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# DESIGNING REASONABLE ACCOMMODATIONS THROUGH CO-WORKER PARTICIPATION: THERAPEUTIC JURISPRUDENCE AND THE CONFIDENTIALITY PROVISION OF THE AMERICANS WITH DISABILITIES ACT

ROSE A. DALY-ROONEY[1]



## I. INTRODUCTION

Working is a state of being that many people with disabilities cannot take for granted because, as a recent Harris Poll found, over 8 million people with disabilities want to work but cannot find a job.[2] Not only is working an avenue of financial support and independence, it is also a source of self-esteem and an

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[2]S. REP. NO. 116, 101st Cong., 1st Sess. 107 (1989).

opportunity to make friends and social contacts. Because of prohibitions against discrimination on the basis of disability by most private employers,[3] the Americans with Disabilities Act (ADA) offers the potential for relief from the staggering level of unemployment faced by people with disabilities.

The Americans with Disabilities Act prohibits discrimination on the basis of disability in employment, public accommodations, transportation, communication, and services provided by state and local government.[4] Title I of the ADA addresses employment discrimination against people with disabilities.[5] Among other things, the ADA prohibits an employer from rejecting an applicant solely because of the need to provide that applicant with a reasonable accommodation.[6] At the same time, the ADA requires that an employer maintain confidentiality about the applicant or employee's medical condition or medical history obtained during acceptable inquiries, including those inquiries needed to design appropriate accommodations.[7]

## II. A THERAPEUTIC JURISPRUDENCE PROPOSAL

The ADA's provision that requires an employer to maintain confidentiality of the medical condition and history of the applicant or employee may actually impair the employer's ability to effectively and efficiently integrate applicants and employees with disabilities in the workplace. This article uses a therapeutic jurisprudence approach[8] to suggest that the confidentiality requirement of the

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[3] *See* 42 U.S.C. §§ 12111-12117 (Supp. V 1993). Employment provisions apply to private employers with 15 or more employees, state and local governments, employment agencies, and labor unions. *Id.* § 12111(2), (5)(A). Employment discrimination by state and local governments is also prohibited under Title II of the ADA. *See* 42 U.S.C. §§ 12131-12133 (Supp. V 1993). Although a plain reading of Title II (Non-Discrimination in State and Local Government) does not indicate that Title II includes employment discrimination, the legislative history and the implementing regulations do make clear that employment discrimination is prohibited under Title II. H.R. REP. NO. 485, 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 367; 28 C.F.R. § 35.140 (1994). *See also* Ethridge v. Alabama, 860 F. Supp. 808 (M.D. Ala. 1994) (concluding that employment discrimination is prohibited by entities covered under Title II).

Exempted from the requirements of the ADA are the federal government, a corporation wholly owned by the federal government, Indian tribes, and certain bona fide private membership clubs. 42 U.S.C. § 12111(5)(B).

[4] 42 U.S.C. §§ 12111-12189 (Supp. V 1993); 47 U.S.C. §§ 152, 221, 225, 611 (1988 & Supp. V 1993).

[5] 42 U.S.C. §§ 12111-12117.

[6] *Id.* § 12112(b)(5)(B).

[7] *Id.* § 12112(d)(3)(B).

[8] Therapeutic jurisprudence is the study of the role of the law (rules, procedures, and legal roles) as a therapeutic agent. David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y. L. SCH. J. HUM. RTS. 759, 761-62 (1993). The development and implementation of laws have therapeutic and anti-therapeutic consequences. *Id.* at 762. The doctrine of

ADA should not be implemented in a manner that forecloses active participation by co-workers in designing reasonable accommodations for and with applicants and employees with disabilities. A group including the applicant, co-workers, and the supervisor should engage in a group brainstorming process to design reasonable accommodations which may lead to more therapeutic results in the integration of employees with disabilities in the workforce.

Legally, just as a psychotherapy patient may waive therapist/patient confidentiality and allow a therapist to inform a third party of the patient's condition or communications,[9] an employee with a disability should presumably be able to waive the ADA's confidentiality provision.[10] Such a

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therapeutic jurisprudence "proposes that we be sensitive to those consequences, rather than iggnore [sic] them, and that we ask whether the law's antitherapeutic consequences can be reduced and its therapeutic consequences enhanced without subordinating due process and justice values." *Id.*

[9]David B. Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtures of Tarasoff, in* THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 201, 232-234, 233 n.192, 234 n.200 (David B. Wexler ed., 1990).

The law offers other examples of protected persons being permitted to waive rights granted by the Constitution, statutes, and common law. For example, a person is permitted to waive the Constitutional requirements of probable cause and a search warrant by consenting to a search. *See* United States v. Morales, 972 F.2d 1007 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1665 (1993). Although husbands and wives enjoy a spousal privilege to prevent adverse testimony in a criminal trial, the spouse who holds the privilege may waive it. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.4 (2d ed. 1987). Another example which comes from the employment arena is the statutory right to a jury trial in an action to recover damages for intentional discrimination in the workplace, 42 U.S.C. § 1981a(c)(l) (Supp. V 1993), which, as with any other right to a jury trial, may be waived by the parties. *See, e.g.*, Scharnhorst v. Independent Sch. Dist., 686 F.2d 637 (8th Cir. 1982), *cert. denied*, 462 U.S. 1109 (1983) (finding that the right to a jury trial in an age discrimination claim may be waived by an untimely demand for a jury, despite the fact that the waiver was unintended or inadvertent).

[10]Surely, nothing in the law would prevent the employee from *personally* informing co-workers about the disability. It seems logical, then, for the law to permit the employee to authorize the employer to disclose certain facts to relevant co-workers. If the law were somehow interpreted not to allow such a waiver, the employee herself could of course make all the necessary disclosures, but in the unlikely event the ADA is so interpreted by the courts, an amendment expressly providing for a waiver of confidentiality would be very much in order.

The use of a waiver keeps the control of whether information is disclosed in the hands of the applicant or employee with the disability. That decision to exercise the right of confidentiality is protected by another provision of the ADA which makes it unlawful for anyone to "coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this part." 29 C.F.R. § 1630.12 (1994).

In the majority of cases the disabled employee should be sufficiently competent to waive the confidentiality provision. A possible scenario involving an employee who might be under legal guardianship and not "competent" to waive her rights would be the situation presented in hypothetical Case #1. *See supra* p. 92.

waiver would allow an employer to discuss with co-workers certain otherwise confidential information relating to the employee's disability.

This proposal to involve co-workers is based on several premises which flow from psychological theory but which deserve empirical study in the disability/employment context. The general theory is that giving a person input or a "voice" in the decisionmaking process substantially increases the likelihood that she will regard the ultimate decision as fair and comply with it.[11] Accordingly, a co-worker may be more willing to implement a plan to accommodate a worker with a disability (and be far less resentful of the accommodation) if she helped design the plan than if she is simply told to implement it. Second, an employee with a disability may not feel as isolated from other employees if they all worked together to design accommodations. In addition, a group brainstorming session may encourage focusing on the job duties instead of the limitations of the employee or applicant with the disability. Finally, a process involving co-workers who actually perform the work may lead to development of more natural and less expensive supports in the workplace to accommodate the employee with the disability.

This article provides three hypothetical cases for consideration, a background on the requirement of reasonable accommodations under the ADA,[12] discussion of the confidentiality requirement, and the implication of confidentiality requirements on designing reasonable accommodations by a group process.

## III. HYPOTHETICAL CASES

Consider in the following examples whether the assistance of co-workers might be helpful in designing reasonable accommodations which would permit these applicants to perform the job.

**Case 1.** Shana is applying for a position as a dishwasher at a restaurant. Dishwashers usually load and unload a large dishwasher, operate the dishwasher and do general cleanup in the kitchen, including sweeping and mopping, taking out garbage and cleaning outside the restaurant in the back parking lot. Shana is a 26 year old woman who is moderately mentally retarded. She can read and write at approximately the third grade level. She has excellent adaptive skills: she lives semi-independently in an apartment in the community, can use city transportation, and can perform most household tasks, such as cleaning. She has some behavioral problems, such as

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[11] Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439-40 (1992); David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 199, 203-08 (David B. Wexler & Bruce J. Winick eds., 1991).

[12] Section IV of this article, relating to the background of the ADA, is largely drawn from Rose Daly-Rooney, *Reconciling Conflicts Between the Americans with Disabilities Act and The National Labor Relations Act to Accommodate People with Disabilities*, 6 DEPAUL BUS. L.J. 387 (1994).

perseverating on certain conversational topics about television shows and, at times, demonstrating inappropriate affect. To learn a new job thoroughly she needs about two weeks of one-on-one training.

Case 2. John applied for a position as a sales clerk in a major department store in the men's department. Sales clerks in this department must assist customers with questions or in locating merchandise, ring up sales and take payment for items purchased in the department, change the merchandise and assist with setting up displays. John is a 21 year old man who uses a wheelchair. He has no use of his legs but has full use of his arms and hands. He has good upper body strength.

Case 3. Jane is applying for a position as an associate at a medium size law firm which specializes in commercial work and personal injury and employment discrimination on behalf of plaintiffs. The firm needs an associate to assist senior partners in personal injury and employment discrimination work. Jane is deaf. She can effectively read lips in one-on-one settings, but uses an interpreter in larger groups, such as meetings and at trial. She needs to use a Telecommunication Device for the Deaf (TDD) or an operator relay system for telephone conversations.

Co-workers could provide an integral role in designing accommodations for these employees. People who perform the job daily are in a better position to provide a detailed description of the job-related functions than are their supervisors. For example, the cook or waitresses may be able to tell, more precisely than the manager or owner, how many times the dishwasher usually has to be loaded/unloaded within a shift and how much time it takes to load and unload the dishwasher. Co-workers also may be able to supply information to help determine those tasks which are essential to the performance of the job. Another sales clerk may be able to tell how often sales racks of merchandise have to be rearranged and if other store employees help with this process. Combined with information about the abilities of the applicant or employee, the co-worker may have valuable ideas about making adaptations. We will return to these matters in greater detail after describing the ADA and some provisions which may impact on the process of co-worker involvement.

## IV. BACKGROUND: THE ADA AND REASONABLE ACCOMMODATIONS

The ADA prohibits employers from inquiring about the nature and severity of a disability, but does permit inquiries about limitations that might interfere with performing the job.[13] This inquiry necessarily includes asking the applicant or employee whether she can perform the job with or without an accommodation. Information about the medical condition or history of the applicant or employee may be given to answer this inquiry. If so, that information must be treated by the employer as a confidential medical record.[14]

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[13] 42 U.S.C. § 12112(d)(2), (d)(4) (Supp. V 1993).

[14] *Id.* § 12112(d)(3)(B), (d)(4)(C).

Therefore, understanding the ADA's provisions regarding reasonable accommodations and confidentiality are essential.

### *A. Eligibility*

The ADA requires numerous individualized determinations by covered employers[15] making employment decisions about people with disabilities. Evaluating whether an individual is disabled is one of the first of these individualized inquiries. Disability is defined as a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[16] Working is a major life activity.[17] Generally, there are no categorical determinations.[18] For example, not all people with epilepsy are disabled according to this definition. One person with epilepsy who has seizures that are infrequent and less serious may not have a substantial limitation of a major life activity while another person with epilepsy may have frequent and serious seizures which impair the ability to work or perform other major life activities. Determining whether an individual is substantially limited in a major life activity,[19] and specifically in the major activity of working, are also individualized inquiries.[20]

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[15]For an explanation of what constitutes a covered employer, see *supra* note 3.

[16]42 U.S.C. § 12102(2)(A) (Supp. V 1993). Also included within the definition of disability is a record of a mental or physical impairment which substantially limits a major life activity or being regarded as having such as impairment. *Id.* § 12102(2)(B)-(C). Since these types of disabilities often do not require consideration of reasonable accommodations, they are not discussed further in the article. However, having a record of such an impairment is an important definition to keep in mind regarding the requirement to keep medical information and history confidential.

[17]29 C.F.R. § 1630.2(i) (1994).

[18]There are some conditions which are not covered under the ADA. For example, the term disability does not include "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; . . . compulsive gambling, kleptomania, or pyromania; or . . . psychoactive substance use disorders resulting from current illegal use of drugs." 42 U.S.C. § 12211(b) (Supp. V 1993).

[19]29 C.F.R. § 1630.2(j)(2)(i)-(iii). Factors considered in determining whether an individual is substantially limited include: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact of or resulting from the impairment." *Id.*

[20]29 C.F.R. § 1630.2(j)(3)(ii). Factors which may be considered in determining whether an individual is substantially limited in the life activity of working include:

> (A) The geographical area to which the individual has reasonable access;
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing

Once an individual meets the statutory definition of disabled, she must otherwise be qualified to perform the essential functions of the job either with or without a reasonable accommodation.[21] Designing the accommodation requires (1) distinguishing between the functions that are essential rather than marginal to the job[22] and (2) assessing whether an employee with a disability could perform the essential function with or without a reasonable accommodation.[23]

### *B. Reasonable Accommodation*

The ADA prohibits a covered employer from discriminating against a qualified individual with a disability by not making a reasonable accommodation for the known physical or mental limitation.[24] The ADA envisions that an employer's efforts to make reasonable accommodations for individuals with disabilities may include:

> [m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities[,]...job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[25]

Congress intended that the ADA would level the playing field between employees and applicants with or without disabilities by removing a major obstacle to employment: failure to make accommodations. Under the ADA, reliance by employers on the cost and inconvenience of reasonable accommodations as grounds for not employing otherwise qualified people with disabilities is discriminatory, subject to the defenses noted in the next subsection.

### *C. Employer's Defenses*

The defenses of undue hardship and business necessity set boundaries on the lengths an employer must go to accommodate the applicant or employee with a disability. If an employer proves that an accommodation would incur

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> similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

*Id.*

[21] 42 U.S.C. § 12111(8) (Supp. V 1993).

[22] 29 C.F.R. app. § 1630.2(o) (1994).

[23] *Id.*

[24] 42 U.S.C. § 12112(a), (b)(5)(A).

[25] *Id.* § 12111(9).

"significant difficulty or expense" in light of a variety of factors set out in the regulations, the employer is not required to provide that accommodation.[26] If, however, the employee offers to pay for part or all of the accommodation or use outside resources, such as services through the state department of vocational rehabilitation, then the employer may not consider those costs in determining reasonableness.[27]

Generally, an employer may defeat a claim of discrimination for using a standard, test, or selection criteria that has an adverse and disparate impact upon people with disabilities if it is proven (1) to be job-related, (2) consistent with business necessity, and (3) *that its performance cannot be accomplished by providing a reasonable accommodation.*[28] However, by definition of this tripartite standard, even if the employer has a standard or policy that is job-related and consistent with business necessity, she may be required to make an exception to or modify the application of the policy for a person with a disability if it would not be burdensome. For example, if a retail employer gives one hour lunch breaks to its employees, but a person with diabetes requires two half-hour breaks during a shift to take medicine and eat, then the employer may have to relax the standard in that case.

### *D. The Process of Designing the Reasonable Accommodation*

Designing a reasonable accommodation is an interactive process between the employer, the employee, and outside resources when necessary.[29] The employer should consider those alternatives preferred by the employee; however, the employer is ultimately free to choose the least costly alternative.[30]

## V. CONFIDENTIALITY REQUIREMENT AND DESIGNING REASONABLE ACCOMMODATIONS

### *A. Discussion of the Confidentiality Requirement*

The ADA prohibits pre-employment medical examinations or inquiries about whether the applicant or employee is disabled and about the nature and severity of the disability[31] and requires confidential treatment of medical information obtained in post-offer examinations.[32] An acceptable inquiry by employers is whether the applicant would be able to perform job-related

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[26] 29 C.F.R. app. § 1630.2(p).

[27] *Id.*

[28] 29 C.F.R. § 1630.15(b) (1994).

[29] *Id.* at app. § 1630.2(o).

[30] 29 C.F.R. app. § 1630.9 (1994).

[31] 42 U.S.C. § 12112(d)(2)(A), (d)(4)(A) (Supp. V 1993).

[32] 29 C.F.R. app. § 1630.14(b) (1994).

functions.[33] If an otherwise qualified applicant with a disability can perform the essential functions of a job with or without a reasonable accommodation, she must be considered for the position in the same manner as other qualified applicants are considered. The employer cannot prefer the applicant without a disability solely because the applicant with a disability will need an accommodation unless the accommodation would impose an undue hardship.[34] For example, the managing partner of the law firm who recruits and hires lawyers could ask Jane how she could (with or without a reasonable accommodation) conduct interviews with new clients and hold meetings with existing clients. But she could not ask Jane when she became deaf and the reason for the deafness.

While making acceptable inquiries[35] the employer may learn about the medical information or medical history of the applicant. If so, the employer must treat the information about medical condition or history of the applicant as a confidential medical record.[36]

There are exceptions to the confidentiality requirement of these records.[37] Two express exceptions which relate to the theory of co-worker involvement in the design of reasonable accommodations include disclosure to supervisors and managers[38] and to first aid or safety personnel.[39] Therefore, only certain employees, specifically supervisors and safety personnel, may be informed about the medical condition or disability status of an employee with a disability under these circumstances. There is no express exception for *other* co-workers to be informed about this information.

An article by Christopher Bell, a disability law specialist, suggests that the ADA is likely to be implemented without co-worker participation because of the confidentiality requirement.[40] Without exploring the notion of an employer

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[33] 42 U.S.C. § 12112(d)(2)(B).

[34] 29 C.F.R. app. § 1630.9(b) (1994).

[35] Acceptable inquiries, in addition to whether the applicant can perform job-related functions with or without an accommodation, include requests for the applicant (once an offer of employment has been made) or employee to undergo medical examination, but certain conditions must be met. *See* 42 U.S.C. § 12112(d)(3), (d)(4)(B).

[36] *Id.* § 12112(d)(3)(B).

[37] *Id.* § 12112(d)(3)(B) (excepting certain managers, supervisors, safety personnel and government officials). Additionally, it is not inconsistent with the ADA to require the collection of confidential medical information for compliance with state worker's compensation laws, 29 C.F.R. app. § 1630.14(b), or to satisfy the affirmative action requirements of § 503 of the Rehabilitation Act, 29 C.F.R. app. § 1630.14(a).

[38] 42 U.S.C. § 12112(d)(3)(B)(i) (allowing disclosure of information relating to job duty restrictions and necessary accommodations).

[39] *Id.* § 12112(d)(3)(B)(ii) (allowing disclosure if emergency treatment may be required for the disabled employee).

[40] Christopher G. Bell, The Americans with Disabilities Act, Mental Disability, and Work, Dec. 2, 1993 (on file with author).

seeking an employee's waiver of the confidentiality provision in his article, Bell indicates that "[b]ecause an employer is prohibited by the ADA's confidentiality provisions from disclosing the disability status of an employee, an employer is not in a position to explain that these items [accommodations], perceived by co-workers as special treatment, are mandated by law because of an employee's disability."[41] Certainly, if the confidentiality provision of the ADA is interpreted to preclude the disclosure of information to co-workers to permit them to understand why a particular accommodation for an individual is needed,[42] it would preclude the disclosure of information to allow the co-worker to assist in designing the accommodation in the first place. My thesis, however, is that the ADA may often (though not always) be more effectively implemented if the employee with a disability agrees to waive the confidentiality requirement for the limited purpose of permitting relevant co-workers to be involved in designing reasonable accommodations.

### *B. Implications for the Design of Reasonable Accommodations*

The importance of obtaining information and assistance from other employees in designing reasonable accommodations will vary depending upon the nature of the job, the abilities of the applicant with a disability, the applicant's or employee's familiarity with the job duties, and the importance of interaction among employees for job-related functions. For example, in the hypothetical cases, Shana's mental retardation may result in her contributing somewhat less to the design of the accommodation than might be true in the case of either Jane or John. Similarly, the cooperation of co-workers may play a more significant role for Shana and John than for Jane, who may do more solitary work. However, even though John would be the expert on how to accomplish tasks without being limited by the disability, he may not be very familiar with all of the job duties of a sales clerk. Involvement of co-workers may be beneficial in determining the duties and frequency of those duties on the job.

The employer should not bring in co-workers to discuss reasonable accommodations if the employee and employer alone could work out details of the specific accommodation, the details do not involve the cooperation of other workers, and the accommodation is not likely to be noticed and resented by the co-workers.[43] However, in those cases where either (1) the applicant or

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[41] *Id.* at 12.

[42] Bell does indicate that an employer may be able to provide general information to the co-workers in the form of training, but cautions that "... training must be presented in such a way as to avoid disclosure of a particular employee's disability ...." Bell, *supra* note 40, at 13.

[43] "Relevant co-workers" needs to be defined so that the group is limited to those people who could meaningfully contribute to the process. Also, for a workplace where relevant co-workers included large numbers in the workforce, the group brainstorming process may need to include selected relevant workers to make the process manageable. A group of more than five will probably decrease the efficiency of the group.

employee cannot contribute as effectively to the design of the reasonable accommodation, either due to unfamiliarity with the job functions or to the nature of the disability, or (2) the success of the accommodation depends on cooperation or non-resentment of other employees, the employer should ideally be able to open the discussion to relevant co-workers with the consent of the applicant or employee with the disability.

### *C. The Mechanics of the Group Process*

Ideally, the group brainstorming process should include the applicant or employee with a disability and relevant co-workers.[44] The covered employer should set the tone that the company wants to accommodate the employee and would like input on how best to arrange the accommodation. This method might discourage people from discussing barriers and instead focus the discussions on the accommodation. The group should work from a job description or, if none is available, should create a list of job duties. From those duties the group should identify the essential job duties. Then, the applicant could address how she could perform those duties with or without a reasonable accommodation. In the case of Jane, other first year associates may be able to identify how much time they spend meeting and talking to clients or opposing attorneys to aid in determining how much time may be needed for interpreter services for Jane.

For duties which the applicant or employee could not perform, the group would generate ideas for making the function feasible for the applicant. Then, following the meeting, the applicant could state her preferences and the employer could consider all of the input in deciding on the most appropriate alternative. If the employee's medical information or history was revealed as a part of that discussion, the employee would be waiving the right to confidentiality of that information within that setting.[45]

Any information not disclosed by the employee or permitted to be disclosed by the employee would still be protected by the confidentiality requirement.

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[44] Whenever an employee wishes to participate in the group brainstorming process she should be informed by the employer that the ADA provides for the private discussion between the employer and employee and protects any confidential medical information that is disclosed. If the employee agrees, the employer may have the employee disclose the confidential information to the group. If any confidential information will be disclosed the employer should obtain a waiver from the employee to permit disclosures that would otherwise be considered confidential information protected by the ADA. To protect both the employee and the employer, the waiver should specifically outline the information that will be disclosed.

In some instances, the employees may not be competent (or may even have a guardian) and be unable to waive this right. The employer may wish to seek permission of the employee and guardian to make the disclosure.

[45] Disclosure of confidential information in the group brainstorming process would not automatically permit disclosure of the same information by the employer to other sources. For example, the employer would not be able to disclose the information to a prospective employer simply on the basis of this past disclosure.

An employer might learn about other confidential information from other sources, such as a work-related physical examination or the employment application that is not needed to design the accommodation. The medical information or history that was discovered from other sources but not useful to creating the accommodation would still be subject to the confidentiality requirements. For example, if John had to get a post-employment physical, the physical may include information about the medical history of the paraplegia. This information would not be necessary for designing the accommodation and would not normally come up in the brainstorming process. The employer would need to protect that information as confidential despite the disclosure of other medical information about the nature of John's limitation.

Disclosure by the employer of protected medical information arising in the group brainstorming process would be prohibited for purposes other than designing and implementing the reasonable accommodation through co-worker participation. By analogy to the express exceptions to the confidentiality requirement, if disclosure to safety personnel for emergency treatment is warranted, that exception would not warrant disclosure to persons other than safety personnel.

### *D. Application to the Hypothetical Cases*

People usually are more receptive to an idea if they contributed to its development.[46] In the case of Shana, she will probably need intense training for about two weeks, but will then be able to handle the repetitive tasks of her job as a dishwasher. On an ongoing basis she may need reminders or cues from the other staff to stay on task or to stop talking about certain subjects. She may also need assistance in filling out timecards, timesheets, or other incidental paperwork. Shana could give her co-workers guidance on how she would like to be reminded so that the reminders and cues are not demeaning or patronizing.

If the restaurant manager, as a training "program," simply assigns Shana to "shadow" dishwashers on other shifts without enlisting the other dishwashers' cooperation, Shana may not obtain the necessary training and may fail in her duties. However, if the manager was permitted to tell the relevant employees about Shana's limitations in behavior and learning style that would likely impact her training and employment, the manager might be able to ask the other workers how that training could best be provided. Some dishwashers may volunteer to have her "shadow" them. Others might share "shortcuts" they use to remember their job duties or functions, such as a simple checklist. In one study of a small number of work settings employing people with more severe disabilities, researchers observed instances where "mentor" co-workers pro-

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[46] *Cf.* Wexler, *supra* note 9, at 204-05.

vided reminders, suggestions, and demonstrations to help their co-workers with disabilities learn the tricks of the trade.[47]

The group brainstorming process might help break down the isolation and barriers that some people with disabilities experience on the job. Whenever a "minority" breaks into unchartered territories, as many people with disabilities will with the onset of the ADA, they may not be readily accepted because people do not understand their disability or may believe that the person was hired or selected because of the disability.

Without disclosure in the group brainstorming process, co-workers may speculate about the worker and the disability. Their imaginations may roam, and the conclusions may be highly inaccurate and based on stereotypes. For example, Shana, who is mentally retarded with some behavioral challenges, may be perceived as mentally ill by her co-workers. Similarly, if Shana lives in a group home, and her retardation is not known to co-workers, she might, to preserve secrecy, decline a co-worker's offer of a ride home on a rainy day, leading the co-worker to feel rebuffed and likely to conclude that Shana is a very strange person. Shana may be better understood if the co-workers learn that her behavior and skill acquisition are affected by mental retardation. Workers with disabilities are more likely to garner co-worker acceptance based on accurate information rather than stereotypes and speculation. Accommodations produced by group effort may build better understanding about the nature of the disability and help co-workers view the individual as a person aside from the disability.

The interactions and teamwork required to develop the accommodation may span the working relationship that follows. The process may encourage accommodations between employees with disabilities and those without disabilities. If accommodations go in both directions the process is likely to increase acceptance of the co-worker with a disability as a team member. For example, suppose John needs to work the day shift because he relied on accessible public transportation that was unavailable after 7 p.m., and that Mary, a co-worker who does not have a disability, agreed to accommodate John by taking some extra night shifts. John might also accommodate Mary by coming in earlier once a week, so that Mary could go to a class. In the study previously mentioned, researchers noted that co-workers without disabilities tended to make accommodations for each other.[48]

If co-workers participate in designing the accommodation and understand the necessity for it, the worker with the disability may be accepted into a natural workplace culture of mutual accommodations. One-directional supports can result in a "benevolence trap" in which people with disabilities always benefit from the good works of others but are not offered the opportunities to provide

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[47] David C. Hagner, *The Social Interactions and Job Supports of Supported Employees, in* NATURAL SUPPORTS IN SCHOOL, AT WORK, AND IN THE COMMUNITY FOR PEOPLE WITH SEVERE DISABILITIES 217, 229-33 (Jan. Nisbet ed., 1992) [hereinafter NATURAL SUPPORTS].

[48] *Id.* at 231-32.

assistance in return.[49] One-directional accommodations are likely to have the same effect.

The disclosure of necessary information for the accommodation may also produce a collateral benefit of removing barriers to communication with co-workers imposed by the co-worker with a disability. Some people with disabilities may wish to hide or mask the existence of a disability to avoid ridicule. Once co-workers learn about the limitations through participation in the group brainstorming process, the co-worker with a disability may feel more at ease talking to her co-workers without fear of revealing information that will lead the others to learn about the disability. For example, if Shana's co-workers knew of her mental retardation, they would not be shocked to learn that she lives in a group home, she would not be embarrassed to accept a ride home on a rainy day, and the situation of her strangely rebuffing them and refusing a ride on a rainy day would never arise.

A brainstorming session to identify accommodations has the potential to take the focus from disability to ability. Job descriptions are often based on the norm of the employee. For example, in *Prewitt v. United States Postal Service*,[50] a job requirement for a mail sorting position was an ability to raise the arm above the shoulder as a shelf for casing mail was above shoulder height. If the shelf were lowered, however, Mr. Prewitt, who had a physical disability that limited his ability to raise his arm above shoulder level, would be able to case the mail.[51] The court noted that the "requirement" was not really a requirement because it was not necessary for the performance of the job.[52]

If the group concentrates on the job-related functions and how the individual applicant can perform these functions, the group will naturally be addressing abilities rather than limitations. In Shana's case, the brainstorming process would focus on the duties of a dishwasher, such as loading the dishwashing machine, operating the equipment, and handling the various cleaning tasks, and would not focus on Shana's IQ or her grade equivalent for reading skills. An incidental result of this group effort may also lead to the development of job descriptions not based on the norm of the employee without disabilities. Developing job descriptions that do not focus on these differences should have an empowering effect upon workers with disabilities.

In the case of John, who applies for a position as a sales clerk in a men's department at a major department store, the group brainstorming process might expose the ways in which a job description contains Prewitt-like requirements. For example, John can ring up sales if the table holding the cash register is lowered, and he can assist customers if there is enough room between

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[49] Michael J. Callahan, *Job Site Training and Natural Supports, in* NATURAL SUPPORTS, *supra* note 47, at 257, 273-74.

[50] 662 F.2d 292 (5th Cir. 1981). This case involved the Rehabilitation Act of 1973 which has a provision similar to the ADA's provision requiring reasonable accommodations.

[51] *Prewitt*, 662 F.2d at 305.

[52] *See id.* at 309.

the racks and in the dressing room. He should be able to reach merchandise above arm level with a "reaching device" that is used for items. It may be a physical barrier built into the workplace or included in the job description or the workplace, and not the limitations of a disability, that prevents John from performing a job-related function.

In the supported employment movement,[53] there is a trend to use "natural" rather than "artificial" supports for employees whenever possible.[54] Natural supports are the use of typical people and environments to accommodate the integration of a person with a disability rather than "relying on specialized services and personnel."[55] For example, using a specially trained job coach to train and supervise Shana would be an artificial support because the job coach is not a part of the natural work setting. An example of a natural accommodation would be for Shana to train by "shadowing" another dishwasher to observe the tasks of the job and attempt to gradually take on the tasks herself.

Natural supports have come into favor because they are generally cheaper and enhance the opportunity for more effective inclusion of people with disabilities. In the case of Jane, who applied for an associate's position at a personal injury law firm, a more natural support may be to hire a secretary or paralegal who knows sign language rather than hiring an interpreter whose only function is to sign for Jane.[56] Obtaining a secretary or paralegal that can sign might cost more than an employee without that skill, but it would be cheaper than hiring two employees. The secretary or paralegal could do other duties for Jane, but could do sign language interpretation for attorney meetings and in court. Therefore, the presence of a paralegal, secretary, or other support personnel would be more natural to the work setting than an interpreter who was waiting on standby.

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[53]"Supported employment began as a philosophical commitment to improve the employment outcomes of individuals with severe disabilities. Supported employment is now a major national initiative with its own technology, practical legislation, and funding system. In its simplest form, supported employment provides paid employment in integrated work settings to individuals previously excluded from work. The success of this approach lies in the provision of intense, individual training and support during the initial stages of employment, and of ongoing assistance, enabling an individual to maintain employment for extended periods of time." Paul Wehman, *Supported Employment and Opportunities for Integration, in* THE ADA MANDATE FOR SOCIAL CHANGE 69, 70 (Paul Wehman, ed., 1993).

[54]Callahan, *in* NATURAL SUPPORTS, *supra* note 47, at 257-58.

[55]Jan Nisbet, *Introduction, in* NATURAL SUPPORTS, *supra* note 47, at 5.

[56]S. REP. NO. 116, *supra* note 2, at 108 (citing testimony of Dr. I. King Jordan, President of Gallaudet University, who suggested that interpreters can be hired to do other things as well as interpret and specifically offered the example of secretaries and professional staff).

## VI. CONCLUSION

Designing reasonable accommodations that effectively integrate people with disabilities into the workplace will be essential to the successful implementation of the ADA. Further study of the usefulness of co-worker participation in the group brainstorming process to design accommodations is warranted to determine if it has expected therapeutic benefits for the worker with the disability and the co-workers.

One way to test this theory would be to study integration of disabled workers at two large comparable employers. Applicants and employees with disabilities of one employer could be encouraged to participate in the group process and waive the confidentiality requirement to the extent medical information is discussed in the group process. The second employer could implement the ADA pursuant to a "business as usual" policy and the accommodation would presumably be ordinarily determined privately with the employer only. Disabled applicants and employees and co-workers at the two settings could later be compared using a number of measures to examine integration in the workforce, effectiveness of the accommodation, job performance, turnover and job satisfaction.

If further study confirms that the group process is in fact more effective, as this article speculates it would be, a therapeutic jurisprudence approach would be to keep the confidentiality requirement in the ADA as is, but to allow employers to encourage voluntary disclosure of limited information by employees for the group brainstorming process. In this sense, therapeutic jurisprudence would urge "law reform" not by changing the law itself, but by suggesting that employers, as one type of "implementer" of the law,[57] voluntarily change their behavior and role in order to encourage employees to consider waiving the ADA confidentiality provision for the limited purpose of co-worker participation in the group brainstorming process.

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[57] *See* David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAVIORAL SCI. & LAW 17, 28 (1993) (referring to private therapists as legal "administrators" of the law).