

December 20, 2010

Commissioner Chai Feldblum
Equal Employment Opportunity Commission
131 M Street, NE
Washington DC 20507

Dear Commissioner Feldblum:

Per your request, I posed the following scenario to members of National School Boards Association (NSBA) Council of School Attorney (COSA) via email.

Two teachers act in an identical manner that is unusual and unprofessional. The principal knows that one teacher has bipolar disorder but does not know whether the other teacher suffers from a mental health condition. Would the investigations into the unusual and unprofessional conduct of both teachers be the same or different? If different, how so? Would the principal directly ask both teachers if they think their behavior might be the result of a mental health condition? If so, when would such a question be asked in the investigation for both teachers?

I received about 20 responses, which is typical for an inquiry of this nature.

All responders quickly got to what they perceived as the heart of the matter: must or should an employer directly ask an employee who has never indicated he or she has a disability whether the employee believes a disability may have affected conduct at work where it is possible the conduct is a symptom of a disability? **Almost all responders indicated that they did not believe that directly inquiring about a possible disability was neither required nor a good idea in this scenario.** In fact, many responders also stated that they believed asking directly about whether an employee may have a disability might violate the ADA.

Responders indicated a number of reasons why they thought employers should not directly ask an employee if he or she has a disability where an employee has acted in an unusual and unprofessional manner but has not previously indicated that he or she has a disability.

- First, responding school attorneys expressed the opinion that it should be the employee's responsibility to come forward with information about a disability that may be affecting performance; after all it is the employee who has this information but has not shared the information with the employer (perhaps because until now it has not been relevant).



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- Second, a number of practical problems arise if employers ask about the possibility of a disability. Specifically, an employee simply having a bad day might be offended by the suggestion which may negatively affect the supervisor-employee relationship. Similarly, employees may see such a question as an intrusion into their private, personal lives; they may want to reveal their disability when they are ready or feel it is necessary to do so. Likewise, an employee may deny having a disability (even if he or she does) or may honestly not know whether he or she has a disability or whether it is impacting his or her performance—which makes asking the question pointless. Finally, knowing when a behavior might be a “symptom” of a disability and therefore should be inquired about is difficult especially when there are many more likely explanations for the conduct that have nothing to do with a disability.
- Third, numerous responders pointed out that school employees, including principals, tend to be sympathetic and concerned that everything is okay with their employees. As a result, principals are inclined to ask an employee who has acted unusually or unprofessionally whether he or she has a disability. However, by asking such a question a principal may be suggesting an answer. Instances of unusual and unprofessional conduct are not uncommon in school settings. Most of such conduct may simply be a performance issue. Turning every instance of poor performance into an inquiry about disability status will be time consuming, unnecessary, and overly burdensome for school districts who have been laying off employees in large numbers.
- Finally, a number of school attorneys expressed concern that directly asking employees whether they have a disability in the event of unusual and unprofessional behavior and no knowledge of a disability may violate the ADA. Specifically, school attorneys questioned whether a direct inquiry would mean the employer has “regarded” the employee as disabled in violation of the ADA. 42 U.S.C. § 12102(2)(C). Likewise, school attorneys questioned whether such an inquiry would violate 42 U.S.C. § 12112(d)(4)(A) (“A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”). After all, no “business necessity” would justify an employer asking an employee if a disability explains his or her unusual and unprofessional behavior.

A number of school attorneys indicated that they might ask an employee who has acted in an unusual and unprofessional manner and has not disclosed a disability whether he or she needs “help” or “support” or may encourage the employee to see someone in the employee assistance program (EAP) rather than directly ask the employee if he or she has a disability.

As stated above, school attorneys who responded to the above inquiry nearly uniformly agree that the EEOC *should not* require or encourage employers to inquire about disability status if the employee has not previously raised the issue. If the EEOC concludes otherwise, however, and imposes such a rule notwithstanding the problems identified above, NSBA strongly recommends that the EEOC (1) devise a criteria for when an inquiry must be made and (2) provide a safe harbor from violations of section 12112 for employers who comply with the new rule. Failure to provide such a safe harbor puts employers in the untenable position of violating the ADA if they ask whether an employee has a disability, and also if they do not ask.

In conclusion, NSBA encourages the Commission to *not* require employers to try to discern whether an employee's behavior might be a symptom of a disability and then directly inquire whether an employee is disabled. Employees can and should come forward with the fact that they are disabled and ask for an accommodation as soon as they are aware of their condition and the need for an accommodation. In the same vein, NSBA and COSA encourage the Commission to reject proposed § 1630.2(l)(2)(i)-(ii) that an employee "is regarded as having such an impairment" in violation of the ADA when an employer makes an employment decision based on the symptoms of an impairment or medication taken to treat the impairment.

Sincerely,



Lisa E. Soronen
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National School Boards Association