EMPLOYMENT MEDIATION REQUIRES A UNIQUE TOUCH

By Jeffrey S. Grubman, Esq.

Although the fact patterns of employment cases vary considerably, there is always a common theme. The plaintiffs believe they have been mistreated by their employers, and the employers almost always deny the factual allegations. Consequently, employment mediations tend to be emotionally charged. At the same time, the cases usually involve a complex body of statutory and case law. This requires a mediator who can empathize with the employee and employer, make them feel comfortable and engender trust. At the same time, however, the mediator must understand the applicable law and be able to discuss how it applies to the facts of the case.

Many mediators describe themselves as either facilitative or evaluative. Facilitative mediators provide a forum for communication among the parties and help explore settlement options without expressing opinions or pointing out potential weaknesses in the parties' cases. Evaluative mediators bring up weaknesses in the parties' legal cases and perhaps even offer potential appropriate settlement terms.

An effective employment dispute mediator, however, blends the two approaches. She must be able to listen actively to each side's concerns and empathize with their situation. She should also be able to give feedback to both parties regarding potential challenges regarding their case. Those challenges may relate to legal pitfalls with their case, the stress and potential embarrassment that may be associated with protracted litigation, and the cost and time involved with this type of legal dispute.

Employment mediation also requires a flexible process. Some mediations are most productive when the parties spend the majority of the time in joint session expressing their feelings. Some attorneys wrongly believe that any direct conflict during the course of a joint session is harmful to the overall process, which is usually not true. On the other hand, in a case where an employee feels threatened by the employer, it might be best to conduct mediation primarily or entirely in caucus.

In a recent mediation of a collective Fair Labor Standards Act overtime case involving the long-term and still employed blue-collar workers of a local company that had been acquired by a national corporation, it became apparent that the employees were more concerned about their treatment by their supervisor than the alleged lack of overtime payments. The employer's corporate representative was the acquiring company's head of human resources. After an initial joint session and several unsuccessful rounds of negotiations in caucus, the head of HR met with the employees without counsel present. The employees were given the opportunity to air their concerns, and the head of HR promised to take certain actions. Once the employees felt that their concerns had been addressed, the case settled almost immediately.

This case underscores an important point that every employment mediator and litigator should understand about the mediation process: unless and until the parties are given the opportunity to tell their story and get things off of their chest, it is very unlikely that a dispute will settle in mediation. Therefore, early on in the mediation process, the mediator should give the parties

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an opportunity to vent and tell their story. Whether that occurs in joint session or in caucus is for the mediator to evaluate with input perhaps from the attorneys. Some people absolutely want to tell their story and take quite a while to get through it. These individuals were once described to me by a psychologist as "painters." If painters are not given the opportunity to tell (or paint) their stories, the mediation will go nowhere. Other people would prefer not to give a narrative and instead want to answer the mediator's questions. The same psychologist described these kinds of people as "pointers." However, the mediator will not know initially if he is dealing with a painter or a pointer and must give the parties, especially the plaintiff in an employment matter, the opportunity to be heard.

Employment litigation is an ever evolving and growing area of the law. The successful mediation of employment disputes requires a mediator who understands how to interact with and gain the trust of angry, emotional people. At the same time, the mediator must be able to understand and explain how the fairly complex body of employment law impacts each side's case. ■

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