



In-Depth Discussion | April 23, 2018

DEAR LITTLER: How Should We Approach an Employee Showing Signs of Cognitive Decline?

By: Sofija Anderson

Dear Littler: We have an employee who is exhibiting signs of dementia or some other sort of cognitive impairment. He has fallen asleep at work a few times recently and seems confused by tasks that did not pose any problem for him in the past. His performance was solid for years but started declining in the past several months, along with his attention to detail. How do we handle our concerns about his well-being and performance? Should we ask him what's going on with his health?

- *Worried in Wisconsin*

Dear Worried in Wisconsin,

While it might be tempting to ask your coworker about his health in light of your genuine concerns, you should resist prying. It is important to be compassionate when you see an employee struggling—but you and your employer also must be careful not to jump to conclusions or ask this employee unlawful medical questions.

We will briefly review some of the legal and practical issues posed by your question. On the whole, you should focus initially on addressing existing performance problems. Once that process is underway, you can see where it leads you, keeping in mind your obligations under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and related state laws.¹

¹ For purposes of this discussion, let's assume your employer is covered by these civil rights statutes. See, e.g., 42 U.S.C. § 12111(5).

Manage Observable Behaviors

At the outset, let's recognize what you know and don't know about this situation. Your employee's performance began to deteriorate relatively recently, and he has become lethargic and confused at work. This marked change is significant and alarming. But while you can see and measure some of the effects of this decline, you really do not know the cause.

The employee's decreased productivity could indeed be due to the onset of dementia, Alzheimer's, or some other cognitive impairment. Or, these symptoms could be caused by illegal or legal drug use—even as an unfortunate side effect of a prescription medication. Your employee might also be suffering from depression or another physical or mental condition, such as sleep apnea. He may be dealing with some unknown stress in his personal life, including difficulty with caregiving for a family member or bouncing back after a loss. He might even be tired and distracted from moonlighting.

Because you are missing key pieces of the puzzle, you should simply stick to what you know. Moreover, as a representative of the employer, your role is limited to managing the employee's work and work-related conduct. Keeping in mind your position and the information available, your response might begin by reviewing and documenting mistakes made by the employee, including missed meetings or goals, instances of confusion or sleeping on the job, or other concrete problems. If you or other colleagues are just now noticing these concerns, you may need to monitor the employee's performance for several weeks to get a sense of the real scope of the problem.

Once you have a fuller picture of the situation, you can address performance deficiencies with the employee. Before presenting your concerns to the employee, consider consulting any company handbook or policies (and perhaps someone in HR) to ensure that you are complying with your employer's procedures. At this point, you should plan to proceed with the conversation, including any discipline or counseling, just as you would with any other employee who is not meeting expectations.

Try to Avoid Medical Inquiries

In your communications with the employee, bear in mind that the ADA largely prohibits employers from asking medical questions or requiring workers to undergo medical procedures or tests.² This restriction precludes any inquiry that is likely to elicit information from an employee concerning a disability, including the nature or severity of a disabling impairment. According to guidance from the Equal Employment Opportunity Commission (EEOC), for example, an employer should not ask an employee (or his or her coworkers, friends, etc.) if he or she has a disability or whether the employee is currently taking medication.³

The EEOC has indicated, however, that employers may ask questions that are not related to a protected disability. An employer therefore could inquire broadly about an individual's well-being and similarly could ask an employee who looks tired if he or she is "feeling okay." Likewise, if an employee has a broken arm, it is acceptable to ask what happened to cause the temporary injury. An employer may also ask if a worker can perform relevant job functions. Nonetheless, employers in your shoes should tread lightly to avoid asking too many questions that, even if well-intentioned, could violate the ADA or a state law counterpart.⁴

² See 42 U.S.C. § 12112(d)(4)(A).

³ EEOC, Enforcement Guidance, [Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act](#) (June 27, 2000) [hereinafter *Disability-Related Inquiries Guidance*].

⁴ See, e.g., Wis. Stat. §§ 111.31 et seq.

Apart from that general limitation, the ADA allows employers to make disability-related inquiries if “job-related and consistent with business necessity.”⁵ In short, an employer may ask medical-related questions (or require an examination) if it has reason to believe—based on objective evidence—that: (1) the employee poses a “direct threat” because of a medical condition; or (2) a medical condition will impair an employee’s ability to perform his or her essential job functions.⁶

Let’s take a quick look at those exceptions. The term “direct threat” refers to a situation presenting “a significant risk to the health or safety” of the employee or others “that cannot be eliminated by reasonable accommodation.”⁷ To authorize an employer’s medical inquiry, the significant risk must be ongoing. The risk should be evaluated on a case-by-case basis, considering its duration as well as the likelihood, imminence, nature, and severity of any potential harm.⁸ In addition, risks are presumably elevated where employers are engaged in physical or dangerous work. One court, for example, held that a forklift driver with a heart condition that could cause him to become incapacitated posed a direct threat in his workplace.⁹ Your question does not suggest that your employee’s performance issues pose any such threat of danger, however, so we can probably rule out this rationale.

The second approach is tied to an employee’s ability to perform his or her job essential job functions. As described by the EEOC, an employer could rely on this rationale to ask disability-related health questions if it “knows about a particular employee’s medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition.”¹⁰ An employer would also be justified in making such inquiries if provided reliable information, from a trustworthy source, that leads to the same conclusion.¹¹ While this exception seems like a better fit than the direct threat analysis, it still requires objective, credible information that an employee has a medical condition. Because you are missing that essential element, as noted earlier, you and your employer should not comfortably rely on this approach as grounds for asking medical questions of the employee.

As a result, *Worried in Wisconsin*, when you speak with this employee about documented performance problems, you should consider avoiding any questions that might elicit information about any potential disability. To the extent possible, leave it to the employee to decide whether to disclose any physical or mental impairment.

Be Aware of Your Reasonable Accommodation Obligations

Nonetheless, you should prepare for the possibility that the employee has a medical or psychological condition and chooses to tell you about it. The ADA requires a covered employer to engage in an interactive process with an employee once it becomes aware that the employee is having difficulty working because of an impairment that might constitute a disability under the statute. If this employee discloses such a condition as the cause of his performance issues—or if that becomes obvious based on your meeting—you should begin that interactive process to see if a reasonable accommodation can be identified.¹²

5 42 U.S.C. § 12112(d)(4)(A).

6 *Disability-Related Inquiries Guidance* (Question 5).

7 42 U.S.C. § 12111(3).

8 29 C.F.R. § 1630.2(r).

9 *Wurzel v. Whirlpool Corp.*, 482 F. App’x 1 (6th Cir. 2012).

10 *Disability-Related Inquiries Guidance* (Question 5).

11 See also *Disability-Related Inquiries Guidance* (Question 6).

12 See EEOC, Enforcement Guidance, [Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#) (Oct. 17, 2012).

Reasonable accommodations can take many forms, depending on the circumstances and an individual's needs. Accommodations may include making workplace facilities accessible, job restructuring, modifying work schedules, or reassigning the individual to a vacant position.¹³ The underlying “purpose of the ADA’s reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work.”¹⁴ You and the employee may need to exchange information about the nature, severity and duration of the employee’s impairment as well as the activity or activities that the impairment limits and to brainstorm solutions before hopefully agreeing on a reasonable accommodation, if necessary.

When undertaking this process, your employer should consider whether any state or local laws might affect the analysis of the employee’s status or potential reasonable accommodations.¹⁵ Indeed, Wisconsin’s Fair Employment Act (WFEA), which likely applies to your workplace, is broader than the ADA in several respects. For example, the ADA expressly excludes certain workers from protection—including current users of illegal drugs—but the WFEA does not. Additionally, the WFEA does not limit its analysis (either for assessing disability or for accommodation purposes) to duties that are deemed “essential functions” of an individual’s job, as under the ADA. If an employee establishes that he or she has an impairment that “makes achievement unusually difficult or limits the capacity to work,” the employer is obligated to grant a reasonable accommodation to allow the individual to complete the duties of his or her job.¹⁶ If challenged for refusal, Wisconsin employers bear the burden of showing either that a proposed reasonable accommodation would impose a hardship or that it would not enable the employee to perform his or her job duties adequately.¹⁷ It’s always a good idea for employers to stay familiar with any state or local laws applicable to personnel decisions.

Don’t Forget the Potential Overlap with the FMLA—or Other Leave Opportunities

Finally, in the course of your conversation with the employee, you may learn information that triggers your employer’s responsibilities under the FMLA, or a state-law equivalent.¹⁸ The FMLA entitles eligible employees to take up to 12 workweeks of leave per 12-month period, due to a serious health condition affecting their ability to work or to care for a child, spouse, or parent with a serious health condition.¹⁹

Importantly, an employee does not need to mention the statute or use any special language to give an employer sufficient notice that FMLA leave may be needed. Thus, if your employee suggests that a leave of absence would be helpful as he explains his circumstances, your employer likely should treat that comment as a leave request. In evaluating any such request under the FMLA or state law, also keep in mind any leave program that your employer may offer. Your employer should enforce its own policies in a consistent and fair manner, as it simultaneously works to comply with the ADA, FMLA, and any applicable state laws.

In sum, *Worried in Wisconsin*, try to restrain the impulse to ask what is going on with this employee from a medical perspective. Instead, initiate a conversation about performance issues and see whether he offers an explanation that invites accommodation or some other mutually-agreeable solution. Best of luck to you both!

¹³ *Id.* (General Principles).

¹⁴ EEOC, Publication, [Employer-Provided Leave and the Americans with Disabilities Act](#) (May 9, 2016) (emphasis omitted).

¹⁵ Madison and Milwaukee have their own fair employment ordinances that protect workers with disabilities.

¹⁶ Wis. Stat. § 111.32; see also State of Wis., Department of Workforce Dev., Equal Rights Div., [Disability](#).

¹⁷ See *Hutchinson Tech., Inc. v. Labor and Indus. Review Comm’n*, 682 N.W.2d 343, 352-55 (Wis. 2004).

¹⁸ Wisconsin has its own family and medical leave statute. See Wis. Stat. § 103.10.

¹⁹ 29 U.S.C. § 2612; 29 C.F.R. § 825.112. Depending on the circumstances, a leave of absence may also be considered a reasonable accommodation under the ADA. See, e.g., Michelle Barrett Falconer & Casey Kurtz, [Dear Littler: Is an Extended Leave of Absence a Reasonable Accommodation Required by the ADA?](#) (Jan. 24, 2018).