

HR QUESTION ? of the month



Unsatisfactory Performance Excused by Disability?

Question: Is an employee who reports a reading/writing disability covered under a protected class? Are there suggestions on how to handle if this employee reported this after receiving a written reminder for performance related issues when no prior notice had been provided to HR either verbally or in writing. The employee in this instance has been employed by the company for 8 years.

Response: The federal Americans with Disabilities Act (ADA) generally defines a disability as a physical or mental impairment that substantially limits one or more major life activities. An individual can also be considered to have a disability if he or she has a record of such an impairment or is regarded as having such an impairment by the employer. That said, the ADA does not contain a list of medical conditions that constitute disabilities, rather an individualized assessment must be undertaken (using the foregoing definition) to determine if one exists. This means that some people with learning disabilities may indeed have a disability under the ADA, while some may not. Without additional information, it is difficult to opine whether the subject employee is disabled within the meaning of the Act. We recommend that you review the information published at <http://askjan.org/media/LD.html> for more information as to whether the employee in question is disabled by the ADA.

Whether the employee is protected by the ADA as having a disability or not, however, the employer is not required to excuse unsatisfactory performance on account of the condition. Indeed the EEOC has expressly stated that "[a]n 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." See question 1 at <https://www.eeoc.gov/facts/performance-conduct.html#perf>. The EEOC also offers guidance as to the particular issue raised by your inquiry at question 4 at the aforementioned link as follows:

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"4. 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. Practical Guidance: If an employee states that his/her disability is the cause of the performance problem, the employer could follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance. If the employee does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level."

Thus, while the employer would be obligated to explore and, if necessary, provide a reasonable accommodation to the employee if the employee's recently-disclosed learning disability is a disability for ADA purposes (and you are entitled to ask the employee to support the existence of a disability with medical documentation), the accommodation does not have to include lowering performance standards or excusing or failing to discipline performance deficiencies. For more information, see question 6 at the link above as well as the guidance published on reasonable accommodation at <https://www.eeoc.gov/policy/docs/accommodation.html>.

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