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A MEDIATOR'S OBSERVATIONS ON ACCOMMODATING DISABILITIES AND FAMILY AND MEDICAL LEAVE DISPUTES

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National Employment Lawyers Association
March 10, 2006
Seattle, Washington

For to win one hundred victories in one hundred battles is not the acme of skill.
To subdue the enemy without fighting is the acme of skill.

Sun Tzu, c. 500 B.C.
(Chinese essayist)[0]

[0]1 Sun Tzu, The Art of War, Translated and with an Introduction by Samuel B. Griffith, Oxford University Press (1963).

Most civil disputes in this country are resolved without trial, the result of negotiations between the parties with or without counsel.[0] A dispute arising between an employer and an employee with a disability or with a need for family or medical leave is no different. It is my belief that at any stage of such a dispute, employment lawyers, and their clients, benefit from using of alternative dispute resolution processes such as mediation or facilitated dialogue. Mediation, in particular, can often create more satisfying and durable settlements than resolution achieved through one on one settlement negotiations. This paper addresses some practical strategies and considerations in using mediation to resolve disability discrimination and family and medical leave disputes.

Introduction

Mediation may be employed by the parties to an employment dispute at any time, i.e. before or after termination, before a lawsuit has been filed, during its pendency, or even after trial or during an appeal. Although wrongful termination is still the most common claim, the number of claims by current employees alleging a failure to accommodate a disability, a failure to grant a family or medical leave, or refusal to allow a return to work following expiration of such leave is steadily increasing. Many times the employee is simultaneously pursuing claims for workers compensation or private disability benefits.

Juries are unpredictable by nature. The law relating to disability discrimination and to family and medical leaves is still far from settled. Litigation (and arbitration) are time-consuming, expensive, disruptive processes, not well suited for employees and employers who are trying to work out a solution to a pressing need for accommodation or family or medical leave. Rather, these disputes are ideal for mediation where the mediator can utilize a variety of techniques to assist the parties in reaching a prompt and mutually acceptable resolution,

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[0]2 A 1987 Rand Study found that only about 5% of all wrongful termination cases went through trial. (See The Legal and Economic Consequences of Wrongful Termination, J. Dertouzas, E. Holland, and P. Ebener). That number continues to be accurate today.

without the limitations or constraints imposed by litigation. In mediation, matters may be settled in creative ways which meet the needs of both the employee and the employer.

Know thy enemy and know yourself;
in a hundred battles you will never be in peril.

Sun Tzu, c. 500 B.C.

The need to have a thorough understanding of both the facts of the case and the applicable law is as crucial in mediation as it is in litigation. In disability and family and medical leave disputes, you also need to understand your client's medical and emotional issues and interests. A disabled employee or one who has recently suffered an injury or debilitating medical problem has special needs to which counsel must be sensitive. The employee is often confused, frustrated, angry and afraid, almost to the point of desperation. His/her own efforts to resolve the employment dispute have most likely failed, thereby creating an untenable working situation, or even worse, in a termination of employment.

The process of mediation, which allows an aggrieved individual to present his or her story to an empathetic listener without having to fear an adverse judgment, can play an important part in helping the employee move past perceived or actual wrongs. Deep emotional needs may be met by this process, needs which are not addressed in a trial setting with its multitude of rules and unanticipated procedural delays. Of course, many individuals long for the vindication which they believe will only occur if there is a public trial. However, if realistically examined, that desire for vindication can usually be satisfied by a skilled mediator in other ways. The likelihood of this occurring is increased if counsel make the mediator aware of any significant emotional issues or needs of the client before the actual day of mediation.

There are complicated emotional issues on the employer's side as well, which issues can be successfully addressed in mediation. Managers, in-house counsel and/or human resources professionals who

have been involved in the decisionmaking which lead to the dispute firmly believe they acted appropriately; they may also fear the consequences if they are found to have made a wrong decision. Mediation allows these individuals to reassess their decisions in a confidential setting without fear of disclosure to the employee, thus allowing the company avoid a costly legal battle and retain a valuable employee.

In a recent case which had been ongoing for almost two years, the supervisor who had refused to let a disabled employee return to work after surgery was present at the mediation. In joint session and to his counsel, the supervisor insisted that the employee might prove to be a danger to himself and hence could not be returned to work. However, in private caucus, the supervisor acknowledged the company's immediate need for the employee's skills. Only after the mediator surfaced the possibility of reinstatement and brought the supervisor and the employee together, did the supervisor begin to think of ways that the employee might be accommodated so as to avoid any danger to himself or others. The matter resolved, with the employee returning to work and receiving back pay and benefits and attorney's fees. After six months on the job, both the employee and the supervisor reported great satisfaction with the situation.[0]

He who understands how to use both large and small forces will be victorious.

Sun Tzu, c. 500 B.C.

In addition to understanding the emotional and legal complexities involved, there are many ways in which counsel may maximize the possibility of achieving a satisfying resolution for a disabled employee or one whose family or medical leave rights have been compromised.

Consider when, and how to get involved in the dispute.

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[0]3 A copy of the settlement agreement in that case may be found at Attachment 1.

Obviously your involvement in the dispute begins when the client retains you. How you get involved depends on many factors. Depending on your client's needs, particularly in a situation where the client is still employed, you may wish at first to provide behind the scenes guidance on accommodation or leave issues, rather than rushing to file an administrative charge. Sometimes a letter from the employee to his or her supervisor (written with the help of counsel) is a good first step. If the employee is not able to achieve his/her goals informally or during an interactive process on his/her own, the situation can be assessed again. A thoughtful letter from counsel to the employer urging resolution may get the employee and employer back to the bargaining table, or move the matter into a facilitated or mediated process.[0] If that is unsuccessful, the time may be right to file the charge or send a more formal demand letter. Litigation is the action of last resort.

I am regularly engaged to mediate cases during the interactive process or other pre-litigation stage, i.e. before and after a charge is filed. For resolution to be achieved, it is important for counsel to have gathered enough information, including medical reports, clear statements of required restrictions or requested accommodations, past and proposed job descriptions, and the like, to make the process meaningful.

Identify a range of settlement options and goals.

Surface settlement goals long before the date of the mediation. It is generally best to have a range of outcomes in mind, not just one set goal. Remember that what can be achieved in mediation is limited only by your creativity and the other side's agreement. Discuss with your client the possibility of both monetary and non-monetary relief, as well as how your fee will be calculated. Because settlement results are related to what could be achieved in litigation, explore best and worst case trial scenarios with the client.

In contrast with other types of discrimination matters, it is not unusual for reinstatement to be achieved in mediation of disability

[0]4 An excellent article by Sara Adler entitled "Resolution of Reasonable Accommodation Disputes" may be found at Attachment 2.

cases. If the client is still employed, discuss whether s/he wishes to remain employed. If the client is not still employed, discuss whether s/he wishes to return. Of course, in either event, concerns about retaliation must be addressed.

In addition, determine whether the time is right to obtain a global resolution, of both the civil and the workers' compensation claims. Even if no global resolution is to be sought, coordination between counsel in both the civil and the workers compensation arenas is crucial to avoid the possibility of inconsistent results or adverse consequences (e.g. an overbroad release of civil claims in the workers compensation settlement).

Once mediation is agreed upon, choose a mediator with the experience and style which suits your dispute.

It is always good to investigate the background and references of the mediator, but especially so in disability disputes. Given the legal and emotional complexities in this area, the most effective mediator is usually one experienced in employment disputes involving disability rights. Inquire regarding the mediator's experience with workers compensation claims, if this is an issue in your case. Talk to the mediator to assure yourself, and your client, that s/he is the best fit for your case.

Consider what you and the mediator can do to make your client emotionally and physically comfortable.

Many mediators have articles available which describe the mediation process.[0] Providing something in writing to a nervous client can be reassuring to him/her. Also it's a good idea to discuss with your client whether s/he wishes to have her/his spouse or parent or possibly a therapist present at the mediation Many mediators offer private pre-mediation conferences with counsel to surface these issues. If such services are not offered, feel free to call the mediator.

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[0]5 Please review my website, www.masters-ribakoff.com for examples of such materials.

Be sure to advise your client that mediations typically last a full day, often well into the night. On occasion, a particularly difficult case may take several mediation sessions, either on consecutive days or over a longer period of time, before the parties come to resolution.[0] Physical comfort is important. Make sure your client knows that medicine and/or special foods may be taken to the mediation.

You should also consider where the mediation should take place: your office, opposing counsel's office or a neutral location. Whatever location is agreed upon, take steps to ensure the location, conference rooms, and restrooms, are accessible to a disabled person. Obtain and provide clear written directions to the location.

Take the time to prepare for the mediation.

Utilize the pre-mediation conference with the mediator to ascertain who will be present from the other side. Because the mediator cannot order the participation of any individual, surface this issue yourself with opposing counsel if you or your client believe the presence of a particular individual is essential for resolution. The pre-mediation conference provides an opportunity to inform the mediator of any emotional or accessibility issues involved. In addition to the private conference, the best way to bring the mediator up to speed about the dispute is to submit a timely written brief outlining the chronology of events, the strengths and weakness of your cases, and the history of settlement negotiations. Make your brief short and succinct; most mediators do not need a primer on the laws of the workplace. Be sure to have relevant documents at the mediation.

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[0]6 In one case counsel asked the mediator to be prepared to discuss the idea of reinstatement on the first day of mediation, and to set aside a second day, to discuss monetary damages. Obviously, if reinstatement had not been agreed upon, the amount of money paid would greatly differ. Remember that demands or offers are not typically relayed to the other party during the joint session. Rather, the negotiations take place later vis-a-vis the mediator, who assists the process of sharing of information and helps the parties craft and convey the parties' settlement proposals in a way that is most likely to be well-received.

Prior to the mediation day, develop a negotiation strategy with your client. Remind them of the range of options for resolution, and prepare them to hear things with which they disagree and to be patient with the process. Explain the ritual of negotiations, so that your client will understand the need for compromise and flexibility.

Consider having your client speak in joint session. This may be absolutely essential if the client is a current employee or seeking re-employment; at a minimum it is usually cathartic, and can often humanize the client to the employer representatives. Mediation proceedings are privileged and confidential by law. Whatever is said cannot be used for any purpose other than the mediation; statements by any party will not be admissible if the mediation fails and the matter proceeds to litigation or trial.

Consider how best to document agreement.

In almost every case, it is wise to reduce the terms of the settlement to a writing which is signed by each of the parties before leaving the mediation site. Spending the time to document, at least in memo form, can avoid unanticipated glitches, which can hinder or destroy the agreement. It also serves to protect each party against later imposition of unacceptable conditions in the settlement agreement.[0]

Do not hesitate to contact the mediator in the event that unforseen conditions subsequently place the settlement at risk. Most mediators will gladly conduct follow-up telephonic sessions in such instance, often without additional charge.

Conclusion

Mediation is a process of the parties' own creation. There is no one correct way to mediate. However, when the process is understood, the economic and emotional realties are considered, and the

[0]7 A sample agreement addressing existence of a workers compensation claim may be found at Attachment 3.

advocates and the parties come prepared with both the facts and the law, mediation can produce a psychologically satisfying result for all involved. Even if the mediation does not actually result in a settlement, there is no downside. You can learn a lot about your client, the other side, and how a neutral third party sees the dispute.