Employment Matters

WINTER 2017

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The Sunk Cost Fallacy: Why Workers Stay with Bad Jobs, Employers Keep Poorly Performing Employees and More Discovery May Backfire

BY HON. KIM PROCHNAU (RET.)

In economics, a sunk cost is any cost that has already been paid and cannot be recovered. The sunk cost fallacy is a mistake in reasoning in which the sunk costs of an activity are considered when deciding whether to continue the activity. This is sometimes referred to as "throwing good money after bad," because the money and time spent have already been lost and will not be recovered, no matter what you do.

The sunk cost fallacy makes it more likely that a person or an organization will continue with an activity in which they have already invested money, time and/or effort. The greater the size of the sunk investment, the more people tend to invest further, even when the return on that added investment appears not to be worthwhile.

This may be why an employer will keep a poorly performing employee or a work-

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Federal Preemption in Employment Matters Involving Interstate Commerce

BY HON. ROBERT FREEDMAN (RET.)

Choice of law in employment matters involving issues of interstate commerce is a constant and evolving concern for attorneys, their clients, judges and arbitration and mediation neutrals.

Proposed amendments to the Federal Aviation Administration Authorization Act of 1994 (FAAAA) provide a case in point. The amendments would have the effect of preempting state law and regulation of meal and rest periods for drivers in the trucking industry.

Yes, the Federal *Aviation* Administration Authorization Act [emphasis added] can and does regulate the trucking industry. This will come as no surprise to practitioners experienced in this area of law, but it may be a revelation to those newer to the subject matter.

Currently, drivers in interstate commerce may operate in two or more states during a single workday. Because the laws of individual states vary as to meal and rest periods, the resolution of disputes about

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Mediation Prep and Practices in Employment Law Cases

BY HON. MICHAEL H. DOLINGER (RET.)

Success in mediation depends not only on the skills of the mediator, but also on the approach of counsel and clients. Here are some issues that counsel should consider before and during mediation. Although we reference employment law cases, these guides mostly apply universally.

At the outset of a case, counsel should assess the client's goals, and what discovery is needed for litigation and negotiation. For employment discrimination claims, the plaintiff typically needs to show disparate treatment and prohibited causal animus. For these needs, statistical and anecdotal evidence should be targeted. For abusive-environment claims, anecdotes are especially useful. In FLSA-type cases, counsel needs documentation, if any, on the client's pay and hours. Counsel may also want to conduct one or more targeted depositions before negotiations.

In anticipation of mediation, plaintiff's counsel must manage the client's expectations and discourage inflated hopes of a quick, outsized payday. To that end, counsel should explain weaknesses and uncertainties in the case and likely critiques by adversary counsel and the mediator, as well as any financial constraints on the adversary's settlement posture. Such preparation is particularly important in employment cases where the litigant's anger over past mistreatment may skew his evaluation of the case.

Plaintiff's attorney should also consider inviting the client to speak at the mediation, probably in a separate session with the mediator. The client's own narrative may positively influence the mediator and even the adversary, or just provide some catharsis for the client. This approach may also work for some defendants.

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When preparing a detailed mediation statement, counsel must assume that the mediator will thoroughly vet these submissions. Thus care should be taken to present a balanced, accurate account of events, supporting evidence and governing law. Accuracy and candor are essential at all stages.

Starting negotiations before the mediation may be helpful to acquire a sense of the adversary's negotiating posture and style. It may also be required by the mediator.

The mediation process will vary depending on the mediator. Many use a pre-mediation telephone conference and a brief joint session at the start so counsel can raise issues in each other's presence. Ex-parte sessions follow, at which the mediator may discuss the parties' submissions, seek opening demands and offers and try to gain some sense of the parties' flexibility. In follow-up sessions the mediator may suggest ways to shrink the gap, triggering further discussion of substantive issues and risk management.

One early question for parties is how to set their opening position. Styles vary, ranging from very aggressive to cooperative or realistic. My experience is that avoidance of an extreme initial position

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tends to move the process forward more smoothly without necessarily giving the adversary an unrealistic view that the bidder is conceding weakness.

Throughout counsel can protect the client's leverage by authorizing the mediator to convey several messages at once—for example, offering a significant change in position with the caveat that reciprocity by the adversary is needed for future moves. The mediator may also be allowed to convey his impression of the other side's targeted range, without committing that litigant.

If the parties' positions are substantially separated, one side may propose a so-called bracket, for example, plaintiff offering to reduce his demand to "x" if defendant will agree to raise his offer to "y." Even if the other side is unwilling to agree to those numbers, he may propose an alternative range; if the two brackets overlap, that may define a range in which the parties are closer than they were before.

During negotiations, parties should continually reexamine their posture and possible "red lines" as new information filters in, from the mediator or the adversary. Counsel should encourage flexibility and continuous reassessment by the client.

To bridge any stubborn gap, each side should consider sweeteners. For example, plaintiff may offer to accept payment over time to ease financial burdens, or defendant may offer a positive reference letter for a jobless plaintiff or provide other job-search assistance.

If negotiations have stalled, as a last step the parties may consider a mediator's proposal. The mediator may ask, "If the other side is prepared to settle on the basis of terms 'x,' 'y' and 'z,' are you prepared to do so?" If both sides say "yes," they have a deal. If one or both sides say "no," I simply advise counsel that there is no deal, thus protecting any party who said "yes."

This summary of the mediation process merely skims the surface of issues likely to arise in mediation efforts. In practice, each case presents unique questions and challenges, and lawyers and clients will bring different perspectives and styles to the process. Nonetheless, to maximize the chances for a successful outcome, planning and forethought, as well as flexibility and judgment, are essential. ●

Hon. Michael H. Dolinger (Ret.) joined JAMS after serving for more than 31 years as a U.S. Judge in the Southern District of New York. He has successfully handled thousands of settlements, ranging from straightforward personal injury actions to complex employment claims to massive class action lawsuits. He can be reached at **mdolinger@jamsadr.com**.

Federal Preemption in Employment Matters (Continued from page 1)

breaks and compensation for alleged violations is often complex. Cases involving these controversies, frequently brought as class actions in state and federal courts, will routinely invoke issues of preemption of state law by federal law.

Dilts v. Penske Logistics, LLC (9th Cir. 2014) is regularly cited as a leading case holding that the FAAAA did not preempt (California) state law on meal and rest periods for truck drivers. The Supreme Court denied the employer's petition for a writ of certiorari on May 4, 2015.

Since the *Dilts* decision, a variety of amendments to the FAAAA on this subject have passed in both the Senate and the House during the current legislative session, but ultimate action on the proposed legislation remains pending. Prior proposed amendments on this subject have been adopted at legislative committee levels in the past two years, but they ultimately died before final adoption.

Lawyers, judicial officers and neutrals active in this subject matter may wish to pay particular attention to an aspect of the proposed amendments relating to retroactivity. Specifically, one provision of a proposed amendment would make preemption retroactive to the year 1994; i.e., the year the FAAAA first became effective.

If full preemptive retroactivity is adopted and construed literally, the effect on pending cases and those yet to be filed could be perplexing. For cases resolved at the trial or appellate level, but with further appellate review still available or pending, a retroactivity analysis could be even more daunting. The enforceability of such a far-reaching preemption provision, if adopted, would no doubt engender its own debate.

For now, uncertainties abound. For those active in this evolving area of employment law who are or may be involved in efforts to settle claims or active litigation currently or potentially subject to the FAAAA, these potential amendments should be considered so that a settlement fully resolves a case.

Experience teaches that uncertainties contribute to settlement. Here is one more set to ponder. ●

Hon. Robert Freedman (Ret.) is a JAMS mediator and arbitrator in Northern California who served for more than 20 years on the Alameda County Superior Court. He can be reached at **rfreedman@jamsadr.com**.

When All Hope is Lost, is Settlement Possible?

BY JOAN B. KESSLER, ESQ., PH.D.

Disputants and counsel in employment matters, among other cases, have told me many times that their cases could not be settled. Yet I have settled various matters after the parties "lost all hope" and gave their "last and final" numbers, which appeared far apart. These cases reached settlement thanks to the parties' hard work, patience, utilization of technology to communicate and move toward resolution and a tool I often use called a "mediator's proposal."

In an employment mediation, patience pays off. Patience allows room for a calm and clear mind in a heated situation, which in turn allows the parties to focus on their ultimate goals in the mediation and better control the outcome. But getting the parties to be patient or maintain patience can be difficult. In employment cases, especially harassment cases, emotions can run high. Though the parties have been well-fed and given adequate breaks, the parties can become increasingly irritable, negotiations can start to break down and a stalemate can appear to be on the horizon.

Sometimes there are impediments to reaching settlement because the parties are located in different geographic areas, or perhaps one feels threatened or intimidated by their adversary and has not been able to communicate in person. In these cases, telephone and email communication is helpful in continuing toward resolution. In addition, videoconferencing and real-time chats can be effective in maintaining the momentum of long-distance talks, while still allowing each party to receive cues from body language, facial expressions and other in-person signals that more traditional means of communication lack. I always encourage the key parties to be at the mediation, live and in-person, even though in employment matters, I may only get counsel face-to-face. Even still, the parties may reach a point where settlement seems hopeless.

So what can we do to encourage clients, and oftentimes counsel, to hang in there? In order to overcome such impasses, I may use a mediator's proposal.

> *The terms [in a mediator's proposal] should be those that the mediator believes both parties will accept and are within the win-win range based on the mediator's analysis of the case....*

A mediator's proposal is a set of terms presented by the mediator in an effort to reach settlement. The terms proposed should be those that the mediator believes both parties will accept and are within the win-win range based on the mediator's analysis of the case; that is, what the mediator believes is better for both parties than their litigation alternative and downside risks.

It is important to emphasize that a mediator's proposal should be used as a last resort, only after the parties have reached a stalemate, usually after having given their "last and final" numbers, and all other impasse-breaking techniques have been exhausted. Before proceeding, I meet with each side in a separate caucus to ask permission to draft a Mediator's Proposal by stating, "If you do not want me to draft this mediator's proposal, just tell me, 'Don't do that.'" This provides me with the opportunity to test which terms each side will possibly find acceptable. If I receive a "Don't do that," I do not go forward, but if counsel are silent, I draft a bare-bones proposal. Then I go to work to convince each side to accept this compromise.

If each side agrees, the mediator's proposal is a great tool to overcome posturing and narrow the gap between the parties. By this point in the negotiation process, a reasoned proposal has a significant chance of being accepted, as the mediator should be seen by those involved as informed, unbiased and credible. The term has received the mediator's stamp of approval, as opposed to one proposed by the biased adversary, which increases the likelihood that it will be accepted by both parties. It often boils down to the parties choosing between the lesser of two evils—either a less-than-ideal settlement or an uncertain and costly litigation and other downside risks.

The mediator's proposal is an effective end-game mechanism for breaking impasses and, in my experience, has helped settle numerous disputes that once seemed hopeless. To give up without attempting to use the mediator's proposal in an employment matter is, in my opinion, a missed opportunity. ●

Joan B. Kessler, Esq., Ph.D. is a JAMS neutral based in Los Angeles. She has mediated and arbitrated hundreds of diverse matters, including individual and class action employment; real property; business/commercial, including partnership and shareholder disputes; estate/probate/trust; insurance; and entertainment cases. She can be reached at **jkessler@jamsadr.com**.

The Sunk Cost Fallacy

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er will stay in a bad job. It is also why conducting more discovery in a lawsuit may backfire. The more time, money and energy spent on conducting discovery, the harder it may be for the client (and lawyer) to settle the case.

In evaluating a settlement offer, the client (and sometimes the lawyer) often mistakenly adds the cost of discovery already conducted to the settlement equation. Even if successful, they may be unlikely to recover these costs at trial, because fee-shifting statutes are not applicable or because the judge declines to award all incurred costs. Many trial judges' experience with billing for their own time in private practice is in the distant past or, if they were formerly public-sector attorneys, nonexistent. Experienced trial attorneys are all too familiar with the Pyrrhic victory of winning the trial but only being awarded a fraction of their incurred fees.

Why More Discovery May Lead to Less Light and More Noise

Exhaustive discovery also increases the chances that the client (and sometimes the lawyer) may become more entrenched in their position, making settlement more difficult. We tend to think of discovery as a search for the truth that will lead the parties to more reasoned positions and effectuate a fair settlement. However, not only does more discovery mean more sunk costs, it may perversely impede settlement by making the parties' positions more intractable.

Several psychological phenomena are responsible. In addition to mistakenly factoring in the costs of discovery already incurred, research has shown that people tend to interpret new evidence as confirmation of their existing beliefs or theories, particularly where such beliefs are emotionally charged. Thus, in a sex discrimination lawsuit, the employee or union might evaluate instances of unfavorable treatment of other female employees as showing a pattern of discrimination, even though the evidence is at best mixed and there are other plausible explanations. The employer, on the other hand, may look at instances where a female employee achieved success as evidence of their fairness, even though that employee's experience is unusual. When the allegations contain an emotional subtext, such as attacking the fairness of the employer or the work ethic of the employee, it is more likely that the client will view the discovery through rose-colored glasses.

A study illustrates this principle. Researchers identified subjects as being either in favor of or opposed to capital punishment. All the subjects were then given two fictitious studies. The first study showed that capital punishment was a deterrent to serious crime inasmuch as those states that enacted capital punishment laws have experienced a decrease in the crime rate. The second study demonstrated capital punishment to be associated with higher crime rates, focusing on those states that had abolished the death penalty. Although these fictitious studies were carefully constructed to employ the same methodology, the pro-capital punishment subjects discounted the study showing an increase in crime and overemphasized the study showing a decrease in crime, while the subjects opposed to capital punishment came to the opposite conclusion. Even though objectively these two studies should cancel each other out, many of the subjects became even more convinced of the merits of their opinion after being exposed to the two studies.

Exhaustive discovery may also lead to overconfidence. Research has shown that the more information a person acquires, even if it is irrelevant, the more likely it is that they will believe that they can predict the outcome of an event. In a study of the NFL Draft, researchers found that teams place too much value on early draft picks, in large part because scouts delude themselves into thinking that they can predict the next superstar. The more information teams acquire about players, the more confident they will feel about their ability to make fine distinctions—even though a professional football player's career is highly variable and subject to unforeseeable injuries.

We know that it is difficult to predict the makeup of a particular jury pool or how the jury ultimately seated will evaluate a case. The more witnesses deposed and paper generated in discovery, however, the more overconfident you and your client are likely to be regarding your ability to predict the outcome at trial—even if much of the discovery is irrelevant.

Remediation

These psychological fallacies are, of course, why well-funded litigators use mock juries to test their beliefs or theories. It is also why the less-well-funded lawyer is well-advised to, at the very least, have another attorney in their firm look at the case with fresh eyes. (Although if your firm has sunk significant time and cost into the case, your partner may also be suffering from the sunk cost fallacy.)

An even more effective solution is to use a third-party neutral to help you evaluate the evidence and law objectively—before the client sinks money and time into expensive discovery. A good neutral can also suggest alternatives to protracted litigation that meet the needs of all the parties. While having sunk costs can be a frustrating position to be in, it doesn't have to be a total waste. Using other tools like mediation or early neutral evaluation can make the most of a challenging situation.

Hon. Kim Prochnau (Ret.) is a JAMS panelist based in Seattle. She previously served for more than 20 years as a judge, commissioner and pro-tem judge in King County, Wash. She can be reached at **kprochnau@jamsadr.com**.