Why Mediation Works to Resolve Workplace Disputes

By Ruth D. Raisfeld

I. Introduction

The following is a common workplace scenario that invariably will lead to litigation: A company fires an employee "for performance related reasons" after several years of employment. Although the company had an employee manual requiring progressive discipline, the supervisor did not document the reasons for the termination, but said he is frustrated by the employee's failure to do the job. The employee had no chance to meet with a human resources manager or any higher-level manager to offer her view of the situation. The employee goes to a lawyer who hears the circumstances of the termination and the employee's belief that she was fired because she objected to harassment by the supervisor. The employee's lawyer sends a letter to the employer, states that the termination may be unlawful and asks for an opportunity to negotiate a reinstatement or at least a severance package before the employee commences a lawsuit.

This scenario represents a workplace-related dispute that is appropriate for resolution through mediation. In mediation, the employer and employee can sit down with each other and their lawyers, and with the help of a neutral third party, review the facts that led to the employee's termination and reach a resolution before either side incurs unnecessary legal fees, additional emotional wear-and-tear, and disruption of normal business activities. This article will describe why the process of mediation works particularly well in employment matters.

A. Employment Disputes Typically Revolve Around Discharges from Employment, the Industrial "Capital Punishment" That Has Economic and Emotional Ramifications for Both the Employer and Employee

Employment disputes typically involve one or more statutory claims challenging a discharge from employment. While the legal issues may be familiar to the employment lawyers, the impact on the individual (or multiple individuals) is significant. Job loss causes not only economic injury but also undermines the former employee's self-esteem and the perceptions of others about the employee's ability to succeed at work. Similarly, employer representatives often feel they have done everything possible to motivate the employee to provide the required job performance and to avoid the discharge, so decision-makers at the company also will have emotional reasons to support their belief that the employee was treated "fairly."

A negotiation between lawyers over the phone or outside a courtroom deprives the parties to the dispute—the employer and employee—of the emotional catharsis that is available when both sides can sit down, review what led to the challenged employment decision and the impact on the people involved, and turn toward devising a resolution that will allow both sides to progress toward the future. The opening statement in a mediation session is often the first time an employee has an opportunity to explain why he or she believes the employer was unfair or acted illegally. From the employee's standpoint, the ability to explain his or her side of the story, and the economic and emotional impact that the challenged employment decision has had, is a turning point which may enable him or her to accept the reality of an employment decision and allow the employee to move on with life. From the employer's standpoint, the mediation gives the employer an opportunity to learn something about the employee, the supervisor, and the workplace that they were not aware of previously, or that they knew of but had not completely or properly addressed. While the ultimate resolution may be economic, discussion of economics can proceed more easily when a neutral third party helps both sides come to terms with the emotional impact of employment decisions.

B. In Employment Disputes, the Damages Recoverable Are Often Exceeded by the Attorneys' Fees and Costs of Litigation, Making Early Resolution More Desirable

A unique feature of employment litigation is that the costs of litigation and attorneys' fees often exceed the damages that can be obtained in court even if the employee is successful. Damages in the form of back-pay and front-pay are a function of the employee's compensation; however, the costs of litigation are the same whether the employee was a low earner or high earner. In addition, in employment litigation there are fee-shifting statutes that enable the prevailing party plaintiff to shift responsibility for the plaintiff's attorneys' fees and costs to the employer. Thus, an employer has the risk of footing its own legal fees and the costs and attorneys' fees of the employee should the employee prevail. Faced with the prospect of paying for both sides, the opportunity to settle in mediation before fees and expenses climb is an important benefit unique to employment litigation. By the same token, mediation gives the employer an opportunity to convey to the plaintiff, that should the plaintiff lose or receive less in a lawsuit than the employer offered as a settlement, the employer may recover its costs of defense . . . an eventuality that may convince an employee to take a settlement even though it is less than the employee hoped he or she would recover in litigation.

C. A Mediator Can Offer a Fresh Perspective on the Facts and Law

Quite often, employment counsel and the client get so involved in the minutiae of moving through discovery

toward the ubiquitous summary judgment motion that they "lose the forest for the trees." Counsel may dread the call from a client wanting an update on the status of a case filed long ago; the client may become dissatisfied with counsel's view of the case, which has migrated from "optimistic" to "doubtful." In such cases, a mediator can provide a "reality check" about the prospects for success at trial that counsel may have difficulty communicating to the client or that the client is having difficulty hearing. A mediator who has employment law experience and is aware of relevant legal developments in the area can help counsel and clients assess and communicate about the strengths and weaknesses of a case. Further, the mediator does not have the same emotional investment in "winning" that the counsel and parties have and is able to provide a dispassionate viewpoint that can move the parties away from a stalemate.

D. Parties Can Obtain in a Mediated Settlement Results That May Not Be Awarded by a Court or Jury

Mediation is an extremely effective dispute resolution mechanism in employment cases because the parties can fashion remedies that may not be available through litigation. The most common of these remedies are transfers and reassignments, letters of reference, assistance with out-placement, provision of health insurance, or provision of training. In employment mediation, the mediator and counsel can provide the employee and employer with an opportunity for a private face-to-face confidential conversation that they never had prior to or at the time of termination; that way "unfinished business" can be conducted outside the presence of counsel, a court reporter, or a judge or jury. Very often, these intimate conversations about issues that only the employer and employee can truly understand pave the way to resolution outside of litigation. Mediation can also provide an opportunity for apologies that would never be available in litigation. Similarly, in disputes over unpaid wages, commissions, or bonuses, mediation provides an opportunity for both sides to "work through the numbers" without spending inordinate time battling over depositions or expert opinions.

E. Mediation Provides "Face-Saving" Cover for Settlement Discussions Between "Repeat Players"

The employment-law Bar is a small one in which firms typically exclusively represent management, unions, or individual employees. Counsel may oppose each other in a number of cases at one time or over the years. Similarly, employers may have claims against them from multiple employees represented by the same plaintiffs'-side firm. Mediation gives "repeat players" an opportunity to engage in settlement discussions without being perceived as "weak" or uncertain about the strengths of a particular case. Counsel may also be concerned about appearing zealous and confident in front of their clients. While mediations can and do get contentious, an effective mediator can encourage a "let's-just-get-along approach" that adversaries may be unable to accomplish on their own.

F. Mediation Provides Confidentiality and Avoids Publicity

The privacy afforded by mediation processes is a key factor contributing to the success of mediation in resolving employment disputes. Both employers and employees may wish to avoid the glare of public attention and scrutiny that often accompany employment litigation. The most recent obvious examples of publicity surrounding employment litigation include the Anouka Brown verdict against Madison Square Garden, the sexual harassment case against Bill O'Reilly, the sex discrimination case against Morgan Stanley, and the class actions against Wal-Mart and Starbucks. Airing employment disputes in the press and before a judge or jury may affect personal relationships of the parties involved, the reputation of witnesses and interfere with the conduct of daily business transactions, and even the plaintiff's ability to secure new employment without fear of retaliation. The confidentiality provided in the mediation process encourages candor, problem-solving, and creativity in resolving employment-related disputes while avoiding the destructive impact of negative publicity.

G. Mediation Is More Predictable Than Litigation

No lawyer can ethically or practically guarantee a client a particular result in court. Litigation is unpredictable: a document can surface that no one remembers, a witness can crumble on the stand, a jury may not appreciate the nuances of an argument. Particularly in employment litigation, memories fail, the emotional significance of an employment decision fades, and the witnesses may have dispersed to other jobs. In mediation, without rules of evidence or procedure, the parties can use less structured means to convey the heart of a problem to the mediator and the other side, which may facilitate settlement discussions, concluding the matter without suffering through the vagaries of litigation.

II. Conclusion

Mediation is not a panacea for all hotly contested employment cases; there will be those extremely emotional current or former employees who won't back down and those cases where an employer won't settle unless a court order is entered against them. However, mediation can provide efficient and effective dispute resolution long before the parties are on the courthouse steps.

The author, Ruth D. Raisfeld, Esq., is a mediator and arbitrator of employment matters. She may be reached at rdradr@optonline.net or through her Web site, www.rdradr.com.