

Clearing the Docket: Alternative Dispute Resolution Under the Americans With Disabilities Act (Introductory Remarks for the Third Panel)

Janet M. Spencer

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CLEARING THE DOCKET: ALTERNATIVE DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT

JANET M. SPENCER*

Those of you who have been here this morning have learned that the ADA is a wonderful source of potential disputes. You can have disputes about the nature of the disability, whether or not a condition qualifies as a disability,¹ and if so, whether it is of a kind that interferes with an employee's work and which can be corrected by reasonable accommodation provided by an employer.² We can also have disputes about what constitutes a reasonable accommodation and whether the accommodation places too great a burden on the employer.³ While we have an Act that is so ripe with the potential for these kinds of disputes, we also have a Congressional policy that favors resolution through Alternative Dispute Resolution ("ADR").⁴

Other factors besides Congressional policy, however, also militate in favor of using ADR to resolve disputes. Most frequently,

* Professor of Law, St. John's University School of Law; B.A., Cornell University; LL.B., Harvard Law School.

¹ See generally Renee L. Cyr, Note, *The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1242-47 (1992); Andrew K. Glenn, Note, *Disclosure of Executive Illnesses Under Federal Securities Law and the Americans with Disabilities Act of 1990: Hobson's Choice or Business Necessity*, 16 CARDOZO L. REV. 537, 543 (1994); William C. Taussig, Note, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act*, 35 B.C. L. REV. 927, 928 (1994).

² See generally Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?* 82 KY. L.J. 219, 222, 227-30 (1994); Eric H. J. Stalhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?* 9 LAB. LAW. 71, 92-96 (1993).

³ See Elliot H. Shaller, "Reasonable Accommodation" Under the Americans with Disabilities Act: What Does It Mean? 16 EMPLOYEE REL. L.J. 431, 433-47 (1991).

⁴ See 42 U.S.C. § 12212 (Supp. V 1993). Section 12212 provides:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

Id.

the individuals who seek accommodation are already in the work force. In this case, the employer may want to retain such an employee. Thus, ADR offers an opportunity to find a mutually agreeable and acceptable way to allow that employer to do so.

Additionally, a provision in the Civil Rights Act of 1991⁵ suggests that it is in the employer's self interest to try and resolve disputes over reasonable accommodation, in good faith with the employee, to avoid liability for punitive damages. Although our speaker this morning denigrated the \$300,000 cap on punitive damages,⁶ my father always used to say, "if you saw it lying in the street, you'd pick it up." I daresay that would be the case here. Thus, there are numerous reasons to think favorably about ADR.

⁵ See Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(3) (Supp. V 1993) (precluding award of damages where covered entity demonstrates good faith efforts at resolution of conflict).

⁶ Kipp Watson, *Healing the Sick Institutions*, 10 ST. JOHN'S J. LEGAL COMMENT. 521, 524 (1995).