

Sophisticated Awareness Is Necessary For Effective Disabilities Act Mediation

by Judith Cohen



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As people with disabilities move deeper into the mainstream, become employed in increasing numbers, and develop a more sophisticated awareness of their rights under the Americans with Disabilities Act (ADA), ADA employment disputes can be expected to increase.



An ADA employment dispute may be limited to a reasonable accommodation request or may involve discrimination allegations such as harassment, unfair discipline or discharge, or failure to promote. The impact of these cases on the parties can be emotional as well as legal. A reasonable accommodation dispute normally has multiple possible solutions. Thus, issues on a number of levels -- emotional, legal, and practical -- can surface. Mediators can tailor an approach for the particular case and for the range of concerns presented. The ability to deal with the multi-faceted nature of a dispute makes mediation an ideal forum for resolving ADA employment conflicts.

Mediation is also a useful tool at the pre-dispute level for preventing ADA complaints, and for assisting in the design of reasonable accommodations. An ADA mediation does not need to be a full-blown dispute.

ADA disputes can be limited if there is a reasonable accommodation request procedure in place for use by employees. There should be a structure that accommodates requests by all levels of employees and managers. In fact, the first case that the EEOC brought to court and successfully prosecuted involved a top-level executive.

As part of the request procedure, either party should be able to ask for mediation at any point. In a unionized work place, this may be facilitated by incorporating grievance mediation of ADA disputes into the collective bargaining agreement. Local government agencies can incorporate mediation into their internal procedures to handle EEO disputes.

Mediators should have experience in the areas of ADA and disability access. Many people feel uncomfortable dealing with people who have disabilities. A mediator should set a correct tone by interacting appropriately and by using appropriate disability terminology.

For example, if the mediator uses a term such as "wheelchair bound" or "handicapped," the person with a disability may be offended, damaging the mediator's credibility with both parties. The mediator's approach and the resulting interpersonal dynamic should set a positive model for the parties to follow in subsequent dealings at the workplace.

The employer may fear that a mediator with ADA expertise will not be neutral and will side with the individual who has a disability. But the point of using a mediator with ADA expertise is for the mediator to use his or her ability to analyze the ADA claim objectively. Such a mediator can be expected to be sensitive to the issues facing the person with a disability, and will not be likely to simply feel sorry for the disabled person and support the claim.

Conducting the session

The mediator and the parties must ensure that the session is accessible, with responsibility for this task to be allocated ahead of time. At or after the session is not a good time to find out, for example, that the deaf person feels that a sign language interpreter is not "qualified."

The mediator should describe to the employee exactly what will happen in the session so that the individual can foresee his or her needs. Whoever is planning access needs to work with directly with the employee to make the most effective arrangements.

For example, if the employee uses a wheelchair, he or she needs to be able to get to the meeting room, sit comfortably at the table and use the rest room. An individual with a psychiatric disability or Tourette syndrome may need a "time out" room available. A person with a respiratory disability or multiple chemical sensitivity will require a room with good air quality and may request that participants not wear fragrance.

It is essential that the parties educate themselves about the strengths and weaknesses of their case before the session. Although general counsel will likely have a solid understanding of the issues at stake, other respondent parties, such as a supervisor, may not. If the employment relationship is continuing, it is essential to have the supervisor present and participating in the mediation session (assuming he or she was involved in the conflict in question). The supervisor should go into the session understanding the employer's obligations to the employee. Although the mediator may clarify the regulations during the session, he or she will not give legal advice to either party.

In the opening statement, along with presenting the ground rules, an ADA mediator should mention any disability etiquette or access issues of which the parties need to be aware. For example, if the employee is Deaf, the participants need to direct their comments directly to the employee, not to the sign language interpreter.

Observing disability etiquette, along with providing reasonable accommodations, is necessary to make the session accessible. Again, this is of particular value because the mediation session sets the standard for future interactions between the parties. Even if a discharged employee is not returning to the work place, the session proceedings can be valuable experience for future relations with employees who have disabilities. Caucus not favored

Many advocates are accustomed to the caucus mediation model, which some mediators use exclusively, shuttling between the parties. Reasonable accommodation mediation, however,

is best initiated by the parties working together. The Equal Employment Opportunity Commission, the enforcement body for Title I, the ADA's employment regulations, has mandated that the reasonable accommodation process be interactive, with employer and employee working together to design the reasonable accommodation. Since the parties know best their limitations and needs, the job and the work site, their collaboration is the most productive approach. Joint sessions are the most effective way for the parties to resolve their differences and establish a more productive way to interact.

But private caucus has its place. It may be beneficial for the mediator to meet separately with the parties at times. Like in any mediation session, caucus in ADA mediation helps develop trust in the mediator. The mediator also may be able to diplomatically relay information that one party is not able to "hear" from the other party. The parties also may reveal critical information to the mediator in caucus that they would not in joint session.

For example, an employee with AIDS may acknowledge in caucus that she is not able to fulfill her job functions, and that she has been struggling to keep her job in order to maintain health benefits. With this knowledge, the mediator can strategically assist the parties in negotiating a settlement, based on a clear mutual understanding of the person's capabilities, limitations and needs.

The caucus is the appropriate setting for the mediator to play the "agent of reality," subtly letting a party know that it has a weak case, or that its expectations may be too high. Likewise, the mediator may use the caucus to assist a party in understanding the impact of the ADA regulations on its case.

Finally, the caucus model is appropriately used for purely financial settlement negotiations, such as in a discharge case where the parties agree that the employee will not be returning to work.

Hard feelings

The joint session, aside from being the appropriate setting for reasonable accommodation discussions, is the place for the parties to resolve hard feelings. Where there is a continuing relationship, negative feelings need to be worked out. The employee who has a disability may feel that he has been undervalued by his supervisor; the supervisor may feel that she has gone out of her way to help the individual and may be hurt or embarrassed that she has been accused of discrimination.

The employee with a disability who feels patronized or ill-treated needs the opportunity to explain these feelings to the employer in order to repair the relationship, "move on," and deal with substantive issues. Parties accustomed to the caucus method of mediation may be reluctant to deal with these conflicts, but the conflicts will not go away. The mediator helps the parties express and deal with interpersonal issues to pave the way for a more productive work relationship.

While most reasonable accommodation mediation sessions last for less than a full day, it

may be necessary to have a second session with a neutral expert to assist in negotiating a reasonable accommodation. For example, an occupational therapist can help the parties design a work space for an employee with a back impairment who cannot lift or reach. A counselor can assist the parties in developing strategies to accommodate an employee who has a psychiatric disability.

Where there is no reasonable accommodation that will enable the employee to do his or her job, the parties may consider a transfer or reassignment to another position. If the individual feels that he has been subjected to discriminatory treatment either by a supervisor or by co-workers, the parties may agree that reassignment is the best solution.

Work place education, such as disability awareness training of supervisory personnel and co-workers may be considered as part of a mediation agreement.

Disability issues may affect the procedure or content of the agreement. For example, for employees who have degenerative disabilities, such as multiple sclerosis, the agreement should contain a provision for reopening the reasonable accommodation discussion. Individuals with cognitive or communication disabilities may need the information memorialized in an alternative format (e.g., braille) or presented in an accessible way.

As with other mediated disputes, parties in ADA mediations will find that the process is speedier and less costly, than litigation, both financially and in terms of damage to the relationship. Because the process is confidential, both the business' reputation and the privacy of the employee with a disability are protected.

DISABILITY TERMINOLOGY

Language is constantly changing. Individuals' preferences may vary. The following are guidelines, but may not always hold true. If you're not sure what term to use, or how to interact, ask the person directly.

Use affirmative "person first" designations such as "person with a disability" or "person who is blind."

Don't use negative phrases like "suffers from multiple sclerosis" or "victim of diabetes."

Avoid euphemisms like "physically challenged" and archaic terms like "handicapped."

Say "wheelchair user," rather than "wheelchair bound" or "confined to a wheelchair."
Remember, the wheelchair is what gives the person mobility.

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