

QUESTIONS AND ANSWERS FOR PARTIES TO MEDIATION: MEDIATION AND THE AMERICANS WITH DISABILITIES ACT (ADA)



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Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act (ADA)

Introduction

The Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (Rehabilitation Act) make it unlawful to discriminate against a qualified individual with a disability.¹ This guide helps individuals with disabilities and their representatives understand their rights and responsibilities when mediating equal employment opportunity (EEO) disputes. Although this guide focuses on mediation, information about the ADA and reasonable accommodation principles will generally also apply to other types of Alternative Dispute Resolution (ADR), such as conciliation, early neutral evaluation, or settlement conferences.

Facts About Mediation of EEO Disputes

If you have an EEO dispute with your employer, you may be offered mediation services by your employer, by a private organization, or by a government agency, such as the Equal Employment Opportunity Commission (EEOC). Mediation can often resolve the dispute more quickly and inexpensively than investigation or litigation. Mediation may be offered at any point in the dispute process, including after you have filed a formal charge of discrimination with an administrative agency, or after you have filed a lawsuit.

Mediation is an informal, confidential process for resolving disputes by using an impartial third-party (the mediator) who meets with the employer and employee. The mediator has no decision-making authority, but rather tries to assist the parties to resolve their dispute. Participation in mediation does not constitute an admission of any violation of the laws enforced by EEOC. Sometimes mediation is the best way to preserve or build a better working or parting relationship. To participate, parties need only be open to the possibility of resolution.

¹The ADA prohibits disability discrimination by private and public employers (Title I), state and local government entities (Title II), and public accommodations (Title III). The Rehabilitation Act contains similar anti-discrimination rules that apply to executive branch federal government agencies as well as various federally funded programs and activities. For purposes of this document, the term “ADA” is used to refer to both the ADA and the Rehabilitation Act.

Generally neither party to a dispute is required to participate in mediation, or to agree to a resolution; an agreement to mediate is an agreement to work in good faith with the other party toward a solution. Mediation typically includes an opening session, followed by a joint meeting of the parties, fully and fairly allowing both the employer and the employee to explain their point of view and to listen to the other party's point of view. Through private and joint meetings with the mediator, the parties attempt to develop and evaluate options for reaching agreement. When an agreement is reached, usually it is memorialized in an enforceable, written document signed by both parties.

Each party may have an attorney, friend, relative, or other support person present at the mediation. If you are not able to reach resolution through mediation, then you may still pursue any legal claims or defenses you have preserved. The mediator is a neutral facilitator, not either party's advocate. The mediator will try to help both parties identify their interests and ways to achieve desired outcomes.

Here are some key questions for parties to consider in preparing to participate in mediation:

- What are the main issues of concern to you? What are the main issues of concern to the other party?
- What are your goals for the mediation? What are the goals of the other party?
- Who are the key players in the dispute?
- What obstacles might there be to having a productive session?
- What will happen if the dispute is not resolved through mediation?
- Is there anything you need to help you participate in the process?

Accommodation for the Mediation Process

Sometimes individuals with disabilities will need an accommodation to allow full participation in the mediation process. Accommodations that might be needed include:

- assistance with verbal or written communications;
- specific meeting times or specific break times due to disability-related fatigue, medical treatment, medication, etc.;
- management of environmental factors such as light, noise, or chemicals;
- permission for a personal assistant to accompany a party throughout the mediation process;

- reminders about what is being discussed, the roles of others who are present, and the way the mediation process is conducted; and,
- other modifications to the way the mediation is ordinarily conducted.²

If you are an “individual with a disability” within the meaning of the ADA, you have a legal right to reasonable accommodation in the mediation if it is not an undue hardship, meaning it does not pose a significant difficulty or expense in light of the mediation provider’s resources or business operations, or fundamentally alter the mediation service. Many mediators will offer accommodation without regard to whether or not someone is a “qualified individual with a disability,” in order to facilitate full and meaningful participation by all parties to the mediation and their representatives.³

1. What should I do if I believe I may require assistance or accommodation in the mediation process due to my disability?

It is best to let the mediation provider know as soon as possible that you may need an accommodation. A mediator needs advance notice to provide many accommodations, such as sign language interpreters, alternative formats for written documents, or an accessible location. The sooner you request an accommodation, the better you can ensure it will be timely provided. You can inform the person who does intake for the mediation program, the mediator, or other appropriate individual responsible for the mediation that you have a disability that requires an accommodation. You may request a reasonable

²The term “reasonable accommodation” is used in this document to refer not only to “reasonable accommodation” in employer-sponsored mediation programs, but also “reasonable modifications of policies, practices, and procedures,” the provision of “auxiliary aids and services,” and other similar changes that provide accessibility for people with disabilities in private and government-sponsored mediation programs. “Auxiliary aids” include such services or devices as qualified interpreters, assistive listening devices, telecommunications devices for deaf persons (“TDD” or “TTY”), readers, taped texts, Brailled materials, and large print materials.

³For example, the ADA Mediation Guidelines (2000), available at <http://www.cojcr.org>, issued by a national work group comprised of representatives from a variety of organizations, and the Practice Standards for ADA Mediators (1999), available at http://www.keybridge.org/med_info/ada/ada_mediator_standards.htm, issued by the Center for Mediation, Key Bridge Foundation, Washington, D.C., provide voluntary practice standards relating to ADA mediation topics, including reasonable accommodation of participants.

accommodation at any point during the mediation when you realize that one is needed.

Example: You need to check your blood sugar or take certain medication at specified times during the day, and you assumed this would coincide with the break schedule during the mediation. However, after the mediation session is well underway, you learn that breaks are not going to be taken at the times you thought. Even though the mediation already has started, you should explain to the mediator your medical need for breaks at certain times so that he can accommodate your needs by modifying the planned break schedule.

2. Will any accommodations be provided without a request?

In general, physical sites and service providers have to comply with accessibility standards by having things like ramps and accessible bathrooms, and must allow the use of service animals. However, there are situations where you will need to request accommodation because the mediation provider will otherwise not be on notice that any policy modifications or services are needed. For example, if you need a sign language interpreter, materials in alternative format, or other arrangements requiring advance planning, you should notify the mediation provider beforehand if possible.

3. What do I have to say or do to ask for an accommodation?

You should inform the mediation provider what accommodation is needed and why. The request can be oral rather than written, and need not contain any magic words, such as “ADA” or “reasonable accommodation,” but it must be sufficient to give notice of the need for a change or adjustment due to a medical condition.

4. Do I have to disclose my disability to the mediator?

If you need an accommodation for the mediation process, you will need to explain what you need and why you need it in order to put the mediator on notice of your request for accommodation and to enable her to provide it.⁴

⁴Even if you do not need an accommodation for the mediation, if your legal claim in the case being mediated involves alleged disability discrimination or denial of reasonable accommodation, it may be useful in resolving the case for you to explain to the mediator aspects of your disability relevant to the workplace dispute.

5. What if I have certain disability-related needs, but I am not sure whether I'll need an accommodation?

You should ask the mediator any questions you have about the mediation site and/or the process so that you can decide whether you need an accommodation. You should advise the mediator of the nature of your concerns so that he can fully respond to them.

Example: You advise the mediator during the initial intake that you use a wheelchair, and ask whether there will be any problem with access to the room where the mediation is scheduled to occur. The mediator states that the mediation was scheduled to take place on the second floor of a building that has no elevator but, now that he is aware of your needs, he will reschedule the mediation to take place on the first floor or in an alternative accessible location.

6. Can the mediator refuse to provide an accommodation to an individual with a disability if it would be too expensive or difficult?

The mediator must provide you with a reasonable accommodation if this can be done without significant difficulty or expense and without fundamentally altering the mediation services. Note, however, that personal use items and personal care services are generally not considered reasonable accommodations.

Example: A private practice solo mediator is offering mediation services on a case in which one of the parties has requested a sign language interpreter due to a hearing impairment. The mediator contacts an interpreter service, and learns that hiring an interpreter will cost \$80/hour. The mediation is expected to last 6 hours. The total cost of \$480 to provide the interpreter is unlikely to be deemed a "significant difficulty or expense" under the ADA, because the overall financial resources of the mediation provider are considered, not just the fee for that single mediation.

Example: An individual with a cognitive disability tells the mediator that she is having difficulty following discussions and understanding various settlement alternatives available to her. She asks the mediator to advise her what settlement option he thinks is best and to do whatever he can to help convince the employer to agree to it. This is not a reasonable accommodation, because it would require the mediator to act as an advisor to, or advocate for, one of the parties, rather than as a neutral third party, and would

thus fundamentally alter the nature of the mediation process. (Of course, the mediator may advise the individual regarding her right to bring a representative, such as an attorney or family member, to serve as an advocate during the mediation.)

Example: A party who uses a wheelchair requests that the mediator provide someone to assist him with transferring to and from his vehicle to his wheelchair when arriving and departing the mediation, and from his wheelchair to the toilet when using the bathroom during mediation breaks. The mediator may deny this requested accommodation because personal care services such as assistance with transferring do not have to be provided as a reasonable accommodation. However, the mediator should also discuss with the party whether there are any alternative means for the party to obtain the services needed, and should offer a reasonable alternative if one exists, for example allowing the party to arrange at his own expense for a personal assistant or other individual to be present at the mediation.

7. Do I have the right to receive the specific accommodation I request or can the mediator provide something else?

If more than one accommodation solution would meet your needs, the mediator may choose which one to provide. If the mediator's proposed accommodation would not be effective for you, explain to the mediator why, so that she has an opportunity to explore an alternative accommodation with you.

Example: A party with a learning disability requests to tape record the mediation session, explaining to the mediator that this will accommodate her inability to take comprehensive notes. The mediator is concerned that allowing a tape recording of the mediation session will inhibit the other participants and may raise confidentiality concerns, so instead offers to provide a qualified note taker for the session. Assuming the notes are satisfactory, this may be an equally effective accommodation.

Example: A party who is deaf requests that the mediator provide Computer-Assisted Realtime Translation (CART) services for the mediation, whereby a qualified transcriptionist contemporaneously types a transcript of what is said at the mediation session(s), and it appears on a screen for the party to read. The mediator wishes to offer a sign language interpreter instead of CART, to reduce the expense. Absent undue hardship, the mediator must provide CART if a sign language interpreter would not be an equally effective

accommodation for the individual, for example if the party does not use sign language or if no interpreter is available to communicate in the type of sign language the party uses.

8. Can the mediator charge me for the cost of an accommodation?

No. However, if the accommodation you request would pose significant difficulty or expense, the mediator might offer a less costly accommodation that also meets your needs and can be provided without undue hardship.

9. Does the mediator have to keep my medical information confidential?

Based on standard mediation practices, the mediator should treat medical information about you confidentially, including the fact that you requested a reasonable accommodation for the mediation.⁵ If it relates to the dispute being mediated, the mediator may ask you for permission to share certain medical or disability-related information with the other party. In that case, you should advise the mediator of what information he may share in the interest of reaching a resolution in the case. All participants to a mediation, including you and your employer, your respective representatives, and the mediator, must keep confidential all communications made during the mediation process.⁶ Everyone in the mediation will typically sign a confidentiality agreement. After the mediation, all parties should destroy any notes they took during the mediation.

⁵In employer-provided mediation, there is additionally an ADA obligation requiring the employer and the mediator to keep the employee's medical information confidential.

⁶EEOC Alternative Dispute Resolution Policy Statement (July 17, 1995) (available at <http://www.eeoc.gov/policy/docs/adrstatement.html>); Questions and Answers About Mediation (explaining EEOC's Mediation Program for charges pending before EEOC) (available at http://www.eeoc.gov/mediate/mediation_qa.html). Threats of physical harm present an exception to the confidentiality rule, and can be disclosed.

OTHER CONSIDERATIONS

10. What should I do if I believe that the mediator does not really understand my disability, or my employer's obligations under the ADA?

You are free to provide the mediator with resource information, such as publications or the contact information for neutral experts, to assist in explaining your disability and your view of the legal dispute. If, after having done this, you still feel the mediator is biased or not properly informed, you should express your concerns to the mediator and/or the mediation program coordinator to determine if the problem can be remedied or another mediator assigned. Remember that mediation is voluntary and can be discontinued at any time by either party.

11. Do I need to be represented by an attorney in mediation?

You are not required to have an attorney for mediation. However, many people find that representation by an attorney or another person with ADA training can help both parties engage in informed participation and decision-making. Even if you do choose to have an attorney present with you at the mediation, you should nevertheless inform and educate yourself on the rights and issues in your case. If you choose not to have counsel present at the mediation, you may still have an attorney review the mediation agreement and advise you before you sign it. The mediation provider is not required to pay the cost of an attorney or other representative to participate in the mediation or to review an agreement.

12. How can I ensure that an agreement reached in a mediation will be enforced?

If you reach an agreement in mediation that is reduced to a written enforceable settlement agreement, you may have the right to ask the EEOC or a court to enforce it.⁷ There are steps you can take in advance to ensure that the employer will do what it has agreed to do. If an agreement you reach through mediation requires that you withdraw a pending EEO charge or lawsuit, or waive claims, in exchange for whatever relief the employer agrees to provide, you may want to make sure the agreement specifies that you will not do so until the employer has taken the steps to which it has agreed. When your agreement will involve actions on the part of the employer (e.g., paying money damages to

⁷EEOC Alternative Dispute Resolution Policy Statement (July 17, 1995) (available at <http://www.eeoc.gov/policy/docs/adrstatement.html>).

you, reassigning you to a new position, or providing an accommodation in your current position), you may want to consider seeking the mediator's and employer's consent to include in the agreement a provision stating that the mediator will follow-up in a specified period of time to determine if the agreement was carried out. The agreement also might provide that either party can schedule another mediation if the agreement breaks down.

13. What should I do if no resolution is reached in mediation?

You have the right to continue with prosecuting your legal claim, provided you meet all other requirements. For more information about how to prosecute a legal claim under the federal equal employment opportunity laws, contact the EEOC at 1-800-669-4000 (voice) or 1-800-669-6820 (TTY), or obtain information on the Internet from www.eeoc.gov.

14. Where can I get more information about mediation and the ADA?

The following is a list of some resources that you can consult for information about the ADA and about mediation:

FEDERAL AGENCIES

U.S. Equal Employment Opportunity Commission (EEOC)

1-800-669-4000 (voice)

1-800-669-6820 (TTY)

<http://www.eeoc.gov>

EEOC Publications Center:

1-800-669-3362 (voice)

1-800-800-3302 (TTY)

EEOC private sector mediation programs:

<http://www.eeoc.gov/mediate/index.html>

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older; sections of the Civil Rights Act of 1991; the Equal Pay Act; Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and Section 501 of the Rehabilitation Act of 1973, prohibiting disability discrimination in federal government employment. In addition to investigation and litigation of claims, EEOC provides extensive technical assistance to employers and employees.

U.S. Department of Justice
Civil Rights Division, Disability Rights Section
ADA Information Line
1-800-514-0301 (voice)
1-800-514-0383 (TTY)
<http://www.ada.gov>

The Department of Justice investigates and litigates claims under Titles II and III of the ADA, and also litigates cases against public employers under Title I of the ADA. The Department also provides education and technical assistance to businesses, State and local governments, and individuals with rights or responsibilities under the ADA through a variety of means to encourage voluntary compliance. Activities include providing direct technical assistance and guidance to the public through a toll-free ADA Information Line, an internet ADA Home Page, and Fax on Demand, developing and disseminating technical assistance materials to the public, undertaking outreach initiatives, and coordinating ADA technical assistance government-wide.

National Council on Disability
202-272-2004 (voice)
202-272-2074 (TTY)
<http://www.ncd.gov>

The National Council on Disability (NCD) is an independent federal agency making recommendations to the President and Congress on issues affecting Americans with disabilities. NCD's overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

Access Board
1-800-USA-ABLE (1-800-872-2253) (V/TTY)
<http://www.access-board.gov>

The Access Board is an independent federal agency devoted to accessibility for people with disabilities. Key responsibilities of the Board include: developing and maintaining accessibility requirements for the built environment, transit vehicles, telecommunications equipment, and for electronic and information technology; providing technical assistance and training on these guidelines and standards; and enforcing accessibility standards for federally-funded facilities.

OTHER RESOURCES

Job Accommodation Network (JAN)

1-800-526-7234 (V/TTY)

<http://www.jan.wvu.edu>

JAN is a free service of the Office of Disability Employment Policy of the U.S. Department of Labor providing information and guidance on reasonable accommodation in the workplace.

ADA Disability and Technical Assistance Center (DBTAC)

1-800-949-4232 (V/TTY)

<http://www.adata.org>

There are ten regional DBTAC centers throughout the United States that act as a one-stop comprehensive resource on ADA issues in employment, public services, public accommodations, and communications. Each DBTAC center works closely with local business, disability, governmental, rehabilitation, and other networks to provide ADA information and assistance. Programs vary in each region, but all of the centers provide technical assistance, education and training, materials, information and referrals, among other services.

American Bar Association (ABA) Commission on Mental and Physical Disability Law

(202) 662-1570

<http://www.abanet.org/disability>

ABA's Commission on Mental and Physical Disability focuses on the law-related concerns of persons with mental and physical disabilities through a variety of activities and publications. Its mission is "to promote the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and their full and equal participation in the legal profession." The Commission's members include lawyers and other professionals, many of whom have disabilities.