

FACILITATION OF ADA REASONABLE ACCOMMODATION DISPUTES

Sara Adler, Mediator

Los Angeles, California

Just as you're breathing a sigh of relief that you finally understand the essentials of the various alternative dispute resolution processes, along comes the need to explore still another way of going about resolving what are likely to be fairly common and often thorny problems, which may best be handled with a process which is another variant of the more familiar and typically used mediation approach, which is called facilitation. Although it entails some differences of format, if properly done facilitation can be as confidential a proceeding as other forms of voluntary mediation. This technique should work especially well with employee requests for reasonable accommodation pursuant to the Americans with Disabilities Act ("ADA"). If used early enough, it should help the parties avoid a discussion of the request becoming an actual dispute. A facilitator assists both sides in the required interactive dialogue. For purposes of this article though, I'll be assume that the parties have reached the dispute stage over a request for reasonable accommodation.

As in other ADR formats, a facilitator is a neutral to the parties in the particular dispute - although it may well be someone from another area or department of the same Company, if that person is perceived by the parties as independent in relation to the particular dispute. In many organizations this kind of "organization-employed neutral" has been very successful, usually working with the title of Ombudsperson, mediator or, perhaps, ADA Coordinator and the like.

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However, also in common with other ADR formats, if your organization does not have a trained facilitator, an outside neutral will be much more efficient and effective than trying to provide the service with an untrained person.

There are two fundamental differences between the most common format used in mediation and the facilitation process. In many employment mediations the parties are together for a relatively brief portion of the process and most of the "work" is done in separate caucuses. In facilitation, the parties are likely to be kept together most of the time. The facilitator will caucus relatively infrequently and usually in relation to a specific, discreet area of the dispute. The second major difference is that mediation is typically conducted in one or two sessions, often extending beyond the normal business day. Facilitations, commonly require several shorter sessions, almost always during regular business hours. This makes it easier to add and subtract participants as needed to understand and resolve portions of the dispute and allows for securing additional information, whether from within or from outside of the organization, without unduly delaying or sidetracking the process.

Up to now, the ADA has been the basis of numerous complaints filed with the Equal Employment Opportunities Commission ("EEOC") of which almost 25% have alleged a denial of a reasonable accommodation

Inevitably a claim for reasonable accommodation involves medical information, legal considerations, employee needs and desires and the realities of the particular work and workplace. Resolving the claim may also require information about technological aids, available resources and possible outside funding sources. Achieving reasonable

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accommodation may involve a union, different departments of the employer and outside organizations.

The concept of facilitation is that the neutral can aid communication between two or more people who may think and speak in very different "dialects". In ADA-related disputes these might include one participant speaking "rights", another responding with "business needs", and still others using medical terms (or jargon) or in legal shorthand. In these circumstances, it may all be English, but not every person sitting at the table will accurately understand what everyone else is saying. Assuming that all the participants in the dispute have a good faith desire to reach a common goal, such as exploring fully whether or it is possible for an employee to perform the essential functions of the job with the aid of a reasonable accommodation, a facilitator will help the participants reached their common goal by a more direct route. A properly trained facilitator will be able to translate the employee's and/or union's claims of rights to the employer and the employer's assertions of business needs to the employee and/or union into language relevant to the common objective. The facilitator should also be able to equally well understand - and make understandable - the medical/legal context for this particular kind of discussion. The ideal facilitator for this kind of dispute will be prepared to suggest additional resources which might be available to maximize the successful resolution of the dispute.

A few examples of how this technique might be employed will give a better sense of its potential for dispute resolution. Suppose a quality control employee brings in a doctor's note diagnosing her as

having a severe repetitive motion injury such as Carpal Tunnel Syndrome. Her essential job duties are to interview clients in the field and compile a report incorporating the information received. In the typical way the job has been performed, the employee makes notes on a preprinted form during the interview and uses a computer to work up the report based on her notes with all job elements being guided by a comprehensive manual. When the employee requests reasonable accommodation for her injury, she says that she is unable to write, unable to drive, unable to use a computer keyboard and unable to carry anything weighing over 5 pounds. Her supervisor's initial reaction is to conclude that she is simply unable to perform the essential functions of her job and to suggest that she remain in a status of being totally disabled. The employee wants to work and demands that she be given an assistant who can perform all of the duties the employee is restricted from performing. At this stage it is already clear that the parties have a dispute and some thought should be given to taking the dispute to a facilitator who can refocus the discussion.

Presumably all the employer requires is that the interviews get done and the report prepared in a cost efficient manner - which the employer believes precludes the hiring of an assistant. It may be that further probing of the medical restrictions would result in the information that the employee could drive relatively short distances if she had a car with power steering and automatic transmission. Alternatively it might be possible to rearrange schedules for this employee so she can either take public transportation or conduct interviews in parallel with another employee who would drop her off and pick her up. It may be that the interview information could be

kept by way of tape recording rather than through written notes. If manuals need to be consulted regularly, perhaps they can be placed in a location where the employee could use them without moving them or perhaps they could be broken down into smaller segments which she could lift. It is possible that the reports could be dictated either to a voice-activated computer or onto a tape to be transcribed by another person. It may be that a number of relatively minor changes would be medically sufficient, if the doctor is brought into the discussion at some points. It may be that there are outside sources for financial assistance available for some of the elements of an appropriate accommodation.

The overall benefit to the parties in this facilitation is having a neutral person redirecting the discussion toward how the essential functions of the job might be accomplished by this employee consistent with not creating an undue hardship for the employer, with the added benefit that the parties will have engaged in the kind of interactive dialogue required by law. A facilitator will be able to change the dialogue from the terms of the need-based demand for a particular form of accommodation and the business necessity-based denial of this particular demand to a constructive joint effort at working toward a solution. It may or may not be possible for the parties to reach an agreement, even with the help of a facilitator, but the process promises to conclude with the employee feeling that every avenue has been genuinely explored in a good faith attempt to achieve the mutually desired goal of getting the employee back to work. This should substantially reduce the likelihood of a complaint being filed

with the EEOC and of suit being brought, or, if brought, of being successful.

Another somewhat common scenario is the employee who brings in a doctor's note saying that he is suffering from a stress-related mental disorder which requires that he not work the night shift. Let's further hypothesize that this employee is a rather junior member of a union-represented bargaining unit which has a collective bargaining agreement with a provision that employees can bid for, and secure, shifts based on their seniority. It is virtually impossible that this employee could become a day shift worker in the foreseeable future using the contractual bidding procedure. The employee demands as a reasonable accommodation that he be assigned to the day shift despite the contractual provision. The employer checks with the union to see if the contractual provision would be waived in this instance and the union says "no". The employer brings in a facilitator to get the employer, employee and union working together to find a reasonable accommodation to this employee's needs, consistent with the collective bargaining agreement and the needs of the employer. Working together with a facilitator all three parties achieve a better understanding of the employee's condition and the factors which might be altered to come up with a mutually agreeable reasonable accommodation. The facilitation process will probably provide a substantially greater chance of success, in a shorter period of time, than the parties trying to go it alone.

If, for example, the final conclusion of the exploration talks is that the employee really does need to be placed on the day shift, and the union agrees as long as it entails a voluntary swap with a current

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day shift employee, the facilitator may be further involved in explaining as much as the parties deem necessary to rest of the workforce, both subordinates and managers, to ensure the continued smooth operation of the employer's business, to explain the union's agreement to a partial waiver of the contractual provision and to ameliorate some of the hostility the employee may expect because he was granted what appears to be preferential treatment.

This kind of facilitation process has been used successfully in a variety of other kinds of disputes, often where there are many wholly legitimate considerations, where the parties begin with strongly held opposing views and distrustful of the other participants in the dispute. One area which has had notable success using this process is where a governmental agency has tentatively announced the site selection for a new facility which some portion of the effected community does not want, often referred to as NIMBY (or, "not in my back yard"). ADA reasonable accommodation disputes share many of the characteristics of these types of community disputes and will be amenable to a similar kind of dispute resolution process. Even where a final resolution has not satisfied all the parties, the participants report a high level of understanding of the various competing considerations and express considerable amounts of satisfaction of having had their positions truly "heard" and seriously considered in the process. At least it's worth a try.