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ALTERNATIVE DISPUTE RESOLUTION AND THE AMERICANS WITH DISABILITIES ACT

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As a lawyer representing plaintiffs' concerns in the area of employment law, I have become a firm advocate of Alternative Dispute Resolution ("ADR").¹ My training is that of a litigator. I clerked for a judge twenty years ago, and learned the skills necessary to be a lawyer and go to battle in court. Gradually it dawned on me that there should be a better way of resolving employment disputes than fighting it out in the courtroom.

There are millions of adverse employment transactions every day including firings, demotions, and unsuccessful interviews. It is poor social and legal policy for those transactions routinely to end up in litigation. Yet, my practice is flooded with people experiencing all kinds of employment problems that our justice system simply is not equipped to handle. I began a conscious study of alternative ways of addressing employment disputes through various methods such as negotiation, mediation, and arbitration.

I use the term ADR in its broadest sense, meaning any way of resolving or preventing disputes. This definition encompasses both formal and informal negotiation as well as dispute resolution procedures within companies, formal mediation, and arbitration. In the broad continuum, which I will call the ADR spectrum, there are numerous ways of resolving employment disputes faster, cheaper and more justly than in court. The efficiency perspective

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¹ See Roderick G. Colloquy, *Creativity and Responsibility: Perspectives on Covenant, Contract, and the Resolution of Disputes*, 36 EMORY L.J. 533 *passim* (1987) (outlining complete discussion of Alternative Dispute Resolution).

of ADR as it applies to the Americans With Disabilities Act ("ADA")² is the theme I address today.

While any kind of dispute is appropriate for settlement without a court appearance, some aspects of the ADA lend themselves more easily to ADR. The best opportunity for ADR under the ADA arises in "reasonable accommodation" cases in which the employee is still working for the company.³ In my experience, the vast majority of ADA disputes arise when people are still employed, or have been on some kind of leave of absence and want to return to work. In either situation, an ongoing employment relationship exists. The ADA presents perfect opportunities for all parties to try to resolve disputes quickly or to prevent disputes at the outset.

I shall discuss the specific applications of ADR to the ADA in the employer-employee context, without reference to job applicants. To be sure, the ADA applies to job applicants as well as employees,⁴ but I hardly ever see the job applicants who do not get jobs because they generally do not litigate. They move on, apply for other jobs and rarely challenge an unsuccessful interview. Naturally, some applicants do contest unsuccessful interviews,⁵ but, I ask, how often do people actually know that the reason they did not get a particular job is because of a disability? For that reason, I confine my discussion to reasonable accommodations in the employment context.

The text of the ADA contains a general provision that encourages ADR through negotiation, mediation, and arbitration.⁶ The regulations state that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."⁷

The phrase, "flexible interactive process," seems to contemplate negotiation, and in that context it makes perfect sense. Who bet-

² 42 U.S.C. §§ 12101-213 (1994) (Supp. V 1993).

³ 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). Failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" constitutes discrimination under the ADA. *Id.*

⁴ *Id.* (applying reasonable accommodation requirement to applicants or employees).

⁵ See, e.g., *Ethridge v. State*, 860 F. Supp. 808, 810 (M.D. Ala. 1994) (police officer denied permanent employment because of disability).

⁶ 42 U.S.C. § 12212 (Supp. V 1993). The statute provides in relevant part that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials, and arbitration, is encouraged to resolve disputes under this chapter." *Id.*

⁷ 29 C.F.R. § 1630.9 (1994).

ter knows exactly what the job entails, what the individual's limitations are, and what reasonable accommodations could be made for those limitations, than the employer and the individual?

Issues of disability discrimination, particularly of the reasonable accommodation variety, are necessarily specific to the individual. These issues are resolved on a case by case basis.⁸ Every job is different with unique features and characteristics, and each individual's specific limitations must be separately evaluated. By definition, reasonable accommodation requires independent, personalized examination.⁹ The analysis does not readily lend itself to third-party adjudication. Rather, it lends itself to careful evaluation and consideration by the parties directly involved to cultivate a functioning employment relationship.

Determining what a reasonable accommodation is requires a four step process. First, the essential functions of the job must be identified; second, a determination must be made of the employee's job-related limitations; third, taking into consideration the given limitations, a resolution must be made of the exact accommodation necessary for the individual; and finally, the particular accommodation must be adopted.¹⁰

As I said before, the first step in the negotiation process is identifying the essential functions of the job. Some functions of the job may be marginal while others will be essential.¹¹ The employer

⁸ See generally, Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans With Disabilities Act*, 64 S. CAL. L. REV. 1607, 1608-09 (1991).

⁹ 29 C.F.R. § 1630.9 (1994).

¹⁰ *Id.* The regulations provide in relevant part:

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is appropriate for both the employee and the employer.

Id.

¹¹ See H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 55 (1990), reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 337. The legislative history of the ADA defines essential functions as "job tasks which are fundamental and non marginal." *Id.*

generally is clear about which functions are essential, but may not be completely honest with the employee or may not fully comprehend where the line should be drawn between essential and marginal job functions. The employee, on the other hand, has often been doing the job or knows what the job entails, and is cognizant of its essential and non-essential functions. This is a topic about which the employer and employee could have constructive dialogue.

The second step is identifying the individual's job-related limitations. The individual knows best what qualifications and abilities she has, despite her limitations. Therefore, the individual should disclose what her limitations are to the extent relevant to the essential functions of the job. The employer then understands what tasks the employee can do that are relevant to the particular job.

The term "reasonable accommodations" is really about effective accommodations. The questions one must ask include: What works? How can this fit? Again, direct negotiation is the best way to take the known essential functions of the job and the known limitations and abilities of the employee and craft a means to allow the person to do the job. It is a perfect opportunity for discussion, disclosure, and negotiation, which necessarily should be done directly between the parties involved.

Finally, after looking at the potential range of effective accommodations, the last step in the process is agreeing upon the particular accommodation that will, in fact, be adopted. There, the employer has the ultimate right to select which accommodation to implement. Ideally, the employer will give some consideration to the employee's preferred method, though absolute deference to the employee's choice is not required.¹² Again, this is something that the employer and the employee should talk about.

Simply by outlining this checklist of issues that arise in a reasonable accommodation situation, it is apparent that the process lends itself to the basic processes of communication that are inherent to negotiation. If the situation cannot be settled through direct negotiations between the parties, perhaps mediation is the next logical step toward conciliation.

¹² See Murphy, *supra* note 8, at 1631-32 (acknowledging employee preference).

Mediation is essentially a facilitated form of negotiation, where an experienced neutral third-party listens to and evaluates the interests, needs and concerns of the parties.¹³ Give and take by both parties in a creative problem-solving mode, with an eye to the ultimate goal of satisfying both parties, is key to the process. When individuals cannot work out troublesome issues on their own, mediation provides an opportunity in the presence of a disinterested third-party to resolve differences as to what are effective or reasonable accommodations.

The same principles apply to a whole range of other issues that arise beyond reasonable accommodation. Whenever discrimination due to a disability or any other condition occurs, it is most efficient for the parties to communicate directly. Attempts should be made at negotiation, mediation or arbitration before rushing off to the courthouse steps.

¹³ See Amy Hermanek, *Title III of the Americans With Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457, 471-80 (1994) (providing complete discussion of mediation in reference to ADA).

