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ADA mediation after *Sutton*, *Murphy* and *Albertson*

By Guest Columnist James Levin, J.D.



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Judith Cohen's summary of the Interim ADA Mediation Standards in the last issue of *The Journal of Alternative Dispute Resolution in Employment* acknowledges the "skyrocketing" number of cases mediated under the Americans With Disabilities Act (ADA).¹ The United States Supreme Court's recent opinions in *Sutton v. United Airlines, Inc.*,² *Murphy v. United Parcel Service, Inc.*,³ and *Albertson, Inc. v. Kirkingberg*⁴ surprised many in the disability community by explicitly excluding an individual from ADA coverage if she mitigates her mental or physical impairment and the impairment as mitigated no longer substantially limits a major life activity. Will the Supreme Court's narrowing interpretation of the definition of "disability" ground the "skyrockets," or, as I suggest below, will the number of mediations in ADA cases continue to soar?

The ADA became law on July 26, 1992. Since then, defendants have been over-

whelmingly successful in defending ADA claims,⁵ although both plaintiffs and defendants have found ADA litigation costly, time-consuming, and stressful. Defendants refusing to settle ADA claims also risk negative publicity and damage to employee morale. Mediation efforts, like those developed by the Department of Justice (DOJ) ADA Mediation Program⁶ and the EEOC,⁷ show that mediation is an effective alternative that meets the needs of employers and businesses as well as the diverse community of individuals protected by the Act. In the DOJ program, for example, 83% of the cases submitted to mediation have settled.⁸

Mediation cuts through law's complexities. Mediation is successful in ADA claims, in part, because it can cut through the complexities of the statute. To make a claim under the ADA, an individual plaintiff must first *prove* that she meets the statutory definition of "disabled."⁹ This is different from other

This issue's Mediation column features James Levin, Adjunct Associate Professor of Law and the Associate Director of the Center for the Study of Dispute Resolution at the University of Missouri - Columbia School of Law. He is a founding member of the National Association for Community Mediation (NAFCM) and served on its Board of Directors from 1994 to 1998. Levin currently serves on the academic advisory committee assisting the National Conference of Commissioners on Uniform State Laws and the American Bar Association in drafting a uniform mediation statute.

employment discrimination statutes where a person, by virtue of his or her race, age or other *easily verifiable* protected status, falls within the purview of the relevant discrimination statute.

Upon meeting the “disabled” threshold, an individual seeking ADA protection must pass a second threshold by proving that she is “qualified” for the job she seeks or hopes to retain. That is, she must prove she can perform the *essential functions* of the job with or without *reasonable accommodations*.¹⁰

Miscommunication, misperception, ignorance, misinformation, strained relationships or some combination of the above are often found at the core of these “second threshold” disputes. For example, an employer may not fully understand what reasonable accommodation is necessary or may grossly overestimate the cost of making such an accommodation. Mediation provides a forum to clear up those misunderstandings in ways that promote fair and effective settlements.

These “second threshold” issues should remain unaffected by the Court’s opinions in *Sutton*, *Murphy*, and *Albertson*, which focus on the Act’s definition of disability. Reversing a trend set by most courts of appeals as well as the EEOC and DOJ guidelines, the Supreme Court uses these cases to find that an impaired person is statutorily disabled only if the impairment, ***in its corrected or mitigated state***, substantially limits a major life activity.

This holding reduces the number of Americans covered by the ADA and, ar-

guably, reduces opportunities to mediate ADA claims. Yet, more than 40 million Americans remain covered by the Act,¹¹ and for these people and their employers, mediation will continue to flourish as an effective and cost-saving means of settling ADA claims.

Even greater incentive to mediate. How, then, will *Sutton*, *Murphy*, and *Albertson* affect the number of ADA cases that will be mediated? The court’s attempt to narrow the definition of “disability” makes ADA litigation more complex, more costly, and more protracted. This creates a greater incentive for parties to consider mediation at the earlier stages of litigation.

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In *Sutton*, two myopic job applicants seeking to be pilots failed United Airline’s uncorrected (*i.e.*, without glasses or contact lenses) vision requirement although their visual acuity was 20/20 or better when they wore prescription lenses. The Court, affirming the lower

court dismissal of the case for failure to state a cause of action, held that the ADA’s definition of “disability” did not apply to the plaintiffs because the ADA requires courts to assess their disability in its mitigated state.

The plaintiffs’ corrected vision did not make them disabled under the ADA, although their uncorrected, impaired vision disqualified them from the positions they sought at United Airlines. The applicants were not *regarded* as having a disability – an alternative statutory definition of “disabled” – because they made no showing that United Airlines regarded them as having impairments that substantially limit their major life activity of *working*.¹²

In *Murphy*, UPS fired a truck mechanic with hypertension because his blood pressure in its unmedicated state exceeded the limits necessary to obtain a Department of Transportation (DOT) health certification. Reiterating its holding in *Sutton*, the Court found no disability under the ADA because the mechanic's blood pressure, when controlled by medication, did not substantially limit a major life activity.¹³

In *Albertson*, the Court held that a truck driver, nearly blind in one eye, also did not meet the ADA's definition of disability. Here, as in the *Sutton* and *Murphy* cases, the Court focused in part on a mitigating factor — *i.e.*, the truck driver's unconscious ability to compensate for his monocular vision — to find that he was not disabled under the statute.

The Court's emphasis on mitigation in these cases adds a layer of legal complexity to an already too complex area of law. Yet, for that very reason, mediation remains an attractive alternative. Consider an amputee with a prosthesis who, through hard work and extensive physical therapy, has regained almost all her mobility. Before this recent line of cases, such a plaintiff would assert a claim, and the case would likely move to a discussion of the claimant's qualifications for the position.

Now, using *Sutton*, *Murphy*, and *Albertson* as ammunition, defendants may engage claimants in a fact-intensive, expert-laden inquiry into whether a plaintiff is "dis-

abled" within the meaning of the ADA. Such a result — protracted litigation at great expense to all parties — clearly creates a compelling incentive for plaintiffs to seek mediation. Importantly, mediation also remains attractive to defendants because it provides a private forum in which to engage in interest-based negotiations that go beyond narrow legal points while saving time and money.

Fewer ADA claims filed, more claims mediated. Where does that leave us? The Supreme Court's actions in *Sutton*, *Murphy*, and *Albertson* narrow the class of

people protected by the ADA and will likely reduce the number of ADA claims filed. However, it should not stem the growth in the number of ADA cases to be mediated.

First, these Supreme Court cases, if anything, make ADA claims more complex, more protracted, and more costly. Mediation can cut through the legal complexities and re-

duce the time and money parties spend to litigate such cases.

Second, despite *Sutton*, *Murphy* and *Albertson*, many ADA cases will continue to focus on "essential job functions" and "reasonable accommodations," issues fueled by misunderstanding, misperception, and miscommunication. Accordingly, such cases remain well suited for mediation.

Third, the increased training of ADA mediators¹⁴ and the recent efforts to develop ADA mediation standards (highlighted in

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the last issue of this Journal), will improve the quality of mediators handling ADA cases and give parties increased confidence that mediation is efficient and effective.

Finally, newly established programs like those at DOJ and EEOC will continue to promote and educate potential plaintiffs and defendants about the many benefits of mediation in ADA cases. ♦

Endnotes

- ¹ Judith Cohen, *Highlights of the Interim ADA Mediation Standards*, THE JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, Vol. 1., No. 2, Fall 1999, p. 13.
- ² *Sutton v. United Airlines, Inc.*, ___ U.S. ___, 119 S.Ct. 2139, ___ L.Ed.2d ___, (1999).
- ³ *Murphy v. United Parcel Service, Inc.* ___ U.S. ___, 119 S.Ct. 2133, ___ L.Ed.2d ___, (1999).
- ⁴ *Albertson, Inc. v. Kirkingberg*, ___ U.S. ___, 119 S.Ct. 2162, ___ L.Ed.2d ___, (1999).
- ⁵ Ruth Colker, *The Americans With Disability Act: A Windfall for Defendants*, 34 HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW 99 (1999), fn 7 (author's study found that defendants were successful in 82% of the cases that went to the appellate level), and fn 9 (citing various studies that found that defendants' success rates ranged from 80% to 92.1%).
- ⁶ DOJ's ADA Mediation Program, administered by the Key Bridge Foundation for Education and Research, handles Title II (State and Local Activities) and Title III (Public Accommodations) of the Americans with Disabilities Act.
- ⁷ For an overview of the EEOC program, see Scott Nelson, *The EEOC's Mediation Program: A New Hope*, THE JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, Vol. 1, No. 2, Fall 1999, p.17.
- ⁸ Key Bridge Foundation Web Page at <http://www.igc.apc.org/medADA/dojada/qa.htm>.
- ⁹ The Americans With Disabilities Act, 42 U.S.C. § 12102(2), defines "disability" with respect to an individual as:
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.
- ¹⁰ See 42 U.S.C. § 12111(8).
- ¹¹ See *Sutton*, 119 S.Ct. at 2147-2148, which cites a Congressional finding that the ADA covers approximately 43 million Americans.
- ¹² The petitioners did not present, and the Supreme Court explicitly did not consider, an "obvious" argument that United Airlines regarded the plaintiffs as disabled under 42 U.S.C. § 12102(2)(C) "due to their impairments as substantially limited in the major life activity of seeing" (emphasis added). *Sutton*, 119 S.Ct. at 2150.
- ¹³ The Court also held that UPS did not regard Murphy as disabled because the "evidence that [he] is regarded as unable to meet the regulations is not sufficient to create a genuine issue of material fact as to whether [he] is regarded as unable to perform a class of jobs utilizing his skills." *Murphy*, 119 S.Ct. at 2138 (1999).
- ¹⁴ Two organizations specializing in ADA mediation training are Access Resources (accessrs@ix.netcom.com) and the Key Bridge Foundation's Mediation Training and Information Center for ADA (keybfound@aol.com).