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Mediating employment-discrimination cases

AN OUTLINE OF THE PROCESS AND A LOOK AT KEY CONSIDERATIONS TO MAXIMIZE SUCCESS AT MEDIATION

This article describes factors to consider regarding the mediation of employment-discrimination cases, including timing and mediator selection. The discussion then moves on to tips for mediation preparation and client management, as well as a breakdown of strategies used by mediators to facilitate settlement. Some key drivers that may motivate one or both sides to favor settlement are presented. Finally, it outlines important terms to include in settlement agreements.

The background

Each year, 70,000 to 100,000 discrimination charges are filed with the Equal Employment Opportunity Commission ("EEOC"). In California, over 22,500 charges were filed with the Department of Fair Employment and Housing ("DFEH") in 2019, two-thirds of which requested immediate right-to-sue letters. From 2010 through 2020, more than one million employment-discrimination cases have been filed. Given the increasing backlog in the court systems, these cases may be pending for years. (Sources provided upon request.)

Meanwhile, national sentiment towards discrimination issues has been evolving over the past year:

- The #MeToo movement has empowered people, and particularly women, to voice complaints of workplace harassment and discrimination.
- The #BlackLivesMatter movement has called attention to systemic racism, leading to a rise in social equity cases.
- Many businesses are becoming more aware of issues surrounding diversity, equity, and inclusion ("DEI"). As a result, they have been establishing infrastructure and best practices to introduce change in the workplace.

These developments have cast a spotlight on discriminatory workplace practices. Many of these conflicts arising out of workplace discrimination are ripe for mediation. The availability of employment practices liability insurance ("EPLI") may also motivate parties to engage in mediation, which can reduce litigation costs and contain exposure. Further, because there is statutory fee-shifting, employers realize they risk bearing all the attorneys' fees, which also incentivizes settlement.

Arranging to mediate

***When to mediate*:** The first decision to explore with your client is *when* to entertain mediation. Each stage of litigation can present an opportunity to mediate – revisiting the cost-benefit analysis intermittently is worthwhile:

- Pre-litigation, after a demand letter has been sent
- Early in litigation, after a formal complaint has been filed
- Before or after a significant motion, such as a motion for summary judgment ("MSJ") (or while it is pending)
- Leading up to trial

As part of this evaluation, consider the perspective of the other side as well as any insurance – the more attractive the timing to your adversary, the more likely settlement can be reached.

In general, because fee-shifting is such a driving component of exposure faced by defendants, there is often an opportunity to explore mediation early, before fees dwarf the potential liability. Sometimes, however, defendants may not appreciate the extent to which expenses may mount until they have begun to pay substantial legal and expert fees and costs.

Certain points in litigated cases are particularly conducive to mediation. For instance, discovery can be expensive when there is significant motion practice. A defendant may be more eager to explore mediation when they may be required to devote internal resources to gather more data or documents in discovery. If there are significant active discovery disputes that would soon be presented to the court for determination or a series of depositions on the horizon, there may be a settlement window.

Likewise, the timing of mediation may hinge on a deadline or MSJ hearing. If an MSJ has already been filed, the likelihood of success in ending or narrowing the case will have a significant bearing. Often, some issues will remain even after a successful MSJ, in which case, the chance that the employer will prevail at trial on those surviving issues will be a motivating factor. In some instances, the parties will prefer to have the pending MSJ resolved first, but at other times, the uncertainty of how the Court will rule on the MSJ itself presents an opportunity to mediate. If the employer is contemplating filing an MSJ soon,

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that can also invite mediation, before investing in preparing MSJ papers.

An employee may be eager to embrace early mediation to collect some money, put the situation behind them, and move on. However, sometimes it is very important for an employee who has faced discrimination to tell their story. This need for validation may motivate them to want to continue to a jury trial. But it may also be an opportunity for productive mediation after the plaintiff has been deposed – testifying might satisfy their need to express how they feel wronged.

When scheduling a mediation for an employment-discrimination case, counsel should determine what information or discovery (formal or informal) is most essential to have a productive mediation and can condition participation in mediation on being provided with certain documents and/or data, potentially under mediation privilege. This can help balance the need for preparation with cost control.

***Mediator selection*:** Private mediation panels include a robust selection of experienced practitioners and retired judges. When choosing a mediator for a discrimination case, a proposed mediator's expertise in employment law and prior mediation experience of similar discrimination cases is paramount. Mediators may offer references, and feedback from other attorneys can be insightful. Do not be too wary of attorneys who predominantly represented the other side when they litigated – these mediators understand the law and offer first-hand experience as to how parties in discrimination cases think as well as what motivates them to settle cases. Thus, their perspective is valuable and may help to establish rapport with the opposing party.

Additionally, as society becomes more diverse and DEI initiatives become a center of discussion in our workplaces, counsel may also consider diversifying their selection of mediators and consider whether certain mediators, based on their backgrounds and experiences, may bring a certain perspective, insight, or set of capabilities that may help connect with clients and facilitate resolution.

Presenting your client's position

***The importance of mediation briefs*:** Mediation briefs in an employment-discrimination case introduce the mediator to your client's claims/defenses and the history of the case. Vital details include:

- Procedural posture of the case; any pending hearings/deadlines;
- Alleged damages, including economic harm, emotional distress, and any punitive damages asserted; as defense counsel, speak to any alleged failure to mitigate and other potential causes of injury
- Attorneys' fees and costs already incurred and those anticipated should litigation continue;
- History of settlement discussions to date, including the last demand/offer and an assessment of the remaining gap;
- Significant facts that help your client's position; and
- Background about the non-pecuniary goals of your client in terms of the working relationship and whether it can continue.

Generally, it is not necessary to detail basic legal arguments for a discrimination case, because an experienced mediator is already familiar with the governing cases. Instead, focus citations on recent, applicable legal developments and more nuanced aspects that distinguish your case. If there is an MSJ pending or anticipated, call attention to the legal issue(s) that would be determined by the court and how settlement is impacted by the risks.

Consider whether briefs will be exchanged. Many mediators encourage this practice because the exchange of briefs can expedite negotiation. The briefs assure that each side is familiar with each other's positions. Sometimes, it is advantageous to share just a portion of the brief but to reserve a supplement for the mediator's eyes only.

***Pre-mediation consultation with the mediator*:** Many mediators in discrimination cases will schedule separate calls with each side before the mediation. This conversation provides an early opportunity for the mediator to gain a sense of pivotal aspects of the discrimination dispute and clarify questions the mediator has about facts or positions presented in the briefs. Generally, these calls do not include the clients. So, if there are client management dynamics or fragile client issues that would be helpful for the mediator to understand, a pre-mediation conversation is an excellent opportunity to discuss such sensitive issues with the mediator.

Joint sessions and caucusing

Before the mediation's first session commences, clarify with the mediator whether the mediator intends to use joint sessions, particularly at the beginning of the mediation. Having all parties together is generally *not* favored for most California employment law mediations. However, with the proper case, it may be beneficial for a former employee to meet with their former employer in a mutual setting.

If you and/or your client are uncomfortable with a joint session, convey this to the mediator in advance. If you plan for a joint session, it is imperative to prepare your client to face the employee or employer representatives and their lawyers, especially if the mediation is being conducted in person.

Generally, most mediation time is spent in caucus. When you share information with the mediator, make clear anything that you are not authorizing the mediator to present to opposing counsel.

Counseling the client

If your client is new to mediation, guide them on what to expect and how to present themselves, along with being prepared to discuss their story and engage with the mediator. Prepare your client as to what to anticipate in terms of opening demands and counteroffers, particularly if either is expected to be a surprise to either side. Additionally, the client should know if you want them to

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speak freely when the mediator is present or defer to you to privately share with the mediator the client's thoughts and feelings. Some attorneys prefer to have the mediator address all questions, comments, and offers only to themselves, but sometimes will invite the client to speak directly to the mediator. Many times, in discrimination cases, it may be wise for an attorney representing a plaintiff to allow them to tell their story and the impact on them directly to the mediator. Curating the mediator's impression of the client and their credibility is crucial.

Virtual vs. in-person discrimination mediations

Virtual mediation has blossomed during the pandemic. Though largely successful, virtual participation may mean less investment and thus more of a willingness for either party to walk away. In some more emotional cases – which is not uncommon where discrimination and harassment allegations are central – the mediator will strive to build trust and rapport with the parties. That comfort may be harder to establish remotely.

Although a remote mediation may be expedient, the reduced ability to convey validation and establish connection could have a detrimental effect on some mediations and certain client personalities. When participating remotely, it becomes crucial – if counsel and client are not located together physically – for there to be channels for private communication outside of the platform.

However, many mediators have found great success in virtual mediations this past year, yielding settlement rates at levels similar to in-person mediations, if not greater. Virtual mediations reduce the time, expense, and stress of traveling and allow parties and their counsel to mediate from locations where they feel comfortable. This sense of ease sometimes allows the mediator to break the ice and get to know the parties and their counsel on a more personal level.

Mediation strategies and techniques for discrimination cases

Mediators apply certain tactics to achieve a resolution. A mediator is seeking to identify what has been coined the Zone of Possible Agreement ("ZOPA") – the range of outcomes that would be acceptable to both the employee and the employer. As part of this process, the mediator will evaluate and assist each party to recognize their Best Alternative To a Negotiated Agreement ("BATNA"), which is the course of action they would take if they do not reach an agreement at the mediation – in this context, generally continued litigation. BATNA analysis enables a mediator to assess each party's reservation point, or walk-away point, in the negotiation. If there is a set of resolutions that both parties would prefer to impasse and continued litigation, then a ZOPA exists, and the mediator should facilitate reaching a deal within that range. When preparing for a mediation, lawyers should give thought to the 'expected value' of the case continuing, factoring in monetary, mental, and emotional costs. Be ready to justify the analysis but also to adjust it at mediation.

Bracketing

One tool some mediators utilize to help clarify the ZOPA in discrimination cases and generate movement toward an agreement is 'bracketing.' Bracketing is a conditional proposal that seeks to create a realistic bargaining range by offering to make a certain move *if* the other side makes a corresponding move. This technique allows one party to make a more significant concession without the risk that it will not be reciprocated, because it builds the required response into the offer itself. When mediations stall with small 'tit for tat' moves, this strategy encourages more significant moves that can shift the focus toward identifying the real target range and generate positive momentum. As attorneys representing a discrimination client at mediation, it is important to think about the midpoint of any bracket being discussed. If you are proposing a bracket, it sometimes is productive to clarify to the mediator if your bracket's midpoint signals a number that would be acceptable or not – otherwise, the assumption may be that you are offering that amount.

The mediator's proposal

When a mediation otherwise appears to be at an impasse, with the agreement of all parties, some more evaluative mediators will make a 'mediator's proposal,' offered simultaneously to all parties on a take-it-or-leave-it basis. By responding confidentially, neither party is compromised – they are only told by the mediator whether a deal has been reached or not. Mediator's proposals often overcome posturing and force both parties to give realistic consideration as to whether the certainty and closure of the potential agreement are preferable to the risk of continued litigation.

Key drivers in employment-discrimination mediations

The assessed strengths and weaknesses of a discrimination case will impact the reasonable expectations. A directive mediator will encourage both sides to evaluate analytically the likelihood that the discriminated employee could prevail at trial. Some key evaluation points in employment-discrimination cases include:

- Has the employee established a strong prima facie case that they faced some adverse action or hostile conditions on account of their membership in a protected category? If the allegations do not survive the "equal opportunity jerk" defense, then the employer might rationally only be ready to offer 'nuisance value.' In other words, a complaint that the boss was tough, sarcastic, or demeaning, etc., often does not suffice to raise an actionable claim when this behavior was equally boorish to everyone.
- Can the employer provide a legitimate business reason for the decision at issue or the alleged misconduct?
- Is the employer adhering consistently to a clear progressive discipline policy?

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- Can the employee demonstrate that the supposed reason offered by the employer is actually pretextual?

Venue considerations

Resolution at mediation should also consider where the case is pending: private arbitration or a court? Is confidentiality important, so that a settlement would avoid the publicity of a trial in court? It is also important to consider whether the case is in federal court – where unanimous jury verdicts are required to find liability and there are statutory caps that could limit damages for claims brought under Title VII (42 U.S.C. § 1981a(b)), or in, what tends to be a more plaintiff-friendly California Superior Court under California law – the Fair Employment and Housing Act ("FEHA"). If your case is in court, has either party requested a jury trial?

Anticipated jury makeup will also affect the settlement value of the case, as certain jury pools are viewed as being more diverse and liberal – and thus generally more receptive to discrimination claims. Other venues may draw from a catchment that tends to be more pro-business and less likely to award large damages or even to entertain punitive damages. Well-prepared counsel often review recent jury verdicts and awards in similar discrimination cases in the same jurisdiction. This information can be helpful both to manage client expectations and risk assessment and to inform mediation.

On an even more granular level, listservs, and networks, among both plaintiff and defense counsel alike, may provide specific insights into the tendencies of the assigned judge or arbitrator. Familiarity with the assigned judge's or arbitrator's history with discrimination rulings in the case itself and other similar cases can help counsel predict more accurately the likely outcome of upcoming rulings. At mediation, this analysis can influence the process and impact the perceived settlement value of the case.

Witness credibility

When the factfinder is being asked to consider whether they believe the employer's offered basis for the alleged mistreatment is legitimate or pretextual, the credibility of the following key witnesses becomes significant:

- the plaintiff/employee
- accused manager/supervisor/co-worker
- the management / HR representative involved who may have been informed of the allegations and handled the employer's response
- other witnesses who may corroborate or dispute the testimony of either side
- potential expert witnesses.

To the extent that these witnesses have been deposed, the parties can reflect on how well they present. Video or transcripts might be used in discrimination mediation to highlight both key testimony and the impact certain witnesses might have at trial. A directive mediator may share an evaluation with the parties as to how well the plaintiff or other potential witnesses present themselves.

Potential exposure and expected costs of continued litigation

Potential exposure and ongoing costs will also be primary factors to weigh at mediation to guide the discussion of settlement value. The disparity between the risk analyses and costs faced by employment discrimination plaintiffs and defendants influences the settlement dynamics. Typically, the exposure assessment will include two main aspects:
(1) ***Plaintiff's alleged damages***: The monetary damages sought by an employee will generally include general/economic damages, which would include lost wages both past and future, particularly where there is a wrongful termination charge. Employees also often seek special/emotional damages, where the discrimination alleged has purportedly led to emotional distress. Finally, under more egregious circumstances when the company purportedly endorsed or carried on the misconduct, plaintiffs will also seek punitive damages. Depending on the expected dynamics and storyline presented, there could be a real risk that financial 'punishment' could be imposed, exposing the employer to very significant risk, particularly under California law.
(2) ***Plaintiff's attorney's fees:*** In California, under the Fair Employment and Housing Act ("FEHA"), Government Code section 12965, subdivision (b) provides for one-way fee-shifting for the recovery of attorney's fees, costs, and expert witness fees and overrides the standard cost-recovery provision that applies in civil actions generally. (See *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, 115.)

For prevailing plaintiffs, attorney's fees, costs, and expert witness fees are recoverable unless special circumstances would make the award unjust. For prevailing defendants, however, none of these items are recoverable unless the court finds that the plaintiff's action was frivolous. Thus, this statutory scheme means that employees do not face the threat of an adverse cost award by continuing to verdict whereas employer defendants feel significant pressure.

Meanwhile, the expense of continued litigation may also impact the two sides unevenly. Defendants must recognize that win or lose, continuing to trial will be expensive. Not only are they footing the bill for attorney time, but there are also hard costs like depositions and filing fees. Moreover, the ongoing disruption to business caused by time-consuming discovery takes a toll.

Typically, the plaintiff's counsel is working on a contingency – they are not billing their client by the hour, so the plaintiff does not face a mounting attorney fee bill each month. The employee may therefore not face financial pressure to conclude the case. On the other hand, the plaintiff may not have ample resources, and receiving a settlement payment more quickly may be very attractive. At the same time, plaintiff's counsel continues to sink time and money into the case with no guarantee that they will ever be compensated.

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Formalizing a discrimination settlement agreement at mediation:

One might think that if a discrimination mediation ultimately results in a monetary agreement, then everyone's work is done. However, it is critical to reach a deal that addresses many terms beyond the bottom line. Sometimes, one or both parties can get hung up on another aspect of release agreement language.

It is not always feasible to reach an agreement on all terms at the mediation itself. A signed Memorandum of Understanding ("MOU") that memorializes what has been resolved along with an agreement to negotiate the remaining aspects within a specific time frame can ensure that the important progress is locked in.

Also, whatever agreement(s) come out of the mediation, make certain to include language that the deal is enforceable under Code of Civil Procedure section 664.6. For a helpful overview of section 664.6 and its import, see *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.

Without this term, neither side can reliably enforce the settlement in court, as the other party can assert mediation privilege. Further, if the court dismisses the case without granting a written request signed by the parties to retain jurisdiction, then there will be no recourse to enforce the agreement. (See *Sayta v. Chu* (2017) 17 Cal.App.5th 960.)

Other specific terms to contemplate in discrimination settlement agreements:

1. *General Release and Civil Code section 1542 Waiver* – Defendants often insist on these terms; plaintiffs can negotiate for consideration, particularly if there could be other known claims foreclosed. In some cases, having a mutual release is appropriate and effective, ensuring finality for all parties.
2. *In Age Discrimination Cases* – When the employee is 40 or over, federal law requires the inclusion of language that ensures that they have both 21 days to consider the proposed agreement and an additional 7 days to revoke it.
3. *Neutral Employment Reference* – Especially when an employee separates under controversial circumstances, it may be important that a 'neutral reference' be provided. This arrangement typically means that either an outside third party or Human Resources will communicate to potential employers only the plaintiff's dates of employment, last position, and (if agreed) final compensation, without any information about the terms under which employment ended.
4. *Confidentiality and Non-disparagement* – Consider if these terms are mutual and if they will be enforced with liquidated damages. Note also that in response to the 'Me Too' movement, California passed the Stand Together Against Non-Disclosure Act (STAND), which places limits on confidentiality clauses in discrimination and harassment cases. (See Code Civ. Proc., § 1001; Civ. Code, § 1670.1, and Gov. Code, § 12964.5.)
5. *Liquidated Damages* – Set at a certain amount, particularly as a mechanism to enforce confidentiality and non-disparagement clauses, this term can act both as a disincentive to breach the agreement and a mechanism for establishing the level of harm, which might otherwise be difficult or expensive to determine.
6. *Payment and Tax Considerations* – Often the settlement amount must be allocated based on the claims to be treated as wages, injury compensation, or attorneys' fees, etc. The designations may have significant tax consequences and may also trigger the employer subtracting withholdings from the gross amount. It is advisable to confirm a clear agreement as to what amounts can be deducted and what the resulting net payments would be.
7. *Mediator Assistance* – When desired by all, the agreement can provide that the mediator will serve to resolve any dispute over effectuating the settlement.
8. *Signatories* – In addition to having all parties or designated representatives sign the final agreement, it is common for counsel to also sign, confirming that their client was represented and approving the document as to form.

By reaching an agreement on these key provisions, you can minimize the risk that the deal falls apart.

Conclusion

Resolving employment-discrimination cases through mediation can be very effective but requires the right preparation and understanding of the impact of the statutory regime on the negotiation dynamics. Familiarity with the strategies employment lawyers and mediators tend to utilize will enable you to advocate effectively for your client to settle at mediation.

Angela Reddock-Wright is a Mediator and Arbitrator with Judicate West, *serving all of California. Reddock-Wright's mediation practice focuses on all aspects of employment and labor law, including discrimination, harassment, retaliation, wage and hour, and other claims. She also mediates Title IX, hazing, bullying, government & public sector, sexual assault, some personal injury, and tort claims. Reddock-Wright is a graduate of UCLA School of Law and obtained her training as a mediator from the Straus Institute for Dispute Resolution at Pepperdine University School of Law. She is Adjunct Faculty in the mediation program at USC Gould School of Law and California State University Dominguez Hills. She is a past president of the Southern California Mediation Association and also serves as a volunteer mediator for the United States District Court, Central District. Before beginning her career as a full-time mediator and arbitrator 10 years ago, Reddock-Wright was an employment litigator for the first 15 years of her career.*