

# Mediating Employment Disputes and Some Keys to Successful Resolution

By Beth Deragon

Mediation of employment disputes presents unique challenges that should be considered ahead of time to increase the likelihood of resolution. Unlike commercial disputes, employment disputes can be more emotionally charged, with an employer typically believing it is under attack and that it behaved appropriately. Likewise, the employee typically believes that the employer acted unfairly, unlawfully and/or did not listen to concerns that were raised. In addition to these emotive issues, employment cases are often fact intensive and can involve a large number of documents and potential witnesses. During the mediation, the employee's performance issues and management conduct are usually raised, which can have an inflammatory effect. Therefore, it is important to consider the timing of the mediation and to choose a mediator who has the skills to handle those dynamics with sensitivity and tact.

The timing of an employment mediation can be critical to the success of resolution, but each case must be assessed individually for "ripeness." Generally, settlement is more likely to be reached when



the parties are reasonable and willing to cooperate and compromise before they are entrenched in litigation and have incurred significant expenses. Some employers consider mediation upon receipt of a demand letter or complaint and others wait until depositions have been taken or after losing a motion for summary judgement. While the parties who attend mediation are there of their own volition and in good faith, both are emotionally charged and usually convinced that a jury hearing their story will find in their favor. A mediator who is well versed in employment laws, compassionate and able to provide an environment in which each party feels like they have received the opportunity to tell their story will be most effective in facilitating resolution.

In cases where some discovery has taken place, the parties are in a better place to assess the legal claims and associated risk. However, in cases where the parties have opted for early or voluntary mediation, it is highly recommended that some limited discovery for the purpose of the mediation takes place. Typically, the employer has access to most of the key documents (a manager's personnel file or investigative report), witness statements, e-mails and other factual information about the case. If discovery has not taken place and the employer asserts facts and defenses at that mediation, the employer should be prepared to reveal that information to the mediator and the other party. Ideally, the employer would do so as attachments to its mediation statement.

Similarly, if either party believes that case law on an issue is in their favor, then the party should be prepared to share the case and legal analysis. This can help manage each party's expectations and set a realistic tone for the mediation.

As the mediation heads toward resolution, usually after a full day of negotiations, financial aspects of the settlement are sometime raised for the first time, which can derail the settlement. Before heading into an employment mediation, the parties should take the time to identify and understand financial issues that might impact the settlement. For example, if the plaintiff/employee received unemployment benefits and lost wages could be awarded in a claim, then, most likely, there will be a repayment obligation to New Hampshire Employment Security. The parties should find out the estimated amount of the potential repayment and agree on which party will be responsible for the repayment.

In addition to monetary payment as settlement in an employment dispute, there are also other settlement options for the parties to consider. Some of those non-monetary options include:

- Development of a policy against harassment or handbook and training for employees
- Reinstatement or transfer to another position
- Development and implementation of a complaint procedure
- Investigation into the allegations as to

- other employees in the workplace
- Payment of cost of counseling
- Payment of cost of retraining
- Tuition payments
- Transferring certain intellectual property to the employee
- Waiving or shortening the non-competition and/or non-solicitation restrictions
- Apology
- Issuing a joint statement about the employee's departure
- Neutral reference letter
- COBRA payment
- If the employee is currently employed, establishing an alternative work arrangement or a different reporting hierarchy

Other terms that can be important to one or both of the parties are confidentiality and non-disparagement. While New Hampshire permits the inclusion of confidentiality provisions in employment settlements, if the allegations are related to sexual harassment, the employer may not be able to deduct the settlement payment and the accuser may have to treat it as income. This brings to light another important point – the parties should seek tax advice prior to the mediation to understand such issues as well as the tax implications of the settlement money allocation.

While an experienced mediator can

RESOLUTION *continued on page 34*



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95 North State Street | Suite 3 | Concord, NH 03301  
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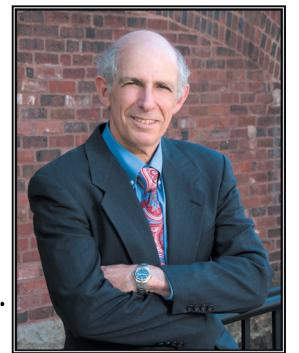
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phone: 508-423-6341  
www.gasparmediation.com • email: gasparmediation@gmail.com  
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