Mediating Employment Disputes Under the Disabilities Act

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The intent of Title I, the employment section of the Americans with Disabilities Act (ADA) is to open up employment opportunities to individuals with disabilities in order to bring them into the economic mainstream. The ADA includes legal and technical requirements that impose both restrictions and affirmative obligations on employers.

This article examines the mediation of disability-related disputes through a look at the key concepts of Title I and the most common issues that may arise under each of them, including ways in which the mediator may address the issues. A detailed review of ADA substantive and procedural law is beyond the scope of this paper. Likewise, effective techniques for presenting legal information in facilitative mediation and for the mediator's compliance with ethical obligations to ensure that the agreement is fair and does not violate the law are not addressed.

We do have some basic premises: In order to assist the parties in analyzing and resolving their case, the ADA mediator must know the law. However, the legal issues are not isolated. The skilled mediator can help the parties deal with the many underlying issues, including emotional ones. Finally, the ADA mediator needs a good command of disability etiquette and appropriate language and needs to be able to set up and run an accessible session.

In this article, the substantive ADA legal requirements are followed by examples of issues that might be raised by the parties in a mediation setting, and tips for the mediator in dealing with these issues. (The mediator should also be aware of state and local laws that may provide more stringent requirements than the ADA.) In analyzing an ADA case, it is most productive to go step by step through the concepts with the parties (for example, agree on what the essential job functions are before discussing reasonable accommodations).

I. Definition of Disability

A disability is defined as a physical or mental impairment that substantially limits one or more major life activities.

Major life activities include seeing, hearing, walking, performing manual tasks, learning, etc. The limitation must be permanent or long term and must have a major impact on the person's functioning.

An individual is covered under the ADA if:

1. he or she has a disability that meets the above definition; or
2. he or she has a record of a disability; or
3. he or she is regarded by others as having a disability.

The Employer may say: The employer may take the position that the employee does not have a disability, or that the person's condition does not rise to the level of a disability under the ADA.

- The employer may believe that the person's disability is not covered by the ADA.
- The employer may state that requested medical documentation was not provided, or that provided documentation was inadequate.

The Employee may say:

- The employee may produce anecdotal evidence to demonstrate that the employer was aware of the disability, or that the employer regarded the employee as having a disability.
- Where the employer denies the presence of a disability, the employee may state that the employer first acted in a manner based on his belief that the person did have a disability, but now is changing that position.

Notes for the Mediator:

- The knowledge and perceptions of the parties at the time they acted is a significant area for discussion to "reality test" their positions.
- Where the employer argues that the employee cannot do the job, yet contends that the employee is not disabled, the mediator can assist the parties in analyzing other possible sources of the alleged poor job performance.
- The ADA requires that each individual's situation be analyzed on a case-by-case basis. Whether the ADA covers the person does not depend on the diagnosis, or name of the disability, but rather on its impact on the individual in question.
- The mediator may facilitate a process of documenting the disability (or lack thereof), possibly by bringing in a neutral expert. The expert may be a vocational rehabilitation counselor or other expert on the disability and its impact on workers. (The same neutral expert may be helpful later in working on possible reasonable accommodations.)

II. Qualified Individual with a Disability

To be deemed as qualified for a particular job, a person must:

1. meet the qualifications for the position. Qualifications include such requirements as a high school diploma, a particular type of certification or length of experience. The qualifications must be legitimate (e.g., requiring a driver's license for a job that does not involve driving would not be legitimate);
2. be able to perform essential job functions (with or without a reasonable accommodation)

The Employer may say:

- The employer may state that it is obvious that this individual cannot perform the essential functions of the particular position, in spite of any possible accommodation.
- The employer may cite anecdotal evidence that it interprets as an admission on the part of the employee that he or she is not able to perform the job.
- The employer may state that many individuals -- with and without disabilities -- are unable to perform this same job, for reasons having nothing to do with a disability.

The Employee may say:

- In the case of being passed over for a job promotion, the employee may argue that he or she never got the opportunity to demonstrate his or her qualifications, or to show the capability of doing the job with a reasonable accommodation. The employee may argue that the failure to at least allow an attempt to perform the job is a per se violation.
- With regard to an alleged admission, the employee may argue that statements attributed to him or her were in the context of the employer's refusal to consider accommodation alternatives or that the alleged admission was merely an expression of concern about his or her own abilities, as might be natural for any employee.

Notes for the Mediator:

- The parties might brainstorm ways to allow the employee an opportunity to demonstrate that he or she is "qualified," or to test reasonable accommodations about which the parties may have reservations. (In caucus, the mediator can point out to the employer that if the employee "fails," then the employer is off the hook. The employer should also know that part of any good defense is in making a good faith effort to accommodate the employee with a disability.)
- Because of the requirement that each employee's situation be evaluated on a case-by-case basis, examples of others who were or were not qualified to perform these essential functions, or of employees who had the same disability, are not relevant.
- Many ADA disputes arise around this issue. That is, the employee has been discharged because the employer claims he or she is not a qualified individual with a disability (i.e., the employee simply cannot do the job). In these cases, the mediator would be mistaken to limit the discussion to whether or not the employer violated the law. Even if the employee comes to acknowledge not being qualified, there is often more that needs to be discussed. Frequently the employee feels that he or she has had to tolerate harassment or other forms of discriminatory treatment by supervisors and even co-workers; or perhaps a legitimate discharge was handled poorly. Allowing the employee to express such feelings to the employer may enable him or her to move on, paving the way for the employer to ensure that like episodes are not repeated.
- In a discharge case, there occasionally is some history of accommodation efforts or offers. In these cases, the employer may feel that it has made good faith efforts to accommodate the person and may be angry at being accused of discrimination. In age/disability claims, the employer's perception may be that the discharged long-term employee had been "carried" rather than accommodated. As a result, the employee may be viewing mediation as the beginning of the process of defending his performance, while the employer may take the position that, by this point, it is too late to consider any alternative to discharge.

III. Essential Job Functions

Factors to consider in defining essential functions include:

1. the position exists to perform the function;
2. limited employees are available to perform that function;
3. the function is highly specialized.

For example, a cashier position exists for the purpose of collecting money. Therefore, being able to count money is an essential function of the job. A deaf person's ability to be a cashier depends on whether being able to communicate effectively through spoken English with customers is an essential function at that workplace.

The essential function tells what has to be done, not how. The reasonable accommodation may define alternatives for how it is done. One essential function of a telephone receptionist would be to take messages, not to be able to write on a message pad. If a receptionist is blind, he or she may perform the function of taking messages by entering them on a computer, or by speaking them into a tape recorder.

If a mobility-impaired cafeteria worker is not able to carry trays back and forth, carrying trays would be an essential function if there were too few employees available to do it.

Additional factors to consider include:
the employer's judgment;
a job description (written before the time of the dispute);
percentage of the employee's time spent on the function;
the consequences of function not being done by the person in that position;
the terms of a collective bargaining agreement; and
past experience of others in the same position.

The Employer may say:

- The employer may claim that function is essential because the position in question has always included this job task.
- Smaller employers particularly may cite the unavailability of other employees to perform this function.
- Where the bulk of the employee's time is spent on a particular function (for example, a clerk who spends most of the day filing), the employer may resist considering it a marginal function that someone else can do.
- The employer may contend that a particular intangible quality is an essential function. Such requirements as regular attendance, being able to work under stress, and being available to work flexible shifts are requirements that pose difficulties for some persons with particular disabilities.

The Employee may say:

- The employee may assert that he or she is qualified, and that his or her difficulties in performing the functions of the job are attributable to factors other than a disability (for example, inadequate staffing, poor supervision, or obsolete equipment).
- The employee may insist that a particular function is not essential. This may include intangible areas that pose difficulty for some persons with particular disabilities, such as effective communication skills, or being able to follow verbal or written directions.
- The employee may claim that other employees are not subject to such rigorous evaluation or even required to perform the function in question.

Notes for the Mediator:

- The mediator can facilitate the process of determining whether a job function is essential by reality testing using the objective criteria listed above.
- If there is a job description that pre-dated the dispute, the mediator may suggest that the employer bring copies of it to the session.
- If the parties reach an impasse as to whether a particular job function is essential, they may choose to jump ahead one step and brainstorm reasonable accommodations to enable the employee to perform the disputed function. If the employer is able to successfully accommodate the employee, the question of whether or not the function is essential can be left for another day.
- Even if the terms of a collective bargaining agreement define the job duties, the entire list of criteria still needs to be used in the analysis of essential functions. The decision as to whether a function is essential cannot be based exclusively on any one of the criteria. For example, even if a collective bargaining agreement states that administrative assistants must do telephone work in addition to filing, the parties must examine whether this is an essential function based on the other criterion -- such as whether other employees available to do the work - in order, for example, to accommodate an employee who has a severe speech disability and cannot do telephone work. The majority of collective bargaining agreements contain a clause requiring both parties to obey the law. Where a term of the agreement appears to conflict with an employee's rights under the ADA, the employer and the union need to work together to achieve a balance that is appropriate and fair to all parties concerned. (This same reasoning applies to other areas of conflict between the collective bargaining agreement and the ADA. In these cases, it may be most productive for the union to participate in the mediation, as it indeed may be entitled to do under the National Labor Relations Act or other relevant statutes.)

IV. Reasonable Accommodation

A reasonable accommodation is a change or adjustment to a job or to a work environment that enables a qualified individual with a disability to perform the essential functions of the job, participate in the job-application process, or enjoy the privileges and benefits of the job equal to those of other employees.

Some types of reasonable accommodations include:
acquiring equipment;
modifying equipment;
architectural changes;
modifying the work environment;
modifying practices;
providing services;
flextime;
job restructuring (i.e., assigning marginal functions to another employee or position);
re-assignment to a vacant position.

The reasonable accommodation requirement is the feature of the ADA that distinguishes it from other civil rights statutes. Where non-discrimination against persons in other protected classes

simply requires that the employer treat them no differently from other employees, the affirmative requirement of reasonable accommodation is to ensure that the employee has a meaningful opportunity to succeed in the job.

Failure to provide a reasonable accommodation constitutes discrimination under the ADA. However, the employer's obligation attaches only to known disabilities, so that the employee will typically need to disclose a disability and request the reasonable accommodation in order to invoke the obligation.

(Note that recent guidance from the Equal Opportunity Employment Commission indicates that the employee need not use the exact phrase "reasonable accommodation.")

The employer has the right to request documentation of the nature and severity of the disability where it is not obvious. Confidentiality provisions require that the employer maintain this medical information separate from the personnel file, and that he share it only with supervisors and emergency personnel and enforcement personnel - and then only on a "need to know" basis.

The process of reasonable accommodation is to be interactive. This collaborative approach is perfectly suited to mediation, as it reflects basic mediation concepts.

The steps of the process are generally:

1. define essential functions;
2. identify the employee's needs and limitations;
3. brainstorm potential reasonable accommodations;
4. select the accommodation to be provided. The employer should consider the employee's preference, but may select any reasonable accommodation, as long as it is effective in enabling the employee to do his or her job.

The Employer may say:

- The employer may contend that it was not aware that a reasonable accommodation was needed, and that no accommodation was requested.
- The employer may argue that it did not discuss reasonable accommodations with the employee, because it was obvious that the individual could not do the job or because no accommodation was feasible.
- The employer may argue that the "team concept" in place at his workplace defines the way that functions are assigned. It may claim that each employee needs to be able to do each task, and that this concept is both important to the successful operation of the business and integral to the nature of the business.
- The employer may contend that accommodations were offered and rejected by the employee.
- The employer may simply resist brainstorming with the employee on accommodation alternatives because it is not part of the practice or the culture of its workplace to include the employees in this type of policy discussion.
- A common perception among employers is that they are not required to consider accommodations that appear to result in the treatment of one employee in a preferential

manner, or which are inconsistent with existing policy or that they consider to be "unreasonable."
- The employer may be defending itself against a claim that it revealed confidential information or it might request the employee's permission to reveal information, because coworkers have complained that the employee is receiving special treatment. The employer may explain management or coworker hostility directed at the employee by pointing out that it was not allowed to share the fact or details of the employee's disability.

The Employee may say:

- The employee may claim that he or she can perform the job function(s) at least as well as other employees, and may allude to the work performance of others.
- The employee may provide anecdotal evidence that others have received assistance in performing this or other job functions, and claim that he or she is being treated differently because of the disability.
- The employee may believe that the employer is required to select the accommodation that he prefers. He or she may request reassignment or permanent light duty as a reasonable accommodation, but the employer may be unwilling to provide this.
- The employee may not understand the interactive nature of the accommodation process and may be unwilling to collaborate.
- The employee may deny that any accommodation efforts were offered or discussed. The employee may also claim not to have been consulted regarding the design of the accommodation, and may have a number of suggestions for possible (different) accommodations.

Notes for the Mediator:

- The employer is required to engage in the interactive process of considering accommodation alternatives before it can conclude that the person is not able to perform the essential functions of the job. The mediator may need to assist the parties through the steps of the process as outlined above.
- The only defenses to providing a reasonable accommodation identified in the ADA are "undue hardship" and "direct threat." Once the brainstorming has taken place, the employer may then reject a particular accommodation on these grounds.
- The mediator may inform the parties, in advance and at the mediation session, that the facilitative mediation approach that they will be engaging in is comparable to the "interactive process" required by the ADA. Although bringing in experts can be helpful, the person with the disability has a certain amount of expertise on the topic, an important empowerment factor, especially if the employee is not represented in the mediation.
- Where violations of confidentiality have occurred, and where the disability is a particularly stigmatized one (for example, alcoholism, mental illness, or AIDS), the employee may request reassignment. If the employer requests permission to reveal information, the employee can specify in the agreement exactly what information the coworkers may be told. The employee may even agree to speak at a meeting of his or her peers.
- If the employer takes the position that the employee did not request an accommodation, the mediator may suggest that the employee is now requesting an accommodation, and that

the matter will not be resolved until this issue is addressed.

- The mediator may want to prepare by researching the particular disability issue ahead of time, in order to become more familiar with the options. Other approaches are to bring in a neutral expert to work on brainstorming with the parties, or for the parties to bring in its their experts, who will work together on designing or at least discussing the accommodation. Documentation that the employee has provided can also be a useful tool.
- The employer is not required to provide a personal use item (such as a wheelchair or a hearing aid), although it may be appropriate to do so under certain circumstances. For instance, newly installed thick-pile carpeting may necessitate that the employer may provide a manual wheelchair user with a motorized scooter to be used at the workplace
- Reasonable accommodation is the heart and soul of the ADA. The potential for successful mediation is high, and the possibilities and options are endless. Creative solutions -- such as job coaches (often paid for by public agencies), extension of probationary periods, coworkers' involvement with alternative work procedures or an exchange of marginal functions that can even streamline the work place -- can be arrived at when the parties collaborate. Even where a discharged employee will not return to work, he or she may achieve some measure of satisfaction in helping the employer come to an agreement to alter its practice in a meaningful way, such as by providing training in disability awareness, or by establishing a procedure for requesting reasonable accommodations.

V. Undue Hardship

The employer is excused from providing a reasonable accommodation if it would result in undue hardship: significant difficulty or expense, or disruption to business.

Factors to consider include:
employer's size;
overall financial resources;
nature and structure of the operation.

The Employer may say:

- The employer may over-estimate or exaggerate the cost of accommodation alternatives, or simply claim that they are not affordable.
- The employer may relate the cost of the requested accommodation to the relative importance of the position or the compensation level of the employee.
- The employer may argue that the deviation from established procedures that would accompany the accommodation would be disruptive or would set a precedent.

The Employee may say:

- The employee may not understand the limits of the employer's obligations, and may not accept that any accommodation would result in an undue hardship.
- As proof that the employer has funds and would not suffer undue hardship by conceding to an accommodation, the employee may recite anecdotal information on unrelated expenses the employer has incurred for items or programs considered by the employee to be of little value.

Notes for the Mediator:

- When cost of an accommodation is anticipated as a possible issue, the mediator may want to obtain information in advance of the mediation session. Resources such as the Job Accommodation Network (1) can provide information on costs and resources available to the employer to defray the costs. Neutral experts may be brought in, or experts brought in by both sides to work together on solving the problem as inexpensively as possible. The mediator may also be prepared to suggest resources in the community.
- The ADA requires any cost analysis to be in the context of the employer's resources and ability to pay, not in terms of the importance of the employee's position.
- Where the employer argues that the accommodation would pose an undue hardship without having conducted an analysis to determine the true cost, or what resources might be available to defray some of the costs, the mediator can reality test the position. In caucus, the mediator might suggest that the employer help move toward a resolution of the case by explaining to the employee how the company arrived at the conclusion.
- While there is no obligation to hire a second individual to "shadow" the employee with a disability, assistance with certain tasks (for example, a reader to go through the mail of a person who is blind) can be a legitimate reasonable accommodation.

VI. Direct Threat to Health and Safety

The employer is not obligated to hire or promote a person to a position that would place the person -- or others - at significant risk of substantial harm, unless the risk can be alleviated with a reasonable accommodation.

The following factors are to be considered:
duration of risk;
nature and severity of potential harm;
likelihood that harm will occur;
imminence of potential harm.

Employers' claims of direct threat are to be based on objective, factual evidence, not on stereotypes or opinions. In general, blanket exclusions are not permissible (for example, "no deaf employees as forklift drivers" or "no persons with seizure disorders can work in the kitchen").

The Employer may say:

- The employer may have a misperception that certain disabilities preclude a safe workplace. For example, the employer may believe that most persons with psychiatric disabilities are violent, that a person with a seizure disorder is at great risk of harm or that a person with AIDS poses a risk to other employees.
- Employers may be concerned about liability or increased costs, such as insurance expenses.
- The employer may base its opinion of direct threat on prior experience involving a different individual and different factual circumstances

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The Employee may say:

- The employee may provide examples of others who arguably posed a direct threat, and were allowed to continue working.
- Where the employer claims that the direct threat is to the health or safety of the individual with a disability, the employee may take the position that he or she should be able to determine whether to assume the risk.

Notes for the Mediator:

- Direct threat is a most difficult defense for the employer to prevail on at trial. The threat to health and safety must be "significant" and the probability of resulting harm must be "substantial." These standards are indicative of the high bar that must be cleared by the employer to successfully maintain this defense. The mediator may reality test the employer's position, using the four criterion listed above.
- When a defense of direct threat is suggested, the mediator should be attuned to reliance on unfounded assumptions, fears or stereotypes regarding the nature or effect of the disability. It may be helpful for the mediator to have background information about the disability in question in order to facilitate discussion and to reality test most effectively. This is another area where it may be effective for parties to bring in experts to work together collaboratively, or for the mediator to bring in a neutral expert to participate in the discussions.
- Although the employer may indeed have had past experience with a person with the same disability, each individual's experience is different. The "objective factual evidence" required must be evidence regarding the current individual's current condition in the instant circumstance. For example, some people with seizure disorders are able to completely control their disability with medication; some are not.
- A reasonable accommodation may mitigate the threat to health and safety, and should be explored by the parties through traditional mediation brainstorming. For example, a person with tuberculosis may be provided with unpaid leave time during the contagious period; or a deaf person who drives a vehicle may be provided with special rear-view mirrors (there may be legal standards to follow in this case).

VII. Conclusion

The employee's rights and the employer's legal requirements under the ADA are most compatible with sound facilitative mediation principles and techniques. However, it is essential to successful negotiated outcomes that mediators of Title I ADA claims be well-grounded in the fundamentals of the statute and regulations and their application to everyday workplace realities. If the mediator becomes familiar with this framework, he or she can provide invaluable assistance to the parties in analyzing their positions and negotiating lasting resolutions.

ENDNOTE (1)The Job Accommodation Network can be reached at (800)-ADA-WORK.

Biography

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DeShazer has presented a number of seminars to attorneys and employer groups relating to the Americans with Disabilities Act. He is on the faculty and planning committees of the ADA Mediation Institute, a program of the Access Center partnership and the University of Louisville Labor -Management Center.

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