

● ● ● | **Discipline or Disability: Walking the Tightrope of Determining Fitness For Duty**

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● ● ● | **Title I ADA and Section 501 of the Rehabilitation Act**

- “Generally do not impinge on right of employer to define jobs and to evaluate their employees according to consistently applied standards governing performance and conduct.”

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● ● ● | **ADA AMENDMENT ACT OF 2008**

- Effective January 1, 2009
- Purpose is to restore the ADA's broad protections as intended by Congress
- Definition of Disability construed broadly: “Substantially limits”, major life activity
- Mitigating measures not considered
- Impairment can be a disability even if episodic or in remission

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## Ca FEHA Definition of Disability

- o A physical or mental disease, disorder or condition that affects one or more of the body's systems and ***limits*** an individual's ability to participate in major life activities.

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## Performance Standards

- o An employer may 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.

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## Scenario

- o Jane is an Administrative Secretary in a Social Services Dept. She had a prior stress claim and received a workers compensation settlement award. Co-workers are complaining that she is acting "goofy". When workers talk to her, she rolls her eyes, waves her arms. Her Supervisor approached her to ask about a past due work assignment. The next day Jane filed another workers compensation stress claim due to her boss "yelling at me". Jane also has an absenteeism problem having used her entire year's allocation in the first two months of the year. The District requests you as the consultant to arrange for a Fitness for Duty Evaluation.
- o What would you advise them to do?

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## Scenario

- Q: What should an employer (ER) do if an employee requests an accommodation for the first time in response to counseling or a low performance rating?
- Madonna did not disclose her learning disability even when she begins having performance problems that she believes are disability related. Her supervisor notices her performance problems and counsels her about them. At this point Madonna discloses her disability and asks for reasonable accommodation. The supervisor denies the request immediately telling Madonna that she should not have waited until she had problems to disclose her disability. WRONG

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## Employer Responsibility ---

- Proceed with the evaluation AND also begin the interactive process

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## Reasonable Accommodation Does not Require That the Employer :

- Tolerate or excuse the poor performance
- Withhold disciplinary action ( including termination-- but very carefully) warranted by the poor performance
- Raise a performance rating or give an evaluation that does not reflect EE's actual performance

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- ● ● | **Conduct Rules Job Related and Consistent with Business Necessity**
- Prohibiting violence or threats of violence
- Prohibiting stealing
- Prohibiting destruction of property
- Prohibit use of alcohol or illegal drug use
- Insubordination
- Showing disrespect to clients, customers, public
- Inappropriate behaviors between coworkers

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- ● ● | **Ambiguous Conduct Rules**
- "Disruptive " Behavior
- Manifestation of a symptom of a disability affecting conduct
- Frequency of occurrence
- Nature of job
- Specific conduct at issue
- Working environment

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● ● ● | **When ER Learns of Disability Issue After Misconduct has Occurred**

- The ER may proceed with termination if that is the appropriate form of discipline
- ADA does not require further discussion about the EE's disability or request for reasonable accommodation
- If discipline is less than termination, ER may proceed with asking if the EE is requesting reasonable accommodation, but not "in lieu of" disciplinary action

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● ● ● | **5 steps of the Interactive Process**

1. Determine whether the EE has a disability
2. Determine the essential functions of the job
3. Identify the abilities and limitations of the individual
4. Identify potential accommodations
5. Determine the reasonableness of the accommodations and select options

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● ● ● | **Seeking Medical Information**

- ER cannot seek medical information or medical exam solely due to EE's behavior being annoying, inefficient or otherwise unacceptable and irritating.

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## Medical Information

- Job related
- Consistent with Business Necessity
- ER has reasonable belief based on objective evidence that EE is unable to perform an essential function, including behavior and cognitive functions or will pose a “direct threat” due to a medical condition

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## Confidentiality Concerns

- EE must sign Authorization for Release of Information from the examining physician to the Employer
- Most Fit For Duty Examiners request medical records from EE’s personal physician. Need release of medical record information from primary physician to Fit For Duty Examiner
- Do not have EE carry own records

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## Limited Medical Information

- Information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat
- May include work function limitations and duration of limitations, whether transitional or permanent,

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● ● ● | **Fitness For Duty: Who You Gonna Call???**

- Start with primary doctor if worker is under medical care
- If Company has “Company” Doctor, make sure s/he has no blanket biases or is noted for always being on the company’s side
- Draft letter to physician explaining the circumstances and provide a job analysis of what the employee’s physical, cognitive, and behavioral **actual current** essential duties demand

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● ● ● | **Who You Gonna Call??**

- Contact the medical provider for your Workers’ Compensation Clinic or where you send EEs for pre-placement physicals
- Contact your EAP Provider. Consider appointing a specific provider within the organization to perform behavior FFD evals
- Contact a specialist. Make sure the physician has better credentials than the primary doctor.
- Workers comp TPA or Carrier may utilize medical management nurses who could suggest a specialist

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● ● ● | **Determine the Essential Cognitive and Behavior Demands of the Job**

- In addition to the physical essential functions determine the cognitive and behavior demands and frequency, preferably prior to the need.
- Ask the examining physician for recommendations of how to accommodate the individual’s cognitive or behavioral limitations

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## No Bossectomies Allowed

- The medical provider may indicate that the employee cannot work with a supervisor or other individual in the department or with the company itself.
- Generally it is the employer's responsibility to determine what accommodation should be implemented.

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## Conducting the Meeting

- Introduce all participants
- Try to arrange seating to facilitate interaction
- Designate a recorder ( Usually the facilitator or consultant)
- Have JA/list of essential functions available for all participants

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## Conducting the Meeting con't.

- Focus on what the employee **can do**
- Discuss each essential function:  
Ask the EE how the task can be performed safely within their work restriction

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● ● ● | **Conducting the Meeting, con't.**

- Ask the supervisor or manager for comments and suggestions
- Remember to keep the focus on how the essential function can be performed
- It is easy to become side tracked and caught up in the conduct or emotional factors
- Consider using an independent consultant/facilitator

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● ● ● | **Conducting the Meeting con't.**

- Document what reasonable accommodation has been selected
- State the date the accommodation was offered, accepted, start date, rate of pay and anticipated hours,
- Document other relevant factors

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● ● ● | **Conducting the Meeting con't.**

- Document any issues requiring clarification or follow up:
  - work activity input from Dr
  - extent of work activity of alternate job
  - scheduling
  - EE wants to discuss with attorney or ?
  - other (retirement, disability)

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● ● ● | **Conducting the Meeting  
con't.**

- If no accommodation is possible, record the specific reason using ADA or FEHA language:
  - Undue Hardship
  - Direct Threat
  - Not qualified

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● ● ● | **Close the Meeting**

- Have each participant sign and date the document
- Provide copies to all participants
- Establish timeline for any follow up

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