the termination in place without violating the ADA because the employee's request for reasonable accommodation came after her insubordinate conduct. (Source: www.eeoc.gov [1])

Q26. May an employer ask a pregnant employee to sign a waiver to release the employer of liability when she works in positions that carry potential risks to the fetus?

No. According to the LSU Law Center, a woman may not absolve the employer of this liability by signing a waiver because the right to compensation belongs to the baby — not to the mother.

For additional information about ADA, contact:

ADA Information Line
U.S. Department of Justice

For ADA publications and questions:

800-514-0301 (voice) 800-514-0383 (TTY)
www.ada.gov [2]

U.S. Equal Employment Opportunity Commission

For publications
800-669-3362 (voice) 800-800-3302 (TTY)

For questions
800-669-4000 (voice) 800-669-6820 (TTY)
www.eeoc.gov [1]

Links:

[1] <http://www.eeoc.gov>

[2] <http://www.ada.gov>

DISCLAIMER: The letters and publications written by the MTAS consultants were written based upon the law at the time and/or a specific sets of facts. The laws referenced in the letters and publications may have changed and/or the technical advice provided may not be applicable to your city or circumstances. Always consult with your city attorney or an MTAS consultant before taking any action based on information contained in this website.

Source URL (retrieved on 06/04/2020 - 1:42pm): <https://www.mtas.tennessee.edu/reference/ada-frequently-asked-questions-3>



Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE