

Oh No! We've Hired Consumers!!!

Personnel Policies & Practices
for People in Recovery (and
Everyone Else)

Your Presenters

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Why you should listen to us

- ◆ CHOICE was the first peer-run agency in Westchester County, NY, in 1997.
- ◆ Services are designed, managed, supervised and provided by peers.
- ◆ We've consulted with top-flight human resource attorneys, from Xerox and private firms.
- ◆ A board member is the author of the HR Answer Book (available at [Amazon.com](https://www.amazon.com)).

Why you should listen to us

- ◆ We hire people in recovery from mental illness.
- ◆ We hire people in recovery from substance abuse.
- ◆ We hire people with felony histories.
- ◆ All are now top flight professionals.

Why you should listen to us

- ◆ These are good policies for everyone.
- ◆ They take into account a wide spectrum of staff needs and behaviors.
- ◆ They could apply to any human service provider.
- ◆ Peer providers must be treated the same way as any other professional: with dignity and respect for both their individual needs and their talents --
- ◆ without a diminishment of expectation for what they can, and are expected, to accomplish.

Why you should listen to us

- ◆ We're going to discuss many examples of things that may never happen.
- ◆ We hope that you will be more likely to hire people in recovery because you won't "what if".
- ◆ If you've already hired people in recovery, we hope we help you make your working relationship more productive.

Pop quiz

Why is it so important to hire people in recovery?

The Peer Advantage

- ◆ Unique engagement skills
- ◆ Highly motivated to succeed
- ◆ Knowledge of the system from the inside
- ◆ Power of hope and example
- ◆ Anti-stigma
- ◆ Enhanced program credibility

Main Foci of Training

- ◆ How the agency relates to the staff member in recovery
 - Hiring
 - Supervision
 - Termination
- ◆ How the staff member in recovery relates to the client in recovery
- ◆ *These policies and procedures are appropriate to any staff member.*

Client anonymity

- ◆ Regardless of the environment in which a CHOICE employee interacts with a CHOICE client, agency standards of conduct apply.
- ◆ Includes 12 step meetings, off hours, bus.
- ◆ Confidentiality and a client's anonymity must be maintained at all times.
- ◆ Contact with a CHOICE client outside of agency business and/or off hours must be initiated by the client.
- ◆ A CHOICE employee is prohibited from greeting a client or initiating a conversation prior to being acknowledged first by the client.

Safety procedures emphasized

- ◆ Assessing risk
- ◆ Clients under the influence
- ◆ Leaving clients alone in the office
- ◆ Transporting clients
- ◆ Home visits

Rule Number One

◆ *Never lower the performance bar.*

◆ Ever.

◆ Never.

◆ Big, big mistake.

◆ Did we mention you shouldn't do this?

Rule Number One

- ◆ Low expectations become a self-fulfilling prophecy.
- ◆ The ADA applies to individuals *regarded* as having a disability.

The ADA applies to disabilities:

- ◆ A physical or mental condition that substantially limits a major life activity.
- ◆ There is no special “accommodation password”.
- ◆ Request can be verbal.
- ◆ Request can be in “plain English.”
- ◆ Request need not use the word “accommodation.”

What's reasonable?

- ◆ You only need provide a “reasonable” accommodation.
- ◆ It would be really nice if you we could tell you what was a reasonable accommodation.
- ◆ We can't –
 - It depends on the budget of your agency.
 - The cost of the accommodation.
 - The degree of disability as relates to the job description .

The ADA applies to disabilities:

- ◆ You can request documentation of the disability if an accommodation is requested
 - What the condition is.
 - What life activity it affects.
 - How it substantially limits that activity.
- ◆ No fishing expeditions!
- ◆ No asking for proof of the obvious.

The ADA also applies if

- ◆ Has a physical or mental impairment that does *not* substantially limit major life activities but is *treated* by an employer as if the impairment does substantially limit activities;
- ◆ Has a physical or mental impairment that substantially limits major life activities *only* as a result of the *attitudes* of others toward the impairment; or
- ◆ Does *not* have an impairment as described in (1) and (2), above, but is *treated* by an employer as having a substantially limiting impairment.

Example

- ◆ An employee with controlled high blood pressure that is not substantially limiting.
- ◆ If you reassign the employee to less strenuous work because of unsubstantiated fears the employee will have a heart attack, you would be regarding the individual as disabled and improperly discriminating against him.

However, the courts are split

- ◆ Courts disagree on this issue. The 5th, 6th, 8th and 9th Circuits held that this group is not entitled to an accommodation. The 3rd, 10th, and 11th circuits do require an accommodation.

Wondering what to do now?

**CONSULT AN ATTORNEY
BEFORE DENYING AN
ACCOMMODATION.**

(more on accommodations later)

Have we freaked you out yet?

- ◆ Sorry, didn't mean to.
- ◆ This really isn't that tough.
- ◆ Accommodations should be negotiated.
- ◆ Document, document, document.

A well-defined job description

- ◆ This will articulate exactly what is expected of your employee. It is global inoculating mechanism; it protects you against ADA-based claims.
- ◆ What are the *essential* elements of the job?

Not everything is a disability

- ◆ Staff member smells bad?
- ◆ Discuss the matter.
- ◆ Be factual and straight forward.
- ◆ Make sure to set a time limit for improvement.
- ◆ Follow your normal progress disciplinary policy for repeated infringements, up to termination, for continued violations.

Not everything is a disability

- ◆ Smelly staff is a work-related performance issue! Do not fear it! We have a dress code policy.
- ◆ When in doubt, return to rule # 1: when you lower the performance bar for peers, you create resentment among non-peer staff.
- ◆ Invitation for everyone to smell bad.

My illness made me do it

- ◆ What about bad conduct that your employee claims is due to a mental illness?
- ◆ You can face legal claims for violations of the Family and Medical Leave Act (FMLA) or for discrimination under the Americans with Disabilities Act (ADA) if you improperly discipline or terminate protected employees who break conduct rules.

My illness made me do it

- ◆ EEOC: you may discipline individuals with psychiatric disabilities for violations of conduct rules that are job-related and consistent with business necessity.
- ◆ However, you must be able to show that you would impose the same discipline on non-disabled employees.

My illness made me do it

- ◆ EEOC: an employee with a mental disability who loses her temper at work and shouts at patrons and coworkers may be suspended because she violated a work rule prohibiting such disruptive behavior. Still, she may be entitled to a leave for treatment as a reasonable accommodation so that she can comply with the employer's rules in the future.

My illness made me do it

- ◆ *Direct threats or acts of violence typically are not protected by the ADA.* In a 1998 ruling, the court determined that an employee fired for outbursts directed at fellow employees could not sue under the ADA. The employer's policy against workplace violence included provisions for suspension and dismissal for "extremely severe" offenses. The court said that the *ADA does not protect emotional or violent outbursts blamed on an impairment.*

Hiring & Recruitment

◆ What you can and cannot ask:

- Recovering addicts **are** a protected class – active addicts are **not**.
- Arrests? **No**. Convictions? **Yes**.
- Are you mentally ill? **NO**. “ Can you *identify* as a person diagnosed with a mental illness and its related stigma”. **YES**
-- this is not a question about diagnosis; it is a question about identification.

The CHOICE advantage

- ◆ We're inoculated by virtue of our long history of hiring people with disabilities. A claim of discrimination for non-hiring on the basis of disability is harder to prove. So hire more people with disabilities.

Who is not ADA protected?

- ◆ The non-disabled
- ◆ The non-diagnosed
- ◆ Those not in a protected class
- ◆ If you fail to hire someone because they aren't mentally ill they have no basis for a claim.

Supervision

◆ Are these your supervisory issues?

- Monday-itis
- Allergic to snow
- Insubordination
- Poor documentation
- Absenteeism
- Presenteeism

Absenteeism

Since regular attendance is essential for most jobs, you generally have the right to discipline, and even terminate, employees who do not meet attendance requirements. However, both the FMLA and the ADA may limit your right to take these actions for certain absenteeism protected by these laws.

Absenteeism

- ◆ FLMA: requires 12 weeks of unpaid, job-protected leave in any 12 month period.
- ◆ The ADA requires covered employers to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would impose an undue hardship on the employer.

Absenteeism

- ◆ As an ADA accommodation, you might have to allow an employee more excused, unpaid absences than you would another employee.
- ◆ Remember the 1 year replacement rule: it costs an average of 1 year of salary to replace an employee.

Absenteeism

- ◆ Conversely, the 11th circuit determined that an employee who suffered from cluster headaches was not a qualified individual under the ADA. He requested an indefinite leave of absence so that he could work at some uncertain point in the future. The court ruled that since he could not perform the essential functions of the job presently, or in the immediate future, he was not covered under the ADA.

Remember the job description?

- ◆ At CHOICE, part of the job description is “advocacy on behalf of clients with Department of Social Services.” DSS is only open 9:00 AM to 5:00 PM; consequently, it is *not* a reasonable accommodation to allow a staff member to come to work at 10:00 AM or later.

A Big Question

- ◆ Will the employee *ever* be able to perform the essential elements of the job? If, with time off, or treatment, or additional supervision, the answer is yes, then make the accommodation.
- ◆ If you can document that there is no reasonable expectation that the individual can perform the essential elements of the job, then you can terminate.

Remember:

- ◆ It is **permissible** to request medical documentation as to the disability!
- ◆ However, such inquiries are limited to those aspects of the disability for which an accommodation is requested – you cannot go fishing.

◆ Did we mention you should

CONSULT AN ATTORNEY?

Enough of the legal stuff!

- ◆ This really isn't that hard – it just takes practice.
- ◆ Excellent web resources:
- ◆ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under ADA
- ◆ <http://www.eeoc.gov/policy/docs/accommodation.html>
- ◆ EEOC Questions and Answers about Health Care Workers and the Americans with Disabilities Act
- ◆ http://www.eeoc.gov/facts/health_care_workers.html

Don't Micromanage

- ◆ Peers bring unique skills, unique talents.
- ◆ Agency culture has to be flexible.
- ◆ Communication styles at CHOICE vary enormously. Some of our staff can be a little ... ***elliptical***.
- ◆ That includes management.
- ◆ Keep your eye on the prize: services, not paperwork.

Don't Micromanage

- ◆ Is it OK to do personal stuff on company time?
- ◆ We allow it: just as long as the work gets done.
- ◆ Don't try to mold everyone into the agency culture – you'll have to be prepared to change as well.

Don't Diagnose

- ◆ It's all about performance.
- ◆ It's none of your business whether someone is or isn't taking their meds.
- ◆ It's none of your business whether someone is experiencing symptoms.
- ◆ If they come to you for support, fine.
- ◆ Otherwise, it's all about performance.

Conflicts of Interest

- ◆ Here's where things get **weird**.
- ◆ Deborah was called to inform a client that a friend of the client had died ... and that's how Deborah found out that her own friend had died
- ◆ Josh worked for same company that provided his therapy – hijinks ensued

Conflicts of Interest

- ◆ ***NEVER, NEVER, NEVER*** – hire anyone to whom you are currently providing services.
- ◆ It is an irreconcilable conflict of interests.
- ◆ Role confusion is a potential disaster --

Conflicts of Interest

- ◆ “Clubhouse receptionist runs over member-boyfriend”.
- ◆ Roles blur over time, no matter how careful you think you are being.
- ◆ We know: rural settings are a special case.

Conflicts of Interest

- ◆ Potential conflicts can arise when your workforce and your clients are closely aligned.
- ◆ Staff are excluded from *all* conversations regarding people with whom they have a preexisting relationship.
- ◆ If an employee has a preexisting relationship with a client they must alert their supervisor immediately.

Who is a friend?

- ◆ Transporting a client in personal vehicle.
- ◆ Disclosing home phone number to a client.
- ◆ Socializing with a client outside business *at a pre-arranged time.*
- ◆ Inviting a client into one's home, or vice versa, for social/non-work related purposes.
- ◆ Engaging in a financial transaction with a client .

Proprietary Resources

- ◆ Any person, resource, vendor, agency, or provider that you either know of or have had extensive contact with because of your work at CHOICE.
- ◆ Against policy to utilize outside the supervision of CHOICE.
- ◆ Some resources cannot be wholly proprietary, i.e. SSA; however, staff need to be careful of individuals who work closely with the agency.

Implied Agency

- ◆ One more thing we learned about the hard way.
- ◆ Occurs when a person, resource, vendor, agency or provider knows you because of your work at the agency.
- ◆ How someone not a client almost burned down a rooming house and we got blamed.

Maintain a Drug-Free Workplace

- ◆ Yet another thing we've learned the hard way
- ◆ We have instituted
 - Pre employment drug testing.
 - Testing for cause.
 - Last Chance Agreement.
 - Termination upon positive test result or refusal to test.
 - *Why? Every human service agency should be on the lookout for substance abuse.*
 - And we hire addicts by the bushel.

Maintain a Drug-Free Workplace

◆ What you can ask on interview:

- If the applicant is currently using illegal drugs.

◆ You cannot ask:

- If the applicant ever used illegal drugs in the past.
- If the applicant has ever been addicted to drugs.
- Whether the applicant had participated in a rehab program or been treated for alcohol or drug use.
- How much alcohol the applicant drinks.

Maintain a Drug-Free Workplace

◆ What we put on our application:

- CHOICE is drug free.
- CHOICE screens as part of the employment process.
- Results are considered as part of employment or promotion.
- If hired, I consent to periodic and random screening.
- If not hired as result of positive, I will have the opportunity to explain.

Maintain a Drug-Free Workplace

- ◆ Believe it or not, we have caught people dirty on their pre-employment drug test.
- ◆ Steps to addressing possible drug use among staff
 - OBSERVE
 - DOCUMENT
 - SEND FOR TESTING

Maintain a Drug-Free Workplace

- ◆ If we catch you dirty on a drug test, you're gone.
- ◆ If employee admits to drug use, we
 - Suspend in contemplation of dismissal.
 - Terminate *or*
 - Offer the Last Chance Agreement and refer to treatment.
- ◆ Testing is mandatory after all accidents in company vehicles.

What does ADA say about drugs?

- ◆ **Alcoholism:** Is a disability if it
 - Currently limits a major life activity.
 - Was substantially limiting in the past.
 - Is regarded as substantially limiting.
- ◆ An employer may not discriminate against, and may need to accommodate, a qualified applicant or employee with alcoholism who can competently perform his job and can comply with uniformly-applied employer conduct rules prohibiting employees from drinking alcohol at work or being under the influence of alcohol at work.

What you can and cannot ask

- ◆ Job candidate out for an interview dinner; candidate drank six beers over the course of the dinner. Can we address the alcohol consumption and ask if alcohol is a problem for him? The candidate has received wonderful references from various sources, but we are concerned by what we observed.

What you can and cannot ask

- ◆ The ADA does not allow employers to ask applicants any questions about the existence, nature, or severity of a disability; and alcoholism can be considered a disability under the ADA.
- ◆ Colorado, Illinois, and Wisconsin specifically prohibit employers from taking any adverse employment action (such as not hiring someone) based on their legal off-duty conduct. So, in those states if you ask about off-duty drinking and then do not hire, it could be presumed that you are discriminating based on the off-duty alcohol use.

What you can and cannot ask

- ◆ Explain your drug and alcohol policy
- ◆ Consider work history and references
- ◆ You can consider the drinking of six beers to be inappropriate behavior at a business function. The example raises questions about the candidate's judgment and ability to interact appropriately with potential colleagues.

ADA and drug use

- ◆ Someone *currently* using illegal drugs is not disabled and may be denied employment, disciplined, or fired on the basis of the current illegal use of drugs.
- ◆ Someone who is *not currently* using illegal drugs but who *has a history* of past drug addiction is an individual with a disability *if* the past addiction substantially limited a major life activity, or is regarded as substantially limiting
- ◆ An employer may not discriminate against, and may need to accommodate, a qualified applicant or employee with a past drug addiction who can competently perform the job and comply with uniformly-applied employer conduct rules.

ADA and drug use

- ◆ ADA Compliance Manual: "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. The provision that the person no longer be using drugs "contemplates a drug-free period of some considerable length and can be read to mean that the person in question has been in recovery long enough to become stable."
- ◆ Note that the regulations make a clear distinction between the *use* of drugs and being *addicted* to drugs.

ADA and drug use

- ◆ Addiction is a disability, and addicts are individuals with disabilities who are protected by the ADA.
- ◆ Protection does **not** extend to actions based on the illegal use of the substance.
- ◆ Participation in completion of rehab while abstaining from drug abuse are factors that would be indicative of ADA protection.
- ◆ Enrolling in such a program after an adverse employment action has been taken on account of drug use will not entitle the person to ADA protection.

Termination

- ◆ Biggest fear: ADA/EEOC/human rights suit
- ◆ Clear job description
- ◆ Ongoing and regular performance evaluation
- ◆ Document performance concerns
- ◆ Document attempts to accommodate, if any
- ◆ Document failure of employee to meet agency standards
- ◆ ***Consistent performance standards***

Review

- ◆ Do you know what the essential elements of the job are?
- ◆ Can your candidate or employee do the essential elements of the job?
- ◆ Is an accommodation reasonable?
- ◆ Have you drawn clear lines to avoid dual-relationships between employees and employees, or employees and clients?

Question and Answer



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