

Questions from Employer TA Center Webinar:

Accommodating Employees with Mental Health Disabilities in Higher Education

Date: April 23, 2015

The following are questions received during this webinar that time did not allow panelists to answer.

Q: There were a lot of suggestions of a flexible work schedule as an accommodation. What if the employee is in a position that requires them to be at work to answer telephones and greet visitors?

A: Similar to any other request for accommodation, the outcome will depend on the individual's needs *and* the essential functions of the job. If you are unsure whether or not a flexible work arrangement would be appropriate for a specific job description, please contact the Job Accommodation Network (JAN) at AskJAN.org or 1-800-526-7234 (Voice), 1-877- 781-9403 (TTY). One of JAN's specialists can speak with you about your particular situation and offer strategies for a successful outcome for all parties. In addition, you might want to read guidance the Equal Employment Opportunity Commission (EEOC) has published for employers related to modified or part-time schedules at <http://www.eeoc.gov/policy/docs/accommodation.html#modified>.

Q: I work for a State government agency in the Executive Branch. We tried to get a central fund to pay for interpreter services, but were not successful. Do you have suggestions on how to establish a centralized fund?

A: The Job Accommodation Network (JAN) has published information about best practices in establishing a Centralized Accommodation Fund at <http://askjan.org/enews/2015/Enews-V13-11.htm#1>. Furthermore, in April of this year, the Federal Disability Workforce Consortium hosted a webinar on the topic; the archive of this webinar can be viewed at <https://efedlink.org/allqual/event-info.cfm?ID=592>.

Q: A receptionist has been diagnosed with depression. Supervisor is concerned with how she interacts with clients, i.e. not friendly, negative, low energy. How would the supervisor accommodate this request when it is expected to be warm, friendly, etc.?

A: Assuming there is an actual accommodation request by the employee in question, it is recommended that the employer engage in an "interactive process," which simply means that the employer and the employee with a disability work together to devise an effective solution. You can read more information about the interactive process from the Job Accommodation Network at <http://askjan.org/topics/interactive.htm>. Regardless of the situation, the

conversation should focus on job performance and/or conduct standards, not the disability. Keep in mind, though, that terms such as “warm” and “friendly” are not necessarily good descriptors of behavior, since they can mean different things to different people. Rather, consider things such as: Has the supervisor received any complaints? Has the employee’s performance changed since the diagnosis? Is it possible now that the supervisor knows about the diagnosis, he/she is biased and/or picking up on things that wouldn’t have been recognized before? These are all questions that should be addressed. But, since every situation is different, it would be prudent to contact JAN to speak with an accommodations specialist, who can guide the employer through the necessary steps to determine if this situation is an accommodation issue or perhaps simply a poor job match. JAN can be reached at AskJAN.org or 1-800-526-7234 (Voice), 1-877- 781-9403 (TTY).

Q: I am having a hard time determining what is truly an essential function of a job versus what should be modified as an accommodation.

A: Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing).

Factors to consider in determining if a function is essential include:

- Whether the reason the position exists is to perform that function,
- The number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- The degree of expertise or skill required to perform the function.

Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job would be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- The actual work experience of present or past employees in the job,
- The time spent performing a function,
- The consequences of not requiring that an employee perform a function, and
- The terms of a collective bargaining agreement.

For more information on essential job functions and job descriptions, please see the Job Accommodation Network’s (JAN) *Accommodation and Compliance Series: Job Descriptions* at <https://askjan.org/media/jobdescriptions.html>.

Q: I work at a state licensing agency. Where can I find information on how not to discriminate against licensing applicants when reviewing negative information in past work history based on

their past history. I mean "based on their disability" (based on past history), which may or may not have been "resolved" via medication or treatment.

A: The Americans with Disabilities Act (ADA) prohibits discrimination against *qualified individuals with disabilities*. An "individual with a disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment or is regarded as having such an impairment. "Qualified" means the person satisfies the job-related requirements of the position he or she holds (or is applying for) and can perform its essential functions, with or without a reasonable accommodation. Thus, the important thing may be to focus on whether or not the person meets the definition of qualified for the license for which they are applying. But, without more context, this is a difficult question to answer. You may benefit from reading more about what constitutes disability discrimination on the Equal Employment Opportunity Commission website at <http://www.eeoc.gov/laws/types/disability.cfm>.

Q: What shall an organization do if they have medical documentation that an employee has a disability but the employee has declined reasonable accommodations and the employee is performing at a level that the employer feels as if they need an accommodations?

A: The Americans with Disabilities Act (ADA) provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may be considered not "qualified" for the job. This is because the ADA protects *qualified individuals with disabilities*. An "individual with a disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment or is regarded as having such an impairment. "Qualified" means the person satisfies the job-related requirements of the position he or she holds (or is applying for) and can perform its essential functions, with or without a reasonable accommodation.

The EEOC's guidance on *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (<http://www.eeoc.gov/policy/docs/accommodation.html>) indicates that an employee with a disability "must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job." Therefore, it is advised that an employer document all communications with the employee regarding the potential need for or offered accommodations. If an employee refuses accommodations initially, the employer should be clear about the current performance issues and potential repercussions if performance is not improved.

Q: I know it's not appropriate to share information about medical needs or specific accommodations of employees, but what is the best way to share with other employees in the office if asked?

A: It is rarely appropriate to share medical information about a person's specific medical needs or accommodations with another employee. The Americans with Disabilities Act (ADA) requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs, as well as information voluntarily disclosed by an employee) as a confidential medical record (and kept in a separate file). Employers may share such information only in very limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA. Lou Orslene, co-director of the Job Accommodation Network (JAN) offers a few strategies in a blog post published at <http://askjan.org/blog/?p=479>.

Q: How do we respond to an employer who tells you if you are unable to do the job maybe you should quit and apply for disability when clearly you are able to do the core functions of the job?

A: Unfortunately, inappropriate comments such as this are made every day in all different situations, including the workplace. If an employee believes he/she is being treated unfairly or has experienced discrimination, it is important to follow the company's grievance and complaint procedure. The employee handbook should include a section on how to file a complaint. Follow the protocol. Also be certain to keep a detailed record of any document the incident (for your records and the employer's records), and stick to the facts (dates, times, what was said and the context in which it was stated, etc.). It is important to remain professional and avoid personal opinions. After doing this, should you feel the situation has not been remedied and/or you feel you have been discriminated at work because of disability (or race, color, religion, sex (including pregnancy), national origin, age or genetic information, you can file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The process for doing this can be found on the EEOC website at <http://www.eeoc.gov/employees/charge.cfm>

Q: Do accommodations need to start with the Human Resource Department?

A: No, accommodations do not need to start with the HR department. A request for accommodation can come at any time during the application process or while employed, so the individual situation will likely determine when or with whom the request begins. On the job, an employee can make a request to any manager or supervisor in the employee's chain of command. In addition, according to the Equal Employment Opportunity Commission (EEOC), you can use "plain English" to make the request. You do not have to mention the ADA or use the phrase "reasonable accommodation."

Q: If there are several options for a typical accommodation, can the employer provide a low cost one that they choose? For example, if someone cannot concentrate, can the employer allow headphones and lighting changes as opposed to a private office?

A: Whereas employers do get to choose from among effective accommodation options, if more than one accommodation would be effective for the individual with a disability, or if the individual would prefer to provide his or her own accommodation, the individual's preference should be given first consideration. It is important to remember that accommodations are people and job specific, and the Equal Employment Opportunity Commission (EEOC) recommends employers use an "interactive process," which simply means the employer and the employee with a disability who requests an accommodation work together to devise an effective solution. For more information on ensuring a success interactive process, see guidance from the Job Accommodation Network (JAN) at <http://askjan.org/topics/interactive.htm>.

More information for employees can be found in JAN's *Guide to Negotiating and Requesting Reasonable Accommodations under the ADA* at <http://askjan.org/Eeguide/IIINegotiating.htm>. More information for employers can be found in JAN's *Employer's Practical Guide to Reasonable Accommodation under the ADA* at <http://askjan.org/Erquide>.

Q: Are employees that have a diagnosis of HIV/AIDS obligated to reveal their diagnosis when asking for accommodations for their job?

A: No. An individual need only use "plain English" to make an accommodation request. The request for accommodation is the same as any other situation. It is important to remember, however, when an employee requests an accommodation and the disability or need for accommodation is not obvious, an employer may require that the employee provide medical documentation to establish that the employee has an ADA disability and needs the requested accommodation. More information on this topic can be found in the Office of Disability Employment Policy's *A Resource Guide for Individuals Seeking to Enter or Reenter the Workforce* at <http://www.dol.gov/odep/topics/hivaids/EmploymentLivingwithHIVAIDS.pdf>. The U.S. Department of Justice also offers a publication titled "Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS" at http://www.ada.gov/aids/ada_q&a_aids.htm#employment.

Q: Is there a duty to accommodate an employee who presents documentation from a health care provider that the supervisor's alleged hostility towards the employee is causing the employee "anxiety" which is adversely affecting the employee's job performance? The employee is seeking a transfer away from that supervisor. If so, what accommodations are reasonable in this situation?

A: Every situation is different. Changes in *supervision* can be an effective accommodation; however, changes in the person doing the supervising may or may not be reasonable. Again, it depends on the situation. The accommodation should be something that works for the employee without creating *undue hardship* for the employer. In such a situation, it would be prudent to contact someone from the Job Accommodation Network (JAN). JAN's expert consultants provide confidential, technical assistance about job accommodations and the ADA. JAN can be reached at AskJAN.org or 1-800-526-7234 (Voice), 1-877- 781-9403 (TTY).

Q: What to do if accommodation request is flexible work schedule, but the position they are in is sensitive to schedules. Would we still have to accommodate?

A: First, it's important to realize that "sensitive to schedules" can mean many things. Each and every situation is different, and accommodations are based on the individual and the essential functions of the job. The best course of action would be to contact someone from the Job Accommodation Network (JAN) to discuss the specifics of the situation. JAN's expert consultants provide confidential, technical assistance about job accommodations and the ADA. JAN can be reached at AskJAN.org or 1-800-526-7234 (Voice), 1-877- 781-9403 (TTY).

Q: Is having a record of disability satisfied by a 20-year old high school record documenting a diagnosed specific learning disability?

A: Having a "record of a physical or mental impairment that substantially limits a life activity" is a provision intended to ensure that people are not discriminated against based on a history of disability or because they have been misclassified or disabled. As an example, former cancer patients are protected from discrimination based upon their prior medical history. The Great Lakes ADA Center has an archived training on *ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association*. This archive includes a PowerPoint presentation and an audio version that may be helpful to review. The presentation is available at http://www.ada-audio.org/Archives/ADALegal/Materials/FY2008/2008-07-22_ADA_Coverage_Beyond_Actual_Disability_Regarded_As_Record_of_and_Association_Disability.pdf. The audio version is available at <http://www.ada-audio.org/>.

Q: How does a fitness for duty evaluation relate to ADA accommodation procedures?

A: A fitness for duty evaluation can be compared to a medical evaluation request. If the need for the medical examination is job-related and consistent with business necessity (and required of other employees in the same position), an employer may ask an employer to submit to a medical examination. The Americans with Disabilities Act (ADA) applies to all aspects of employment, including job advertisements, job applications, job interviews and post-offer medical examinations. Although many of the ADA rules that apply to applicants and new-hires are the same as the rules for employees, there are some differences. Please see the Job

Accommodation Network's Employer's Practical Guide to Reasonable Accommodations Under the ADA at <http://askjan.org/ErGuide/Two.htm> for more information.