



To: University Council

From: Doug Burgess, Professor and Department Chair, History
Diana McClay, Director, Employee Relations
Ashley Leonard, Compliance Counsel

Date: December 10, 2019

Re: Fitness for Duty – after 14-day comment period

I. Introduction

The Fitness for Duty policy is a new policy and procedure that specifies the method for determining employees' fitness for duty. The public comment period for this proposed policy ran from November 11, 2019, through November 25, 2019. 23 comments were received on this policy.

II. Comments Received

The first few comments on this policy acknowledged the policy was “overdue” and an initiative of Faculty Senate. The majority of comments, though, found the policy contrary to ETSU’s values of treating people with dignity and respect. Some comments were incorrect that the policy is discriminatory; rather, ETSU’s office of university counsel confirmed the policy was lawful. Other comments suggested that cost of a fitness for duty evaluation should be ETSU’s responsibility. These suggestions were not incorporated into the final draft of the policy since cost should be covered by insurance.

The other theme of comments questioned why another policy was needed when the university has a progressive discipline policy. These comments were made without the benefit of viewing the Observed Behavior Summary Form (attached), which will be used when the Fitness for Duty policy is necessary. The Observed Behavior Summary Form shows why a Fitness for Duty policy is necessary, and how it is different than a progressive discipline policy.

Based on public comments, two changes were made to the final draft of the policy: the length of time to obtain a second opinion on a fit-for-duty evaluation was changed from 14 days to 21 days and a conflict of interest provision was added to spell out that healthcare providers may not have a conflict when evaluating an employee for a fit-for-duty evaluation.

III. Legal Review of the Proposed Policy

This new policy complies with the Americans with Disabilities Act, as amended and the Drug-Free Workplace Act of 1988.



Fitness For Duty	
Responsible Official: Chief Operating Officer	Responsible Office: Human Resources

Policy Purpose

The purpose of this policy is to provide a method for determining fitness for duty using sound management and Human Resources principles and a humanitarian and compassionate approach to assisting employees.

Policy Statement

I. Scope and Applicability

A. Scope

1. This policy and procedure covers all regular full-time and part-time faculty, administrative/professional, and support staff employees.
2. This policy and procedure does not apply to temporary employees.

B. Employee Responsibilities

1. Employees are expected to perform their work duties safely and competently.
2. Employees are responsible for notifying their supervisors when they are not fit for duty.
3. Costs associated with a fitness for duty evaluation and any subsequent treatment are the employee's responsibility.

C. Employer Responsibilities

1. The university may refer employees to the university's Employee Assistance Program (EAP) or for a fitness for duty evaluation when:
 - a. An employee is having observable difficulties in performing work duties and the performance and/or behavioral issues demonstrate the employee is not physically and/or mentally ready to perform the essential functions of their job; or
 - b. An employee is posing an imminent and serious safety threat to self or others.
2. The university will not charge leave time for initial EAP appointments if supervisors are notified of appointments.

3. Any document containing medical information about employees is considered confidential to the extent permitted by law. The university will maintain medical records in a file separate from employees' official personnel records.

Authority: Americans with Disabilities Act, as amended; Drug-Free Workplace Act of 1988

Definitions

Coordinating Team	Representatives from the appropriate university offices including but not limited to Human Resources, the Office of the Provost, the Office of University Compliance, and Disability Services responsible for reviewing, coordinating, and facilitating fitness for duty evaluations.
Employee Assistance Program (EAP)	No-cost consultation, self-help resources, and referral for employees and their eligible family members who are experiencing personal challenges, which are likely to have an impact upon work performance and/or personal well-being. All full-time and part-time employees eligible to participate in the State of Tennessee insurance program and their eligible family members may participate regardless of whether they participate in the State's Group Insurance Program. EAP services are offered at no cost to employees and to eligible family members.
Fitness for Duty	Ability to safely and effectively perform the essential functions of the employee's job with or without reasonable accommodations.
Fitness for Duty Evaluation	Evaluation performed by an impartial, independent doctor of medicine or osteopathy, dentist, podiatrist, clinical psychologist/psychiatrist, optometrist, nurse practitioner, or a licensed clinical social worker authorized to practice in the state of Tennessee or in the state the employee resides. The evaluation may include a health history, physical, and/or psychological examinations, alcohol and/or drug testing, or other required medical tests or studies. A fitness for duty evaluation is limited to job-related inquires and must be consistent with business necessity.
Supervisor	For purposes of this policy, supervisor means a chair, dean, director, provost, vice president, or any other supervisor or individual holding a supervisory title or capacity.

Policy History

Effective Date:
Revision Date:

Procedure (s)

A. General

1. An employee who is aware of a personal need for assistance may always voluntarily approach their supervisor to seek assistance.
2. A supervisor may initiate a fitness for duty evaluation and/or EAP referral.
3. An employee who is aware of another employee's need for assistance may approach their supervisor to express concerns. If a supervisor determines that the concerns have merit, they initiate a fitness for duty evaluation and/or EAP referral.
4. If a supervisor has reason to believe an employee is not fit for duty, the supervisor reviews the Observed Behavior Summary Form to document concerns and behaviors and to help determine whether to consult Human Resources. If circumstances allow, prior to consulting with Human Resources, the supervisor sets up an informal meeting with the employee to discuss the perceived concerns.
5. If unresolved following the informal meeting with the employee, the supervisor consults a Human Resources representative before submitting a fitness for duty referral.
6. After consultation with a Human Resources representative, if appropriate, the supervisor sends a memorandum and the Observed Behavior Summary Form to the Office of Human Resources through the proper signatory chain to request a fitness for duty evaluation, EAP referral, or both.
 - a. The memorandum must specify any incidents and/or behaviors that are affecting the employee's performance of workplace duties.

B. Coordinating Team and Employee Responsibilities

1. Human Resources reviews the request with the Coordinating Team to determine the appropriateness of a fitness for duty evaluation. The supervisor's memorandum, the Observed Behavior Summary Form, a current job description, leave records, and other pertinent information will be reviewed.
2. If the Coordinating Team approves the request, the employee is immediately notified of the request, the need to participate, the need to sign any necessary documents and releases necessary for the evaluation.
 - a. Human Resources forwards a request and certification for a medical fitness for duty examination to an appropriate healthcare provider as determined by the Coordinating Team.
 - b. The healthcare provider cannot have a potential or perceived conflict of interest with the university's request to evaluate.
 - c. It is the employee's responsibility to schedule an appointment with an appropriate provider; failure to do so may lead to progressive disciplinary action.

- d. Non-compliance with a request for a fitness for duty evaluation may constitute insubordination and may be cause for disciplinary action.
3. The employee referred for a fitness for duty evaluation may be relieved of duties and placed on paid administrative leave:
 - a. Immediately;
 - b. At any phase of the fitness for duty process; or
 - c. Pending completion of the evaluation.
4. The healthcare provider conducts the fitness for duty evaluation and returns the findings to Human Resources and to the employee.
5. Employees may request a second evaluation at their own expense if they are unsatisfied with the initial evaluation findings.
 - a. Employees' second evaluation must be completed within 21 calendar days of receiving the findings of the initial evaluation.
 - b. If a second evaluation is sought by the employee or other medically related information is made available, that evaluation and/or medically related information is sent to Human Resources and the employee.

C. Final Determinations

1. The Coordinating Team makes the final determination of an employee's fitness for duty. Human Resources notifies the employee and the direct supervisor of the Coordinating Team's final determination.
2. If an employee returns to work or continues employment:
 - a. Continued employment may be conditioned on the employee's compliance with subsequent treatment, counseling, therapies, or other requirements established by a healthcare provider.
 - b. An employee may request any disability-related accommodations through Disability Services.
 - c. Information available to the employee's work unit is limited to whether the employee is fit to resume job duties and whether the employee has specific reasonable accommodations.
3. If it is determined an employee is not fit for duty, the employee works with Human Resources to determine appropriate options, including:
 - a. Annual leave;

- b. Sick leave;
 - c. Sick leave bank;
 - d. Family Medical Leave;
 - e. Medical leave;
 - f. Retirement;
 - g. Disability retirement; or
 - h. Resignation.
 - i. If expiration of tenure is appropriate, the formal process for expiration of tenure will be initiated.
4. The university may terminate an employee based on a fitness for duty evaluation and other relevant information and factors that support a determination that the employee is not and will not in the future be able to safely or competently perform their job.

Procedure History

Effective Date:
Revision Date:

Related Form(s)

Observed Behavior Summary Form

Scope and Applicability

Primary: Employment

East Tennessee State University

Fitness for Duty Assistance

Observed Behavior Summary

**This Observed Behavior Summary is intended to be confidential.
Any unauthorized use of dissemination of this information in whole or in part is strictly prohibited.**

This checklist should be used to document behavior that:

- Is out-of-the-ordinary
- May observably impair an employee’s ability to perform the essential functions of employment
- May indicate that an employee needs assistance, support, or some form of intervention in order to address the health and safety of that employee or of fellow employees and students.

This form is properly used when an individual reasonably believes that an employee may be experiencing:

- 1) a physical or psychological decline over time,
- 2) an observable shift in cognitive function, emotional stability, or social interaction, which might be attributed to recent physical trauma, emotional trauma, or disease, or
- 3) the ill effects of medication, withdrawal, improper use of drugs, prescribed or otherwise, or alcohol.

When using this form, the number of observations of behavior may vary from one to several. Use a separate form for each observation. An individual using this document should use reasonable care and good judgement as to how many times a behavior or behaviors are documented.

Please note: In all circumstances, if one reasonably believes that an employee presents a clear and present danger to self or to co-workers, that person should immediately contact Public Safety, the Office of Human Resources, and the employee’s immediate supervisor.

Observed Employee’s name:

Date of observation:

Time of observation:

Location of observation:

Duration of observation:

Note and describe any or all behaviors which you reasonably believe may apply:

1. Memory loss which disrupts the essential functions of the employee’s job.

2. Challenges in planning or problem-solving which disrupt the essential functions of the employee’s job.

3. Difficulty in completing familiar tasks at work that are an essential and expected component of employment.

4. Confusion (either consistent or sudden) about time, place, or essential employment functions, or circumstances.

5. Problems with visual images and spatial relationships, not accounted for by a previous diagnosis, or not accommodated by the Americans with Disabilities Act.

6. Difficulties (either consistent or sudden) with speaking or writing that cannot be accounted for by previously diagnosed conditions, or as side-effects of legitimate use of prescribed medications, or not accommodated by the Americans with Disabilities Act.

7. Difficulties (either consistent or sudden) in retrieving objects or retracing steps that cannot be accounted for by previously diagnosed conditions or as side-effects of legitimate use of prescribed medications.

8. Decreased or poor judgement in required employment activities including, but not limited to inconsistent decision making, inappropriate interaction with fellow employees in either speech or physical contact, and so forth.

9. Unusual (sudden or recent) withdrawal from required employment activities.

10. Unusual (sudden or recent) changes in mood and personality that a reasonable observer may understand as confusion, suspicion, depression, anxiety, or excessive or unwarranted fear/paranoia.

11. Lethargy; confusion; moodiness; easily upset; behavior that can be reasonably understood by an observer to indicate sadness, feelings of lack of self-worth, confusion, anxiety, or related issues, that have a negative effect on job performance and on fellow employees, that cannot be accounted for by previously diagnosed conditions or as side-effects of legitimate use of prescribed medications.

12. Uncharacteristic outbursts of anger, aggression, defensiveness, risk-taking, etc. that have a negative effect on job performance and on fellow employees that cannot be accounted for by previously diagnosed conditions or as side-effects of legitimate use of prescribed medications.

13. Appears to be responding to things which are not there (ex. hearing voices), exhibiting bizarre and unusual beliefs, disorganized thinking and speech, exhibiting disorganized or abnormal motor behavior for that person.

14. Other:

Please use the following in conjunction with the previous narrative descriptions to identify specific observed behaviors or appearance.

1. Are alcohol, drugs, and/or drug paraphernalia present? Yes No (circle one)

a. If "yes," specify:

2. Did employee admit to the use of drugs or alcohol? Yes No (circle one)

a. If "yes," specify:

3. Appearance and Personal Hygiene (circle all that apply):

inconsistent with usual appearance/hygiene	drowsy/sleepy	flushed
dilated/constricted pupils	bloodshot eyes	messy
profuse sweating	puncture marks	runny nose
tremors/shaking	odor of alcohol	sores
unusual wearing of sunglasses	odor of marijuana	

Explain:

4. Behavior/speech that affect an employee's ability to perform the essential functions of employment (circle all that apply):

inconsistent with usual behavior/speech		incoherent
changed volume of speech	confused	slurred speech
unable to concentrate	silent	slowed speech
aggressive behaviors	weepy	listless
unreasonably defiant	inability to write coherently	
Other (specify):		

Explain:

5. Behaviors that affect an employee's ability to perform the essential functions of employment (circle all that apply):

confused	excessively excited	paranoid
disoriented	enervated/fatigued	uncoordinated
experiencing mood swings	takes frequent breaks from tasks	agitated
nervous	withdrawn	fixated
detached	cognitively slow	
other (specify):		

Explain:

6. Changes in motor skills that affect an employee's ability to perform the essential functions of employment (circle all that apply):

swaying
stumbling
collapsed
other (specify):

falling
reaching for support
unable to stand

staggering
unable to maintain balance

Explain:

7. Other observed actions or behaviors that affect an employee's ability to perform the essential functions of employment (specify):

Check all that apply:

1. Contacted Public Safety. ()
2. Contacted Human Resources. ()
3. Discussed the matter with your immediate supervisor. ()
4. If the supervisor of the employee, relieved employee from duties and/or removed from campus. ()
5. Implemented safe transportation plan, if necessary. ()
6. Informed employee of process for returning to work. ()

Completed by: _____
(print name) (signature)

(title) (date)

Witnessed by: _____
(if applicable) (print name) (signature)

(title) (date)

For HR use only. Received and Reviewed by:

Name: _____

Date: _____

FITNESS FOR DUTY REQUEST & CERTIFICATION

Employee Authorization

I agree to attend a fitness for duty evaluation and authorize the healthcare provider to forward this certification and any findings, and to review and discuss relevant information regarding my fitness for duty evaluation with East Tennessee State University's Office of Human Resources.

Employee Signature: _____

Name (print): _____ Date: _____

Fitness For Duty Request & Certificate Information

The remainder of this form is to be completed by a healthcare provider. This form is for return-to-work purposes due to an illness or injury. Because employees are valuable resources, healthcare providers should assist employees in returning to work as soon as possible.

Healthcare Professionals

Your examinee has three return-to-work options. *[A job description and Observed Behavior Summary Form is attached for your reference.]*

- **Full Release.** The examinee has no work restrictions. They can return to their prior position because you, the healthcare provider certify that they can perform the essential functions of their job.
- **Modified Duty.** The examinee has some work restrictions. Work restrictions must be specifically notated on page two of this form. Each modified duty work restriction request will be reviewed carefully to determine if the employee can perform the essential functions of the job and return to work.
- **Not Released.** The examinee is not released to work in any capacity due to physical or behavioral limitations.

GINA Provision

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information" as defined by GINA includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Submission

The Fitness for Duty Request & Certification can be submitted to the following:

*Office of Human Resources
East Tennessee State University
P.O. Box 70564
Johnson City, Tennessee 37614-1707*

[List Employee's Contact Information Here]

FITNESS FOR DUTY CERTIFICATION

Employee/Examinee Name (Last, First, & Middle)	Date of Exam

Employee's Release for Duty Status

Full, unrestricted duty effective ____/____/_____
 Modified duty effective ____/____/____ and next evaluation date ____/____/_____
 Not released for any type of duty. Next evaluation date will be ____/____/____

Physical and/or Behavioral Restrictions (Check and explain any that may apply.)

Lifting Restrictions	Explanation
<input type="checkbox"/> Sedentary, 0 to 10 pounds	
<input type="checkbox"/> Light, 10 to 20 pounds	
<input type="checkbox"/> Moderate, 20 to 50 pounds	
<input type="checkbox"/> Heavy, 50 to 100 pounds	
Other Physical Restrictions	Explanation
<input type="checkbox"/> Pulling/Pushing/Carrying	

Employee/Examinee Name (Last, First, & Middle)	Date of Exam
<input type="checkbox"/> Reaching/Working above Shoulder	
<input type="checkbox"/> Walking	
<input type="checkbox"/> Standing	
<input type="checkbox"/> Stooping	
<input type="checkbox"/> Kneeling	
<input type="checkbox"/> Repeated Bending	
<input type="checkbox"/> Climbing	
<input type="checkbox"/> Operating a Motor Vehicle	
<input type="checkbox"/> Finger Manipulation (typing)	
<input type="checkbox"/> Pain (frequency, degree, signs)	
Behavioral Restrictions	Explanation
<input type="checkbox"/> Understanding	

Employee/Examinee Name (Last, First, & Middle)	Date of Exam
<input type="checkbox"/> Remembering	
<input type="checkbox"/> Sustained concentration	
<input type="checkbox"/> Follow-through on instructions	
<input type="checkbox"/> Decision making	
<input type="checkbox"/> Receiving supervision	
<input type="checkbox"/> Relating to co-workers	
Other Restrictions, Considerations, or Notes	

I hereby certify that the facts in this document are true and correct.

Healthcare Provider Signature: _____

Name (print): _____ **Date:** _____

Phone Number: _____