

# Mediation might make more sense than litigation

**E**mployment discrimination cases can be emotionally taxing for employees. Although an employee may want his or her "day in court," few think about what it takes to get there.

First, a court complaint must be filed, typically by an attorney. Then, the employer may move to dismiss the case. If the case survives the employer's motion and the employer answers the complaint, a substantial amount of time is expended in the process of discovery. Discovery is available as a tool to allow each side to find out more details about the opponent's case. Accordingly, each side may call witnesses from the other side to find out information. This includes deposing the plaintiff.

After that, motions for summary judgment are often made. These motions may dismiss some or all of either side's case. There is a substantial monetary cost involved to get this far in a case, which is not even at the point of trial. If the summary judgment motion(s) are denied, a trial date will be set. Even once a verdict is reached, the losing side may decide to appeal. This adds even more time to the litigation process.

Aside from the monetary cost, there are emotional costs for individuals to consider before deciding to litigate. If an employee is litigating a punitive action by an employer, like a dismissal, she or he must re-live the circumstances surrounding that decision at each stage of the litigation. Some litigants may need the support of mental health professionals during this sometimes protracted and distressing process.

Mediation is an alternative to litigation. It is a process where the mediator enables both sides to reach an agreement. Typically, a mediator will determine what each side wants. Then the mediator will ask where there is room for compromise. If the compromise positions of the parties overlap, the mediator can facilitate an agreement. If the compromise positions do not yet overlap, the mediator may go back and forth between the parties until they do. However, a party might come to a point where it has no more room for compromising. In such a case, the mediation would stop.

Mediation, unlike an arbitration or court decision, does not impose a decision on the parties. Furthermore, if no agreement is reached in mediation, the negotiations made during the mediation process cannot be used in a subsequent litigation between the parties.

The Equal Employment Opportunities Commission recently established a mediation program that is expected to enable the EEOC to investigate faster the cases that do not settle.

Advantages of mediation are that it takes less time, costs less and gives the parties

involved more control over the outcome. Generally, a case can be mediated by the EEOC in a single day. EEOC mediators are intimately familiar with employment law, while judges and juries may not be. Finally, the mediator is there to facilitate a settlement to which the parties agree.

The mediator, unlike an arbitrator, judge or jury, cannot rule in favor of one side over the other. Thus, the parties always maintain control over the outcome. They can walk away in disagreement or they can agree on a settlement with the help of the mediator.

Additional advantages of EEOC mediation are that it is free and quick. The EEOC, not the parties, pays the mediator, something that does not usually happen when parties arbitrate a case and split the arbitrator's fee. In addition, EEOC mediation must be convened in 15 days. Once the parties agree to mediate, the mediation must be convened and completed within 45 days. The longest a case can take is a total of 60 days.

For charging parties, mediation is quicker than waiting a year or so for an investigation of their case by the EEOC. In addition, they do not have to choose between mediation and investigation. If the parties do not settle during the mediation, the investiga-

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tion of the charge continues and a party retains his/her right to go to court.

For respondents, mediation is a chance to take a step back from the federal charge of discrimination. When both parties agree to mediation, the investigation stops, and if a settlement is reached the investigation ends, as does the chance of going to court. Moreover, mediated settlements do not necessarily have to be monetary settlements. For example, the parties may agree to give an employee a good reference.

The EEOC mediation program is a valuable opportunity for both parties. Given the monetary and emotional costs of taking a case to trial, mediation should be considered as an means of alternative dispute resolution by all employment attorneys.

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