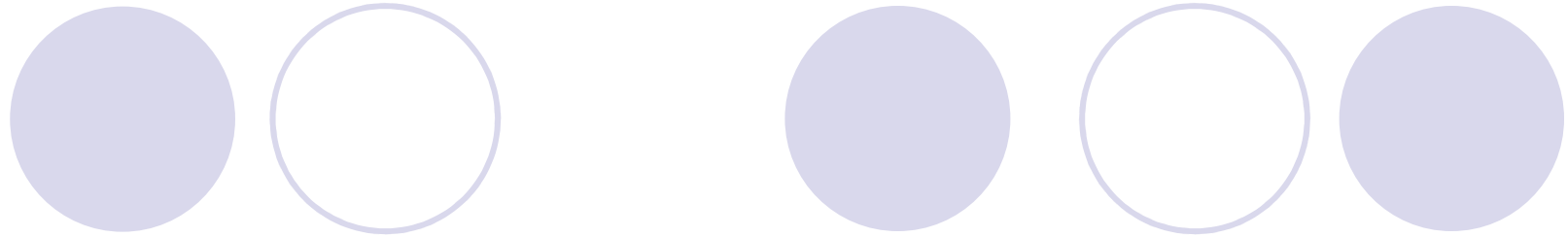


The Untapped Workforce: Hiring Individuals with Disabilities

Robin A Jones, Director
DBTAC-Great Lakes ADA Center
University of Illinois at Chicago

Where are we today?

- Only 35 % of people with disabilities employed full-time compared with 78% of those who do not have disabilities
- People with disabilities continue to report less satisfaction with their lives than people without disabilities



- Significant changes in the physical environment to increase accessibility, yet people with disabilities continue to report dissatisfaction with business response to the ADA
- Attitude and stereotypes remain the main barriers reported by people with disabilities

Why Should We Care?

- People with disabilities are the largest minority group (18.1%)
- 42% of Americans over the age of 65 have a disability
 - Workers are staying in the workforce longer...aging workforce!
- By 2010 1 in 3 Americans will have a disability
 - Increased technology, baby boomers aging, increased disease, etc.

What are some of the current issues?

- ADA Amendments Act of 2008
 - Changes the definition of disability under the ADA
 - Broader interpretation of “who is a person with a disability”
 - Removes “mitigating measures” as a factor in determining “who is disabled”
 - Broadens protections under prong of definition “regarded as”
 - Clarifies the types of major life activities covered
 - Includes episodic conditions and those in remission
 - Includes impact on bodily functions (bowel/bladder, cell growth, etc.)

Effective Hiring

- Identify recruitment strategies and incorporate outreach to organizations serving people with disabilities
 - State Vocational Rehabilitation Programs
 - Workforce Development Programs (NWWIB)
 - Private Vocational Rehabilitation Programs
 - Veterans with Disabilities Programs (State Veterans Affairs, Veterans Administration Vocational Rehabilitation Programs, etc.)

Things to consider

- Job Recruitment/Pre-Employment

- Job qualifications

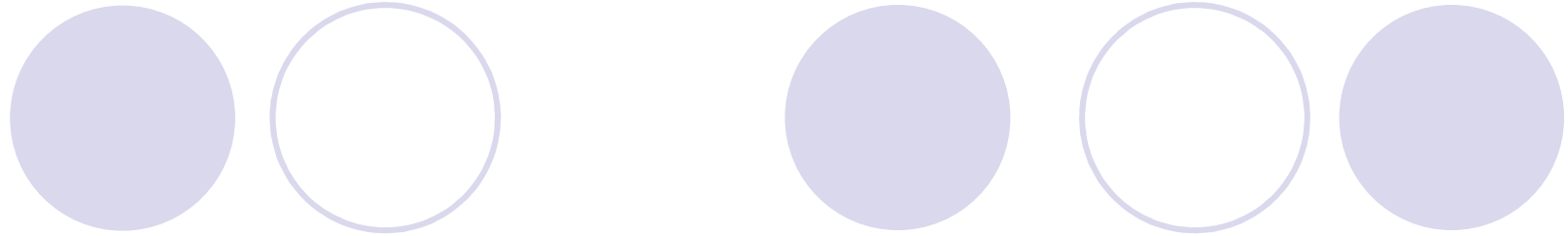
- Remove any non-essential functions/standards
 - Drivers License, Travel, etc.

- Electronic Recruiting

- Is the information accessible to people who use screen readers or other assistive technology?
 - Evaluate accessibility of information technology

- Testing

- Review pre-employment testing to determine if using any 'medical' tests and/or those which could be challenged for disability bias



- Language regarding the need for reasonable accommodation
 - How is this addressed for completing the application process?
 - How is this addressed for the interview process? Testing?

Interviewing – What can I ask?

- Pre-Employment

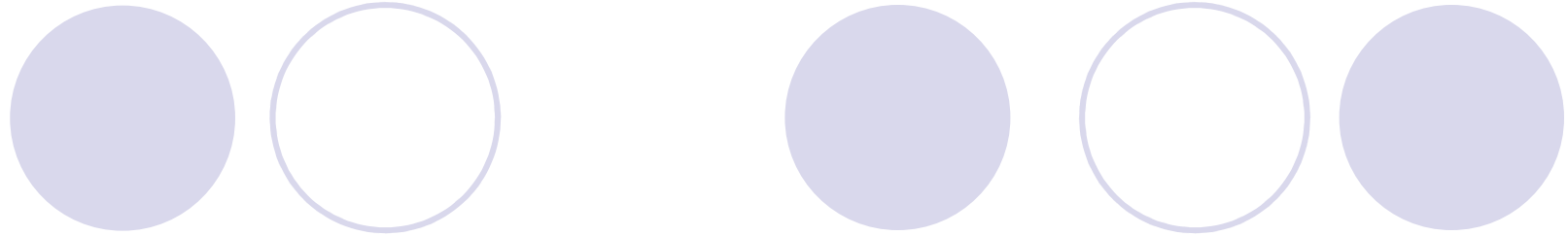
- No questions likely to elicit medical information

- # of “sick days”

- “nature of impairment”

- Whether a reasonable accommodation is needed to do the job

- May ask if individual is able to perform the duties of the job with or without an accommodation



- **Conditional Offer of Employment**

- **Conditional on determining:**

- Qualified for the position following medical exam or questionnaire
- Ability to provide a reasonable accommodation
 - Undue hardship
 - Financial
 - Administrative

Disclosure of Disability

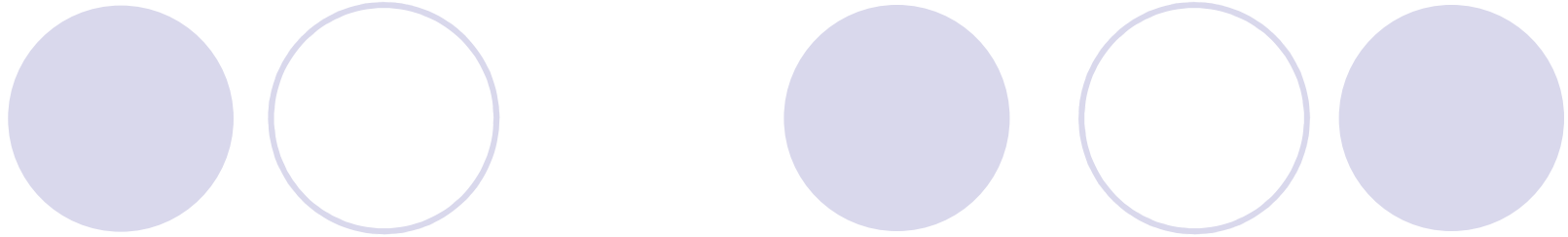
- Individuals are not required to disclose a disability
 - Unless requesting a reasonable accommodation
- Employer is not required to “second guess” whether or not a disability is present or an accommodation is needed
- My disability made me do it is not a defense under the ADA

Confidentiality

- Medical records must be kept confidential
 - Need to know basis
- Supervisors/managers typically do not need to know the specifics of a disability
 - Information that someone is eligible for an accommodation
 - Not the “why” or “what” related to the disability itself
 - Information necessary to manage the disability or respond to medical issues
 - Seizure disorder, etc.

Interplay between the ADA and FMLA

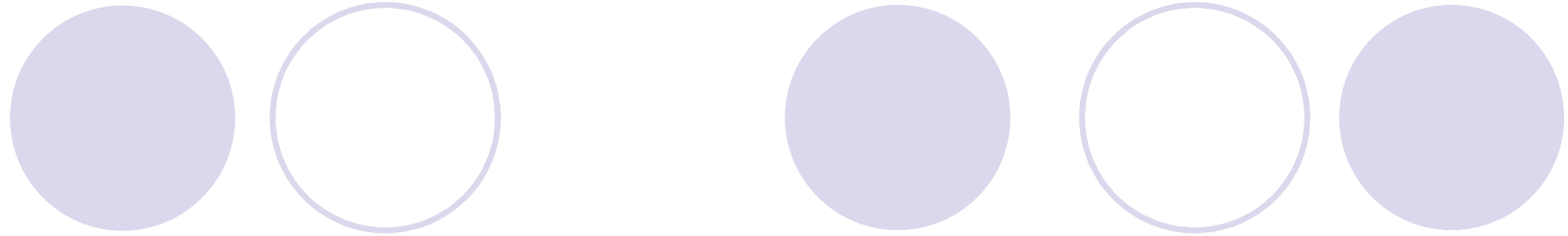
- Leave as an accommodation under the ADA
 - Available the 1st day of employment
 - Disability related condition/impact
 - Amount of time is based on “what is reasonable”
 - “Light duty” is not required under the ADA but does not preclude an employer from engaging in the interactive process and identifying the array of potential accommodations, including reducing activity, etc. as an accommodation



- Leave as a benefit under FMLA legislation
 - Major Health Condition
 - Birth of a Child
 - Adoption or foster child
 - Care of family member
- Subject to the # of hours that the employee has worked within 12 month period of time
- Maximum amount of time available is 12 weeks within 12 month period

Attendance/Leave Issues

- Reasonable accommodation does not mean an employer has to exempt an employee from time and attendance requirements
- Accommodation does not require tolerance of chronic, frequent, and unpredictable tardiness or absences
 - Inability to perform one or more essential functions of the job
 - May impose an undue hardship on the employer
 - Courts have rejected extended leave indefinitely for chronic, frequent, unpredictable absences



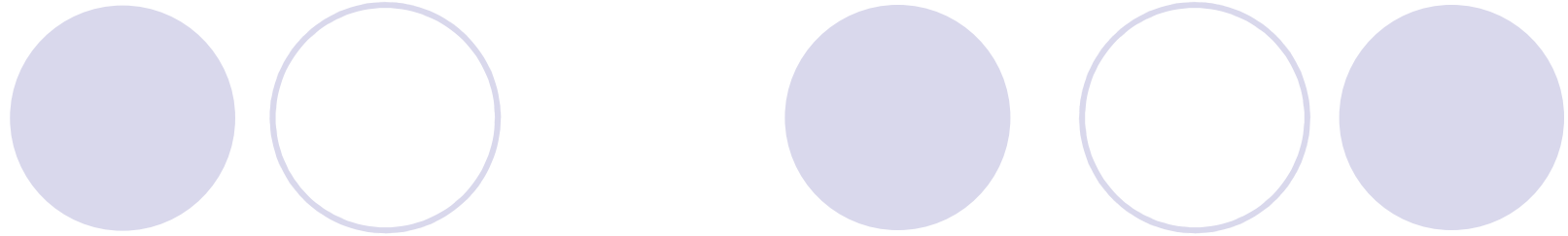
- Indefinite leave is when an employee (or his/her doctor) can give no date of return, or predict whether an employee will return to work
- An approximate date of return (e.g. employee will return at the beginning of November) is not indefinite leave
- A time period for return (e.g. employee will return between October 15 and October 30) is not indefinite leave

Request for Accommodation after Attendance Problems Develop

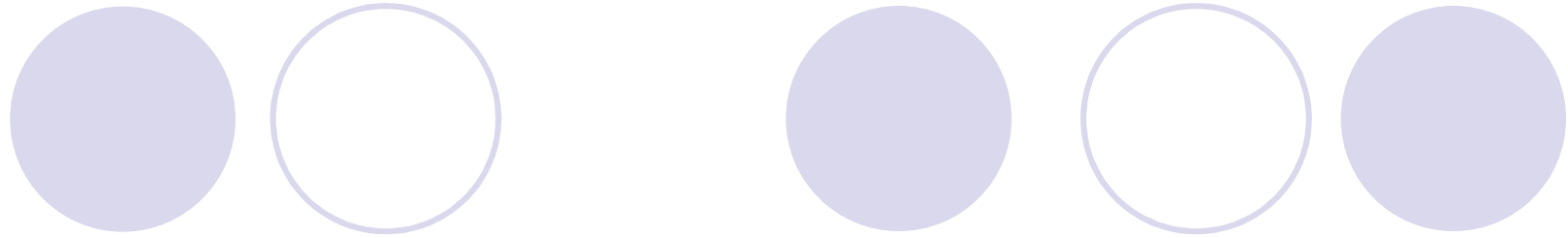
- If an employee with a disability requests reasonable accommodation after attendance problems develop, thus resulting in disciplinary action, the employer may proceed with discipline
- The employer must also consider and, if appropriate, grant a reasonable accommodation unless it would pose an undue hardship

How do they work together?

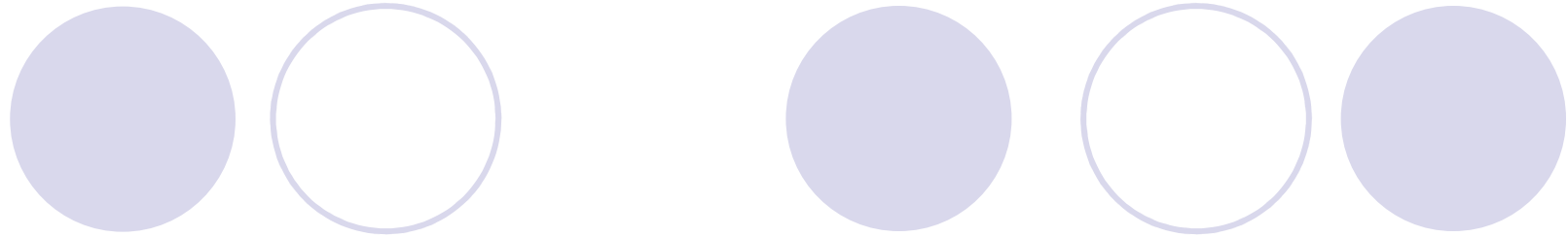
- Employee with a qualifying disability may utilize both FMLA and ADA Accommodation of “leave” for the same incident
 - **Example:** Employee deemed eligible for use of 12 weeks of FMLA leave but is unable to return to work for 14 weeks. Reason for inability to return to work is related to their disability.
 - 12 weeks FMLA eligible leave
 - Additional 2 weeks would be subject to a reasonable accommodation request and determination by the employer



- **Example:** Employee submits request to use FMLA for the care of a family member. This individual utilizes 8 weeks of FMLA leave. They have an exacerbation of their disability which is intermittent (i.e. Mental Illness) and request 8 weeks of leave to seek treatment and adjust their medications.
 - 4 weeks remaining of FMLA leave for qualifying incident
 - Additional use of time would be subject to a reasonable accommodation request and must be related to the individuals disability.



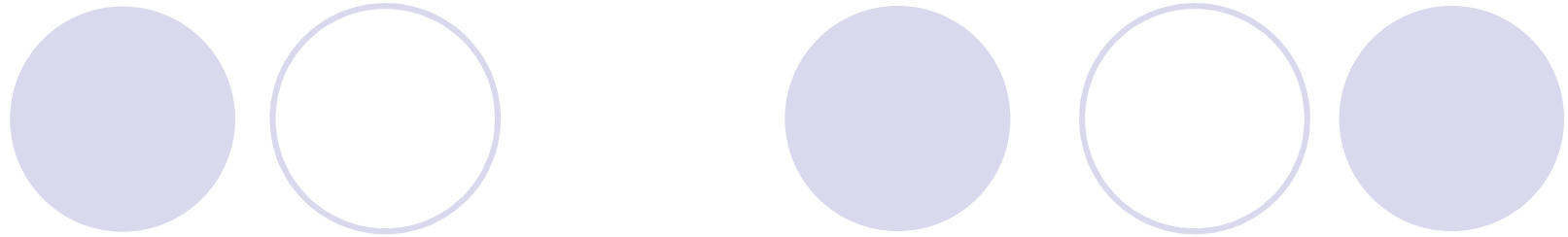
- **Example:** Employee who has worked for the company for 3 months and is still on probation approaches their supervisor with a request for leave due to treatment necessary for their multiple sclerosis. The employee submits documentation from a qualified medical professional that they need an indefinite period of time off, unclear when they will be able to return to work
 - Is the employee qualified for consideration of “leave” as an accommodation? Is this reasonable?



- **Example:** Employee identifies to the employer that they will need to take time for their disability but cannot predict how frequent they will need to take the time or how much time they will need (come to work when I can).
 - Is this reasonable? What would the employer be required to do?
 - What if the employee said it would be approximately 2 x's per month? Different response?

Performance and Conduct Issues

- Employer establishes performance and conduct standards – consistent with business necessity
- Reasonable accommodation does not require “lowering” of production and/or eliminating a conduct standard
- Employers should evaluate job performance of an employee with a disability in the same manner as all other employees
 - Failure to provide evaluation/feedback leaves an employee at a disadvantage for improving performance if needed – disparate impact?



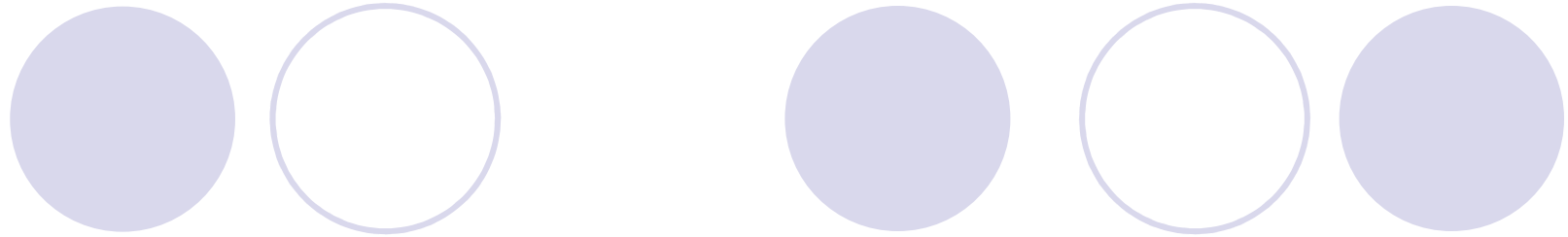
- Employers may discipline an employee with a disability for violating a conduct standard if the disability does not cause the misconduct
- Employers may discipline an employee with a disability if the disability causes a violation of a conduct rule that is job-related and consistent with business necessity and all other employees are held to the same standard

Examples:

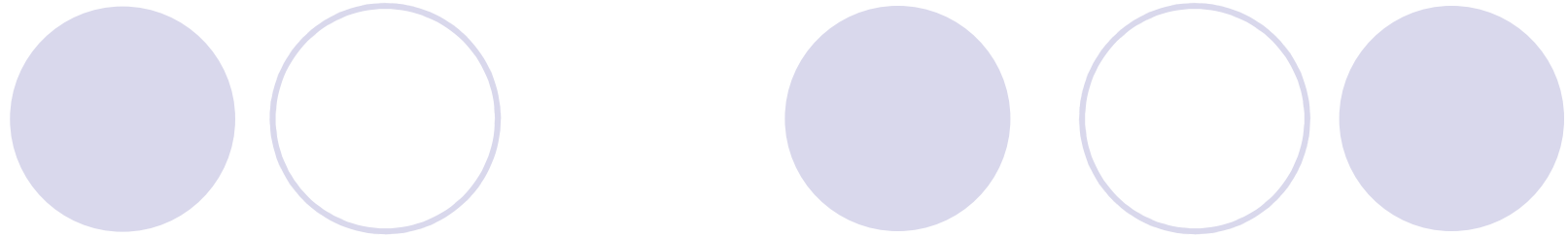
- Prohibiting violence or threats of violence
- Prohibiting stealing
- Prohibiting destruction of property
- Insubordination
- Showing disrespect to clients, customers and the public
- Inappropriate behavior between coworkers
- Prohibiting alcohol use or illegal drug use

Disciplinary Action

- Response depends on when the employer learns that a disability may be the cause of the conduct problem
 - If termination is the appropriate form of discipline and the employer learns about the disability as a potential cause during the termination process they can proceed with termination
 - No further discussion about the disability or reasonable accommodation is required



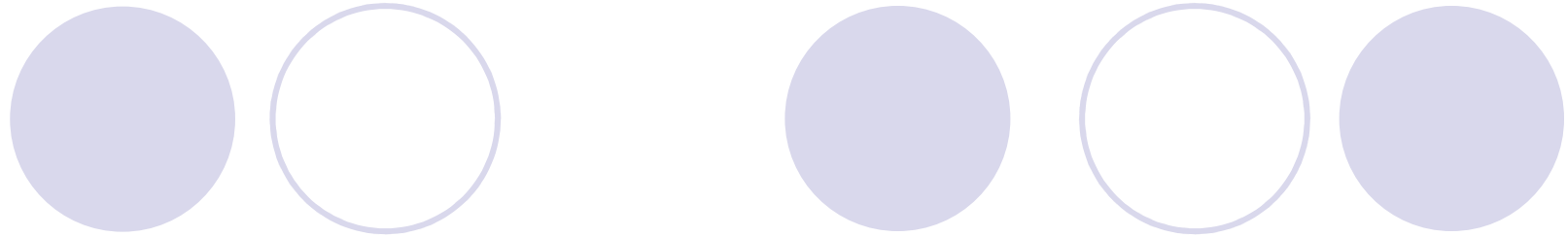
- If the employee states that a disability is the cause of the misconduct, and something less than termination is the appropriate disciplinary action (i.e. warning or suspension),
 - The employer may ask about the relevance of the disability and whether the employee is requesting reasonable accommodation to avoid further misconduct



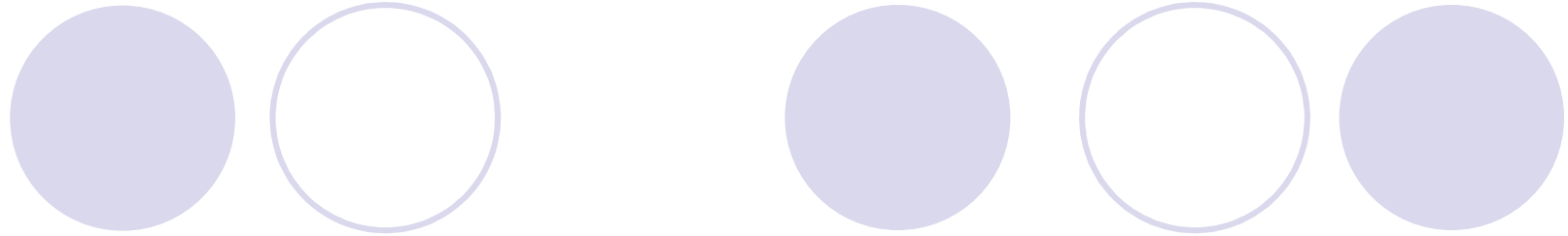
- Reasonable accommodation cannot be withheld as a punishment for a conduct violation
 - If an employer refuses an accommodation that could assist the employee in controlling behavior (without causing an undue hardship), the employer has violated the ADA

Rules to remember – Performance or Conduct

- Generally inappropriate for employers to focus discussion about a performance or conduct problem on an employee's disability
- Focus on correcting performance problems and avoiding future misconduct
- Generally preferable for an employee, rather than an employer, to raise disability issue
 - Emphasizing disability can risk a “regarded as” claim



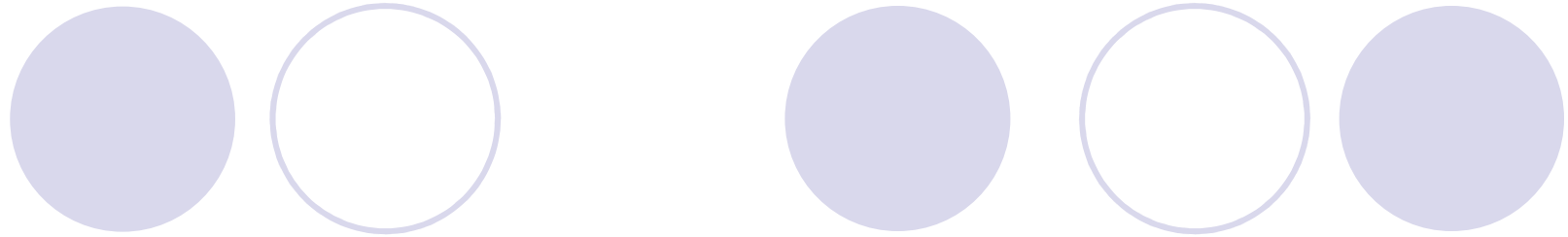
- Employers do not have to rescind a disciplinary action warranted by poor performance or misconduct
 - Reasonable accommodation may be required going forward in order to rectify the performance or conduct problem



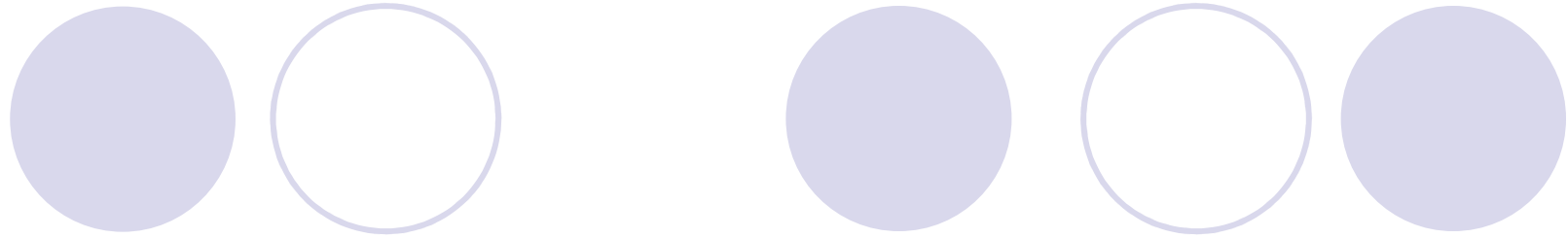
- When the disability is known to the employer:
 - An employer may ask whether the employee needs a reasonable accommodation if it appears that there is a connection between the disability and the problem
 - An employer may ask what steps can be taken to improve performance or conduct without mentioning the disability or accommodation

Key Issues/Lessons Learned

1. There is no end to what might be an accommodation-Whether or not it is “reasonable” is a case by case determination
2. Employers should be proactive in addressing the need for accommodations with any employee who is experiencing performance related problems
 - a. Majority of disability is invisible. Best practice is to be proactive with ALL employees.



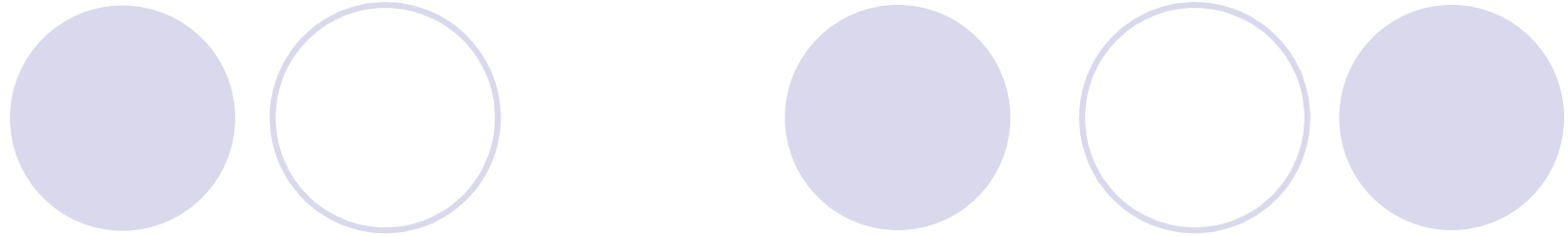
3. Never say “NO” to an accommodation request before:
 - a. Considering the full array of options, not just what the individual has requested
 - b. Exploring resources to assist with the cost of an accommodation and/or problem solving potential accommodations



4. Monitor the effectiveness of accommodations and/or the on-going need for an accommodation
 - a. Some accommodations may only be needed short term
 - b. Accommodation needs may change as the job changes and/or the individuals disability changes (age, etc.)

Resources for Additional Information

- Equal Employment Opportunity Commission
 - www.eeoc.gov
 - 800-669-4000
- Job Accommodation Network (JAN)
 - www.jan.wvu.edu



- Office Disability and Employment Policy
 - www.dol.gov/odep/
- Department of Labor –Family and Medical Leave
 - www.dol.gov/fmla/
- HR Tips (Cornell University School Industry and Business Relations)
 - www.hrTips.org

Accommodations make good
business sense!

Still Have Questions??????
DBTAC-Great Lakes ADA Center
800-949-4232 (V/TTY)

gldbttac@uic.edu

www.adagreatlakes.org