


A Deeper Look at the ADA

Advanced Workshop on the Interactive Process,
Reasonable Accommodation, and the Mysterious
"Undue Hardship"

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SPOT THE DIFFERENCE!

Is this a performance issue or a disability?

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Lights! Camera! Discipline?

Anita is a public relations specialist for Banana County. Her job requires expertise in multi-media communications, creative marketing, and digital media.

It is a creative position. She needs to come up with new, spicy ideas to keep the County looking fresh.



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Lights! Camera! Discipline?

Unfortunately, Anita suffered a brain injury during a recent rock-climbing vacation. She was out for a while but now she's back at work. Anita's supervisor allowed her some time to get back on her feet, but it's been two months and Anita's work is still not at the required level.

**The supervisor wants your advice on what to do.
What do you suggest?**



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Options To Consider



Work plan?



Discipline?



Other?

What would you want to know from the supervisor?

What are the pros and cons of each option?

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Ready For a Close Up

One of the main issues with Anita's performance is that she lacks creativity. She keeps reusing old promotional materials. Anita waits for co-workers to give feedback on her work and then incorporates their ideas into her work product, taking credit for their ideas. Anita also used a co-worker's publicity video and tried to pass it off as her own.

**You and the supervisor decide to meet with Anita.
What do you ask her?**




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Ready For a Close Up

Anita blames her performance issues on her brain injury. She says she has headaches and difficulty sleeping which makes it difficult for her to concentrate and she gets confused easily.

What is your next step?



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What if....


Does your next step change if:

- **Anita's** performance issues predated her accident and brain injury?
- If the video that **Anita** tried to pass off as her own was copyrighted material from a County in Georgia?

If yes, how so?




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What if....

The County provides **Anita** with all of the accommodations recommended by her doctor, but her performance doesn't improve. Her supervisor's patience is wearing very thin.

What are your next steps now?




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Have You Identified?



Essential Job Functions
Can you articulate the responsibilities of Anita's job? Can you identify the essential functions of the job and that she must be able to do? What would you use to support your conclusions?



Performance Expectations
What are the standards for Anita's performance? Have they been communicated to Anita? What evidence do you have to support your conclusions?




Impact of Impairment on Performance
Do you have evidence to support the relationship between Anita's impairment and her performance?



Good Faith Accommodation Efforts
Has the County taken multiple steps to try to accommodate Anita?





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LEGAL WRAP-UP



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Listen carefully!

Is the employee saying things to you or her co-workers about not being able to work, having difficulty working, not sleeping, etc.?

What to listen for: Any physical or mental condition (or a side effect) that impacts performance.

If not, consider proceeding to discipline based on performance issues.



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The rule on "accommodating" poor performance:

Evaluate employee job performance uniformly – everyone is held to the same standard.



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But what if...?

What if the employee gets a bad evaluation and states that the performance problem was caused by a disability?



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On the other hand...

If we know that performance problems started only after an accident or medical condition developed, playing "blind" won't likely create good optics for a jury, the EEOC, etc.



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What about misconduct at work?

An employer may discipline/fire an employee with a disability for violating a conduct standard if the disability does not cause the misconduct.

Examples:
Weaving v. City of Hillsboro (2014)
Mayo v. PCC Structural, Inc. (2015)



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Is it Okay to Fire...

- An anesthesiologist falls asleep during surgical procedures?
- A manager who slaps a co-worker's hand during an angry confrontation?



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**BOTTOM
LINE**



Every employee's situation needs to be judged on a case-by-case basis.



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WHEN IT LOOKS IMPOSSIBLE, LOOK AGAIN!

Getting to Undue Hardship

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Well, that stinks!

Tony is a waste water operator for the City of West Benning. He has a circulatory condition that causes complications like fatigue, light headedness, weakness of legs, increased infection and open sores. He needed surgery and used his 12 weeks of OFLA.

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Well, that stinks!

A week before Tony is scheduled to return to work, he contacts you and says he needs another month off work. You grant this request. A month goes by and he asks for another month off. With your inside voice, you think, "Seriously?"

What factors will you consider in determining how to respond to his request?

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Factor in the Following



Practical

Consider the issues specific to this employee, their job, and their Department that impact the accommodation request.



Structural

Consider the City-wide issues that come into play; applicable or contradictory policies and comparators.



Global

Consider the 10,000-foot view on this issue. What decision would be fair, logical, defensible?

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Well, that stinks!

While you're working through these factors and engaging in the interactive process with Tony, the Department Head is getting impatient and frustrated. He sees the writing on the wall – Tony isn't coming back. The Department Head wants to post the position.

What will you tell him?



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Well, that stinks!

Now the City Council is involved. They notice that there has been no progress on some of the pending projects and they want to know why.

What will you tell the City Council?

What if they want to know when work will start again?



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The hardship!





After full review, the City has determined it cannot give **Tony** more time off. He's already been out for 16 weeks and it's a small department, after all.

The City can fire him, right?



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But Did You Consider?

-  **Assistive Equipment**
Can Tony do the job if he's given the appropriate gear? What if necessary gear is expensive?
-  **Reassigning Non-essential Duties**
Are the parts of Tony's job that he cannot do essential? Can they be reassigned?
-  **Transitional Duty**
Could Tony complete a light-duty (gulp) capacity and work back up to 100%?
-  **Alternative Positions**
Is there another position in that Department or at the City in general that is available and for which Tony is qualified?

DOCUMENTED???

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The miracle!

Throughout all these interactive conversations, **Tony** has seen the writing on the wall. He's been heard telling co-workers he's going to be fired. He brings a note from his doctor saying he's released to full duty.

What do you do?



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What is an “undue hardship”?

Something that requires “significant difficulty or expense.” Consider (among other factors):

- The nature and the cost of the accommodation needed
- The financial resources of **the employer** and the effect on expenses and resources or other impacts on the operation of the employer caused by the accommodation

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Leave as a “Reasonable Accommodation”

Neither the law nor the courts tell employers how much time must be given to an employee with a disability who can’t work.

- Sixth Circuit Court of Appeals: Six months
- Ninth Circuit Court of Appeals: One month, six months, twelve months, etc.

- But: Courts and the EEOC look down on employers who have “maximum leave” policies or practices

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Leave as a “Reasonable Accommodation”

When an employee like Tony asks for time off after an OFLA/FMLA leave, have a conversation with the employee. Topics:

- Why do you believe you can't return to work?
- What has your doctor told you?
- Can you perform any of your duties?
- Can you do any work? (What is the extent of your limitations?)
- How long do you expect to need off?



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Leave as a “Reasonable Accommodation”

When an employee like Tony asks for time off after an OFLA/FMLA leave:

- Ask for medical verification in support of the employee's request for time off. Key information needed: How much time off is needed?
- Discuss how the leave will impact his health benefits (typically, no coverage)
- Discuss what message you would like to send to other employees about the employee's absence



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Leave as a “Reasonable Accommodation”

When does leave under the ADA become an undue hardship?

- Unless you're a really small employer, some time off will likely need to be granted
- Consider the duration of the request (fixed amount of time versus “indefinite”)
- Consider the financial impacts of the request
- Consider the logistical impacts of the request



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Well, that stinks, too!

None of these laws allow an employer to consider whether an employee's time off is an "undue hardship:"

- Sick leave
- OFLA/FMLA leave
- Time-loss leave (workers' compensation)
- Oregon's upcoming paid leave law

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Documenting the Interactive Process (Internal)

- Description of **disability history** (when the employer learned about it, what the employee has said about it, including what limitations are imposed, and whether medical information was received)
- **Dates** of conversations and meetings
- Description of **accommodations considered** by the employer (show that you were thinking outside of the box) and why those accommodations were rejected.

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Documenting the Interactive Process (Internal)

- Description of **accommodations suggested by the employee** and whether accepted (if not, explain why)
- Description of **accommodations suggested by the employer** and whether accepted
- Identification of **written communications** with employee about accommodation requests and interactive process discussions

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Accommodation Work Plan (With Employee)

- **When** the employee brought the limitations to the employer's attention and **what information, if any**, the employee provided about why the limitations are required
- **Dates** of interactive process discussions
- **What accommodations were proposed** by both employee and employer and a description of what was discussed



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Accommodation Work Plan (With Employee)

- A description of what **accommodations will be provided** to the employee
- Any **other instructions** the employee must follow (e.g., if his/her situation changes, if he/she can't perform a duty)
- A **date for a follow-up** progress meeting

See CIS Toolbox for a sample Accommodation Work Plan!



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ARE YOU SEEING WHAT I'M SEEING?

When do performance issues warrant a
fitness for duty examination?

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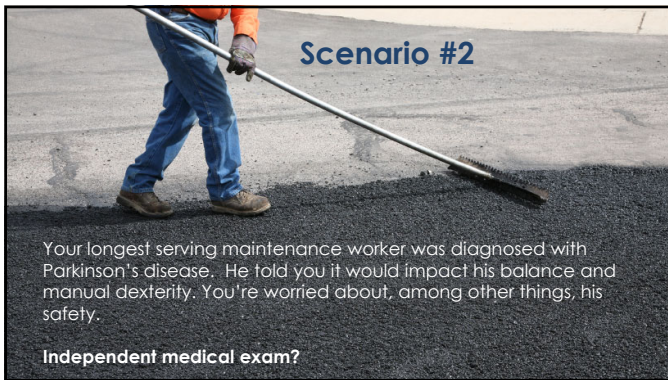
Scenario #1

A bus driver for the City came back recently from leave after a back surgery. He's gotten into two accidents – minor fender benders – since his return. When you address this, he says he's having leg spasms.

Independent medical exam?



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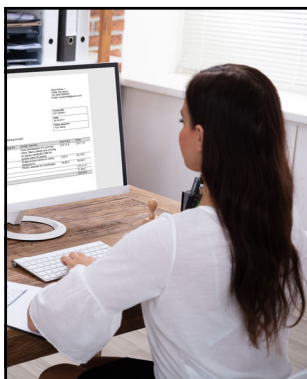


Scenario #2

Your longest serving maintenance worker was diagnosed with Parkinson's disease. He told you it would impact his balance and manual dexterity. You're worried about, among other things, his safety.

Independent medical exam?

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Scenario #3

Your Payroll Specialist keeps making mistakes. She doesn't pay attention to details or double check her work before its submitted. One of the Payroll Specialist's co-workers went to high school with her and reports that she has ADHD.

Independent medical exam?




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Scenario #4

A police officer is going through a divorce. He mopes around and lashes out at anyone who tries to engage him in conversation. Lately, he's been driving to an unknown location and hiding out while on shift. His divorce is making him depressed and you're worried about what he might do.

Independent medical exam?



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LEGAL WRAP-UP




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Fitness-for-Duty Exams (FFD): **When**

1) When the employee's ability to perform job functions comes into question

- Requires an employer's "reasonable belief" based on objective evidence obtained prior to the FFD.



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**When does an employer have a
“reasonable belief”?**

- Has the employee said something about his inability to do some task or assignment?
- Does the employee lament that she's just not thinking clearly these days (or similar comments)?
- Have other employees complained that an employee keeps asking them to do things that were assigned to that employee?
- Have YOU seen something?



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When does an employer **NOT have a
“reasonable belief”?**

- When the evidence comes from a co-worker who expresses concern about another employee's health.
- When you think back to what your uncle experienced and know that this employee is going through the same thing.
- When you recall that article you read during a Google search that said . . .



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When does an employer **NOT have a
“reasonable belief”?**

- When you know, just know, that if this employee continues to drive, he's going to get in an accident.
- When you suspect a medical condition exists and justifies a FFD (but only reached this conclusion after there was no “just cause” to fire the employee).



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Fitness-for-Duty Exams (FFD): **When**

2) When the Employer believes that the Employee Poses a Safety Risk

- There must be a **significant risk of substantial harm** to self or others that cannot be reduced or eliminated through **reasonable accommodation**
- Determination relies on best available **objective evidence**
- An **individualized assessment** is required, and typically requires medical verification



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Quick Hit #1

Shell v. Burlington Northern Santa Fe Railway Co. (7th Cir. 2019)

- Employer's concerns about future medical issues relating to applicant's obesity justified not hiring him.
- ADA does not provide protection against concerns over development of future disabling medical conditions.



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Quick Hit #2

Clark v. Champion National Sec., Inc. (5th Cir. 2020)

Employee's discharge for falling asleep at work in violation of policy requiring employees to remain "alert" was not discriminatory.

- Court rejected employee's argument that being fired before he could request an accommodation for his disability was discriminatory.



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Quick Hit #3

Benson v. Tyson Foods, Inc. (5th Cir. 2018)

Employee with workers' compensation injury (broken ankle) not "disabled" for purposes of ADA.



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Thank you!

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