A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act

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I. Introduction

Over the years, the United States Equal Employment Opportunity Commission (EEOC or Commission) has vigorously enforced the laws prohibiting employment discrimination by emphasizing different facets of the Commission's mission. Since the Civil Rights Act of 1964, which established the EEOC and authorized the use of alternative dispute resolution (ADR) in the form of conciliation, enthusiasm for ADR has waxed and waned, depending on the policy choices of particular Commissions.[1] Recent statutory mandates endorse ADR as consistent with the practical necessity of processing an ever-increasing case load in a time of diminishing resources.

ADR furthers the mission of the EEOC—to ensure equality of opportunity by vigorously enforcing federal laws prohibiting employment discrimination through investigation, conciliation, litigation, coordination, education, and technical assistance. The Commission's guiding principle has been that EEOC sponsored or sanctioned ADR must strengthen its enforcement program by allowing the EEOC to use its limited resources to maximize impact. By facilitating resolution where agreement is possible, ADR can free up Commission resources for greater emphasis on identifying discrimination in the workplace and perform more expeditious and thorough investigations in those cases that are not resolved through alternative processes. These improvements in the agency's enforcement efforts, in turn, encourage victims to come forward, make the prospect of filing a charge less daunting, and enhance the Commission's credibility as a law enforcement agency, thus supporting the Commission's overarching mission to eradicate discrimination in the workplace.

II. Mediation Provides a Just Alternative to Litigation There needs to be an alternative to the long, drawn-out, expensive and frustrating process that often ensues from an employment discrimination dispute involving the Americans with Disabilities Act (ADA).[2] Certainly litigation in federal court is a critical component to implementing this vital civil rights statute, and mediation is not appropriate for every kind of disability employment rights case. However, mediation is not second-class justice either, and in many instances, with procedural safeguards to ensure fairness, mediation can provide better justice than a lawsuit. The ADA, in fact, explicitly encourages parties to utilize ADR as a means of resolving ADA disputes.[3]

The sad reality is that federal litigation does not always provide a satisfactory avenue of redress for disabled workers. This is due to the high cost of lawyers needed for litigation; the role of judges who are still stuck in the medical model of disability; and the increasing number of cases that are lost based upon a narrow, restricted definition of disability. Such a definition prevents a court from examining the issue of whether the underlying accommodation is reasonable or

creates an undue hardship.[4] ADR, and mediation specifically, can provide justice for many who would otherwise be without recourse. While mediation is particularly well-suited in the ADA context, it also provides an appropriate alternative for other types of employment civil rights disputes generally, including claims based on race, national origin, gender, religion and age.

A. What is Mediation in the ADA Context?

Mediation is an informal, expeditious, and cost-effective process in which a trained, third-party neutral assists or facilitates the parties in reaching a negotiated resolution of a charge of discrimination.[5] The mediator does not decide who is right or who is wrong.[6] The mediator has no authority to impose a decision on the parties.[7] Thus, it is a very different process from arbitration or litigation before a judge. Instead, "the mediator helps the parties to jointly explore and reconcile their differences," to think creatively in resolving their disputes, and to reach a solution that is acceptable to all parties.[8]

Mediation differs in theory and practice from simply "negotiating settlements." Mediation is:

a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.[9]

A key distinction between mediation and other settlement techniques is that there is no determination of guilt or innocence.

Mediation does not mean that an employer must resolve a bogus claim or that an aggrieved worker must give up his or her rights. Rather, mediation is a way for the parties to come together and mutually explore creative solutions to resolve disputes. For these reasons, mediation is more likely to result in a satisfactory outcome.[10]

Mediation, as a process in which the parties control the outcome, avoids reliance on the vagaries, expense, and unpredictability of a court and jury judgement. Thus, the result is often a faster and more cost-effective method of resolving employment disputes. The vast majority of mediations of ADA employment disputes, more often than not, are completed in a one-day session.

B. ADA is a Contextual Statute

Because of the contextual framework that is at the core of the ADA, mediation is a particularly well suited process for resolving disability employment disputes. The ADA's contextual definitions of disability,[11] reasonable accommodation,[12] and undue hardship[13] lie at the heart of the statute's ability to respond to disability discrimination on an individualized basis. The flexibility embraced by the ADA is necessary in order to take into account the wide range of different disabilities, the uniqueness of jobs that have their own essential functions, and the different financial resources of employers to pay for accommodations. Disabilities are manifested in different ways, and may require different accommodations depending on the

degree of limitation and the job in question. It is precisely this lack of a simplistic "one size fits all" approach embodied in the ADA that makes mediation a particularly effective tool for ADA disputes.

Mediation, because it is a party-driven process, and not a judge-mandated process, can achieve more creative, targeted, and satisfying resolutions. Litigation often does not provide such flexibility. Litigation creates a winner and a loser; mediation seeks to create a win-win situation. This flexibility is particularly useful for resolving issues arising under the ADA given its contextual approach to addressing discrimination.

Moreover, mediation is a particularly appropriate process for resolving disputes regarding requests for reasonable accommodations that take place within the context of an ongoing employment relationship. Unlike litigation, mediation allows the parties to collaboratively and creatively reach a mutually satisfactory and effective solution to an accommodation dispute while at the same time preserving the working relationship. As the resolution is crafted and agreed upon by the parties themselves, there is a greater likelihood that it will resolve the problem and allow the disabled employee to succeed at the job.

C. Principles that Support the Fairness of Process

Because of the uniqueness of disability issues and the accommodation needs of many disabled people, safeguards need to be implemented to ensure a fair mediation process. To begin, however, there are several key principles that are at the core of any employment mediation program regardless of whether the individual is disabled or the substantive charge is grounded in the ADA.

First and foremost, fairness to aggrieved workers and employers must be the hallmark of any mediation program. The process must be fair both in perception and in reality. Fairness requires that parties be supplied with accurate information concerning the process. If an unrepresented party feels that they need representation, they should be entitled to have it or be free otherwise not to go forward with the mediation.

Second, the process must be voluntary. Voluntariness ensures that the parties knowingly and willingly enter into both the proceeding and any resulting agreement. Either party should have the opportunity, prior to executing the settlement agreement, to opt out of the process for any reason, including use of the federal judicial system. While participation in the mediation should be voluntary at all stages until an agreement is reached, that voluntary agreement should constitute a final disposition of the charge and be enforceable by the EEOC. Parties should also be free to settle as long as the proposed agreement is lawful and enforceable and all are aware of their rights.

Third, neutral facilitators are crucial to arriving at a fair agreement and will help maintain the integrity and effectiveness of the mediation. The facilitators must be impartial and honest and act in good faith. Mediators must be schooled in both mediation skills and the substantive anti-discrimination law at issue.

Finally, the mediation process must be confidential. Parties will be candid and forthcoming only if they believe that their statements will not otherwise be used against them in a later proceeding.

D. Unique Issues to Preserve Fairness for Workers with Disabilities

Beyond these basic principles of fairness for mediations generally, mediations involving the ADA depend on recognizing and addressing the unique and complex issues facing disabled people. The needs of the disabled individual must be specifically considered to ensure that he or she is able to effectively, meaningfully, and fairly participate in the process.

Organizations that provide mediation services, including the EEOC and employers, are legally required to make their services accessible to people with disabilities.[14] In addition, mediations involving individuals with certain types of mental or psychiatric disabilities may raise the issue of whether an individual has the capacity to effectively participate and represent his or her interests.

There are steps that mediation providers can take to better ensure compliance with the ADA and foster the development of a fair and effective mediation process for all parties, including those with disabilities.[15] The following paragraphs illustrate such steps.

1. Accessibility of the Mediation Process

Mediation providers must ensure that the mediation process is accessible to persons with disabilities. This obligation applies not only to parties, but also to their representatives, mediators, staff, volunteers, and other mediation participants. To ensure accessibility, mediators must be attentive to, and address, disability-related factors that may impact the parties' ability to participate, including physical and/or communication barriers.

Mediation providers should advise mediators and the involved parties that accommodations will be provided if needed to facilitate accessibility to the mediation process. Mediation providers should also have in place policies and procedures concerning accommodation requests.

Making the mediation session accessible may include such measures as conducting the session in an accessible facility; providing written materials in alternative formats such as Braille or large print; providing a sign language interpreter or reader; or assisting a person with a cognitive impairment in filling out paperwork and understanding the intake process. The cost associated with taking these measures should be borne by the mediation provider just like any other public accommodation.[16]

2. Confidentiality of Medical Information

Mediators and mediation providers should always maintain confidentiality with respect to the health and disability-related information that is disclosed for the purpose of providing reasonable accommodation or in the course of the mediation, unless a party authorizes the disclosure of such confidential information.[17]

3. Diversity of Mediator Panels

Mediation programs should endeavor to have a diverse panel of mediators. Such diversity recruiting efforts should include seeking out qualified mediators who have disabilities. Disability rights advocates, vocational rehabilitation counselors, and job coaches all may have the necessary experience with disability issues to be trained as mediators. It may also be appropriate to allow family members, attorneys, or union representatives to participate in mediation sessions as representatives of persons with disabilities.

4. Mediation Training and Etiquette

Mediator training should also be fully accessible to all participants, including those with disabilities. Training programs for mediators should include disability access and etiquette issues.[18] For example, neither the mediation provider nor the mediator should direct questions and comments to the personal assistant of the person with a disability. In addition, the personal assistant should not speak on behalf of the person with the disability unless she or he is also the individual's representative or the individual has requested the personal assistant to do so.

III. The EEOC Mediation Program

Since 1994, the EEOC has been successfully using mediation to resolve employment discrimination charges filed before it, including those pertaining to ADA charges.[19] Mediation complements the EEOC's administrative enforcement efforts by facilitating early resolution where agreement is possible. By reaching resolution in some cases through mediation, more of the commission's scarce resources are available for investigations, conciliations, and litigation. The EEOC mediation program is firmly rooted in the principles outlined above.[20] General information about the EEOC mediation program can be found on the EEOC website at www.eeoc.gov.[21]

A. The Results Achieved in EEOC ADA Mediation

The EEOC mediated 7,544 charges during fiscal year (FY) 1999, resulting in $58.6 million in monetary benefits.[22] During FY 2000, the EEOC mediated 11,451 charges, resulting in $109.9 million in monetary benefits.[23] Generally, the EEOC successfully resolves 65% of the charges it mediates.[24] EEOC's mediation program has been quite successful in resolving charges filed under the ADA. Approximately 20% of all ADA charges at the EEOC are resolved through mediation.[25] During FY 1999, the EEOC mediated 1,819 ADA charges, and had a success rate of 63%, and during FY 2000 the EEOC mediated 2,646 charges, and had a success rate of 65%.[26]

In FY 1999, more than 24% of the cases mediated in EEOC's overall ADR program involved the ADA, and of those 24%, over 35% involved the issue of reasonable accommodation, 8% involved hiring, over 47% involved discharge, over 13% involved the issue of harassment, and over 15% of the mediations involved the terms and conditions of employment.[27] Since the inception of the EEOC mediation program, ADA mediations have resulted in monetary benefits totaling over $38.6 million, almost 23% of the total amount of monetary benefits collected

through EEOC mediation.[28] Often ADA charges involve non-monetary relief, and more than 46% of ADA charges that were resolved through mediation involved a non-monetary benefit, such as reasonable accommodation, rehire, policy change, or training.[29]

In FY 2000, more than 23% of the cases mediated in the EEOC's overall ADR program involved the ADA, and of those 23%, over 38% involved the issue of reasonable accommodation, over 6% involved the issue of hiring, over 53% involved the issue of discharge, over 14% involved the issue of harassment, and over 14% involved the issue of terms and conditions of employment.

During FY 1999, EEOC ADA mediations resulted in $12.2 million of monetary benefits,[30] a figure that increased to over $26.3 million in FY 2000,[31] accounting for approximately 24% of the total amount of monetary benefits collected through EEOC mediation in FY 2000. And 48.6% of ADA charges that were resolved through mediation involved a non-monetary benefit in FY 2000.[32]

When mediated, the average processing time for ADA complaints is nearly cut in half, as compared to the time it would take the EEOC to administratively address the complaint. This time frame includes the time from the charging party walking in the door of the EEOC to the time of resolution or impasse. On average, ADA charges take 286 days to reach a determination in the EEOC's administrative process.[33] Where mediated ADA charges took on average 151 days to reach final resolution.[34]

Moreover, as previously stated, data from an independent study of the EEOC mediation program found that 91% of charging parties and 96% of responding parties would use mediation again.[35]

Unfortunately, employers are still hesitant to submit to voluntary mediation as a means for resolving disputes filed with the EEOC. Only 31% of employers opted into the EEOC's mediation program when offered, as compared to an 83% acceptance rate for charging parties in FY 2000.[36] For ADA charges, employers accepted mediation 31% of the time and charging parties 85% of the time in FY 2000.[37] Oftentimes, parties are more likely to agree to mediate a charge and to reach a successful resolution if there is still an active employment relationship between the employer and the employee.[38]

The EEOC does not collect detailed data regarding the reasons why a particular mediation fails. Thus, it is difficult to develop a profile of the type of charge more likely to be resolved by mediation.