

Mediating Reasonable Accommodations for ADA Cases: What every mediator needs to know

by Debra Dupree

March 2003

“What has disability got to do with conflict?”

The disability itself is not the source of "conflict" between parties. Instead, it's the perceptions or attitudes that lead to miscommunication and breakdowns in relations. An employer's misunderstanding may simply arise from a lack of information about the disability. When faced with the impact of disability in the workplace, both the employee and employer often lack appropriate information about the interactive reasonable accommodation process, their rights and responsibilities under the law, and the disability itself. The employer is concerned with getting the job done, the impact on bystanders, and potential lawsuits if not handled appropriately. The employee may be concerned about whether or not an accommodation will be provided and about losing his or her job. These concerns, coupled with a lack of knowledge, can easily lead to fear, uncertainty, and lack of trust, creating internal stresses that spill over into the workplace.

When business operations are affected, the employer may react from an emotional, judgmental, or subjective perspective. The parties need to explore how the employee's functioning can be brought to productive levels through reasonable accommodation. Certainly, restoring someone to full functioning in the workplace is a win-win proposition for both the employee and the employer – the employee with the disability feels good about being able to perform the job and retaining employment while the employer is satisfied that the job is getting done.

An individual's level of confidence, morale, and productivity is affected when he or she faces challenges in getting a job done well, and when he perceives negative attitudes from co-workers and supervisors. The result can be a confirmation of stereotypical expectations that further feed attitudes and biases about disability.

This conflict spiral -- including an escalating breakdown in communications and relations, perhaps involving bystanders, and oftentimes leading to a formal complaint by the employee with a disability -- may likely be resolvable through mediation. It is in the interests of all parties to return to effective job functioning and restored employee morale.

Understanding Disability issues

To address both rights- and interest-based issues presented in reasonable accommodation cases, qualified workplace ADA mediators have knowledge of ADA law (including reasonable accommodation design) and disability issues and a self-awareness of their own attitudes. Because of the substantive issues presented in these cases, the ADA mediator needs to be familiar with resources such as the Job Accommodation Network (JAN), the Department of Vocational Rehabilitation (DVR), Independent Living Centers (ILCs), Disability and Business

Technical Assistance Centers (DBTACS) and other local disability-related services. These resources can help the mediator draw upon appropriate tools for information and education to the parties as part of the mediation process.

Laying the Groundwork for a Successful Mediation

Convening or case development is a valuable step towards a successful outcome when disability issues exist, as it is in many cases involving interpersonal relations. By working with each party prior to the first mediated session, the parties are better prepared to mediate effectively and the mediator is better positioned to understand the interests as well as the needs and fears of the parties.

In one mediation case, for example, the mediator learned through pre-session conversations that the person with the disability lacked a clear understanding and knowledge of her rights, expressing unrealistic expectations about the employer's responsibilities. The mediator referred her to appropriate ADA resources such as the Job Accommodation Network (JAN), mailed her an EEOC guide on Employee's Rights & Responsibilities which also provided additional resource numbers to call, and referred her to an association that specialized in her disability. The mediator may also research issues prior to the mediation to better understand the disability, and to be familiar with types of accommodations possible or to arrange for appropriate resources for use during the mediation. Drawing upon neutral experts in particular fields to provide needed information at a mediation session can help dispel misperceptions and enhance understanding among the parties.

Another benefit achieved in convening in a reasonable accommodation case is that the mediator becomes familiar with disability issues involved in the case from the parties' perspectives, learns about the fears and concerns of both parties, and can thus prepare him or herself to engage in the mediation more effectively. The mediator is able to check out any biases and attitudes he or she might hold about the particular disability or the issue presented for mediation. Lack of awareness on the part of the mediator around disability or other issues can inadvertently compound perceived bias issues already present and fueling the case.

During mediation of the case mentioned above, after hearing the employee's concerns, the employer realized that the organization's reasonable accommodation policy had not been effectively communicated to its managers, much less to the employees. The employer offered to provide updated training to all managers, supervisors, and employees as part of the final agreement. This met the employee's concerns that what happened to her would be less likely to happen to others in the future.

Mediation as part of the ADA interactive process ... The EEOC, the enforcement agency of the employment provisions of the ADA, advocates an "interactive process" for negotiating reasonable accommodations. This interaction should take place as soon as the need for an accommodation is raised. Sometimes the parties need the assistance of a neutral to facilitate the process and it may not be until parties are in a mediation that they are truly in a frame of mind and in an environment where they can negotiate effectively.

In the mediation process, a successful outcome involving reasonable accommodations in the workplace can be achieved by including several basic steps. First, the parties articulate the essential functions of the person's job and the current issues about performing those functions. Then, they establish a clear understanding of the employee's abilities, and limitations, as well as workplace needs. They separate out those functions that are non-essential to the job, whether or not the person is having difficulty performing them. The parties concentrate only on those functions where the disability affects the person's ability to do the job and brainstorm on ways to do the task(s) differently. The mediator helps the parties weigh the pros and cons of each identified accommodation solution. Lastly, they come up with a written plan of action outlining the agreed upon solutions, including future meeting(s) to review the success of the accommodations. The mediation process provides an opportunity for the individual with the disability to address the impact of disability on daily functioning, as well as for the employer to address business concerns. Mediation can facilitate the contribution of ideas around performing essential functions and the types of accommodations possible. It also provides a forum that can enhance understanding for both parties around the handling of the request for an accommodation and how it contributed to the communication breakdown. Generally, increased understanding and satisfaction on the part of both parties results from a mediated session, setting a positive tone for future interactions, essentially improved employment relations.

The mediation process concurrently provides an arena for the employer to address the impact of disability on the business operations and on others in the workplace. There may be disappointment and financial impact when goals are not achieved or when increased demands are placed on co-workers to complete job functions. The employee with the disability is better able to "hear" this type of concern in the safe confines of a facilitated mediation session.

This process is valuable regardless of whether or not the employee's disability is actually protected under the law. It helps the parties recognize the value the employee brings to the table while helping the employee recognize the business challenges faced by the employer, improving the overall employment relationship. By helping the parties collaborate to define the workplace issue presented by the disability and its impact on essential functions or performance standards, the mediator shifts the emphasis from the individual with the disability to the two parties working out a solution to solve the workplace issue.

Closing

Mediators handling reasonable accommodation cases can enhance their role as a neutral by understanding disability issues, including the law. Laying the groundwork for successful reasonable accommodation mediations involves several special techniques: 1) conducting pre-sessions with the parties, 2) researching disability issues where relevant, and 3) enlisting appropriate resources to educate and collaborate with the parties when needed.

The mediator who has expertise in disability issues, along with sensitivity and awareness of his or her own biases, furthers successful resolution of reasonable accommodation disputes. Overall, mediation can play an integral role in the ADA interactive reasonable accommodation process for employment disability issues by bringing the parties together and giving them the opportunity to discuss the issues and solutions available...essentially, the art of mediation!

NOTE:

Understanding the ADA is not always enough. Some states have comparable but different laws such as the California Fair Employment & Housing Act (CFEHA). Various disability-related systems such as Social Security, Workers' Compensation, Disability Insurance Plans, Disability Retirement as well as the ADA and FEHA have different definitions and criteria for disability eligibility and protection. Mediators should always check state and agency guidelines applicable to the issues presented for mediation.