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## Dispute Resolution

# Using ADR to Resolve ADA Disputes: A White Collar Case Study

*By Peter David Blanck, Jill Handley Andersen, Eric J. Wallach, and James P. Tenney*

This article identifies eight key “decision points” in the accommodation process that are relevant to employers, persons with disabilities, human resource personnel, and employment counsel.

**The Case of Mike Johnson.** Mike Johnson was a thirty-five-year-old senior account executive for Perfect Technologies, Inc., a large nationwide manufacturer and distributor of sophisticated communication systems. By 1993, Mike had held this position for five years and was considered an excellent employee. After a recent sales campaign, however, Mike was diagnosed as having bipolar mental illness—sometimes called “manic depression.” Mike immediately reported his illness to his supervisor and applied for short-term disability benefits. After a three-week period of hospitalization and rest, Mike told his supervisor that he was “ready to return to work” and that he should “stay this way as long as he continued outpatient treatment.”

Mike returned to work, and after one month back on the job appeared to be performing in a satisfactory manner. But after being back on the job for two months, Mike told his supervisor, “I feel stressed out again and wish there were an alternative.” Mike’s supervisor suspected something was still wrong, even though Mike never referred to himself as a person with a disability or requested any specific accommodations. Perfect’s managers decided to consult the firm’s human resources staff and employment law counsel to

chart an appropriate course of action.

### **Ignore or Address Mike’s Disability?**

The U.S. Equal Employment Opportunity Commission (EEOC) regulations, and at least one court opinion, indicate that employers have no duty to accommodate a hidden disability if an employee denies it exists. Yet, whether Perfect had to consider making accommodations for Mike without his declaring that he needed any is not absolutely clear. If Mike’s supervisor had not discussed the matter with Perfect’s management, ADA-related complications might have arisen later. By addressing Mike’s condition, his company was able to reach a constructive response to his situation.

**Get the Facts.** After investigation and consultation, Perfect determined that Mike had a disability covered by the ADA because he had a mental impairment that substantially limited the “major life activity of work.” Perfect next assessed the ways that Mike’s disability substantially limited his ability to perform his work. With Mike’s consent, Perfect sought outside medical guidance on the specific nature of Mike’s condition. In this process, the firm learned that Mike’s condition was permanent, and that his ability to perform was substantially limited when he was in a manic cycle by his tendency to create grandiose schemes and to overload his schedule. When depression set in, Mike would likely wake up late for work, miss appointments and project deadlines, and experience fatigue.

Perfect concluded that Mike could perform in a highly satisfactory manner, and proceeded to analyze whether it could make reasonable accommodations to help Mike perform his essential job tasks.

**Identify Areas for Reasonable Accommodations.** Mike’s supervisor and Perfect’s employment counsel met to discuss the ADA and the nature of Mike’s disability. A formal medical diagnosis by Mike’s therapist and by the physician consultant guided this discussion.

Mike’s supervisor worked with legal counsel and human resource staff to identify the essential functions of Mike’s position by reviewing Mike’s written job description. Identifying the type and scope of potential reasonable accommodations was the next task. As Perfect assessed Mike’s disability, several questions emerged: What symptoms of bipolar disorder affected Mike’s ability to meet his sales projections—that is, to be “qualified” for his job? Did Mike’s illness pose a threat to himself or to coworkers outside the office (e.g., while driving on long sales trips)? Would the costs of reasonable accommodations pose an undue hardship to Perfect?

**Assess the Need for Expertise.** Perfect retained an ADA compliance expert to act as a neutral problem-solver by finding workable solutions and inspiring Mike’s trust. As a result, the firm would improve its chances for a “win-win” situation, a productive employee would return to work, litigation would be avoided, and the experience would provide a corporate model for addressing employees’ disabilities.

**Assess Cost Factors and Potential Undue Hardship.** After analyzing Mike’s job description, the ADA consultant developed a list of potential accommodations that Mike’s supervisor, the firm’s management, and counsel reviewed to evaluate

each accommodation's cost, feasibility, and relevance to the ADA's undue hardship provision. Management, Mike's supervisor, and the ADA consultant reached a preliminary consensus on the choice of accommodations, subject to discussions with Mike. If Mike's supervisor had not supported the consultant's proposals, a constructive discharge could have occurred—that is, Mike's supervisor could have consciously or unconsciously made Mike's work environment hostile. This would not have been conducive to productivity or to the ADR process and could have further aggravated Mike's disability.

#### **Initiate a Problem-Solving Dialogue.**

After management reviewed the consultant's prospective accommodations and selected those it was willing to implement, it initiated a formal problem-solving dialogue with Mike. Mike was encouraged to bring a family member, friend or advisor. Mike was also given a list of the consultant's proposed accommodations. Legal counsel and human resource staff did not attend the initial problem-solving dialogue. Counsel's attendance could lead Mike to infer that the company had something other than ADR on its agenda, such as documenting a legal record in favor of Perfect, which might in turn cause Mike to make only guarded comments.

#### **Develop an "Accommodation Plan."**

The accommodation meeting began with a discussion of the principles that governed the relationship between Perfect and Mike. For instance, management assured him that Perfect was committed to offering him reasonable accommodations and that his privacy would be respected throughout the accommodation process. Mike and his supervisor reviewed each job task and came to an agreement about which tasks were essential functions. Once Mike and

his supervisor agreed to potential accommodations, they established a time line for implementing them and developed a method for evaluating the effectiveness of the accommodation plan.

The parties put the plan into a signed writing for several reasons: (1) it made the plan specific and thorough; (2) it made the plan tangible so Mike and Perfect could refer to it whenever questions arose; and (3) it substantiated the company's actions in providing reasonable accommodations. The accommodation plan facilitated a positive work environment for Mike, his supervisor, and their colleagues.

Because Mike's job responsibilities were cyclical—consisting of periods of intense performance and travel followed by periods of inaction—the accommodation plan included "short-term" and "long-term" accommodations and allowed for a gradual reintroduction of Mike's workload.

#### **Evaluate the Accommodation Plan.**

Mike, his supervisor, and the ADA consultant met to evaluate its effectiveness and decided that a second six-week accommodation plan was necessary.

The ADA consultant suggested that requiring Mike to assume his full responsibilities at an early juncture could lead to a pattern of intense performance followed by no performance. Therefore, after the twelve-week transition period ended, the parties developed a third accommodation plan that eliminated the short-term accommodations and retained certain long-term accommodations.

**Conclusion.** Had Perfect terminated Mike without any attempt—or only a sham attempt—to accommodate his condition, Mike could have filed an ADA or state law claim, forcing Perfect to defend itself at a cost of several hundred thousand dollars.

Perfect would have also incurred

## **For More Information About the Section of Dispute Resolution**

-This article is an abridged and edited version of one that originally appeared on page 20 in *Dispute Resolution Magazine*, Spring 1997 (3:3).

A longer version of this article also appeared in the ABA Commission on Mental and Physical Disability Law's *Mental and Physical Disability Law Reporter*, and was published as a chapter in *Regulation, Litigation and Dispute Resolution Under the Americans with Disabilities Act* (ABA 1996). It is reprinted here with permission.

-For more information or to obtain a copy of the periodical in which the full article appears, please call the ABA Service Center at 1-800-285-2221.

-Web site at <http://www.abanet.org/dispute>.

-Periodicals: *Dispute Resolution Magazine*, published quarterly; *Just Resolutions Newsletter*, published quarterly.

training costs in replacing Mike, and could have lost clients who had developed strong relationships with Mike, and who were displeased by his termination might have re-signed their accounts.

The actual costs of Perfect's long-term accommodations were minimal: \$30,000 for a multimillion-dollar firm. Perfect's proactive approach proved far less time-consuming and disruptive than the alternative of deposition and trial.

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