Employment Matters

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Mediation in Employment Discrimination Disputes Can Serve the Interests of All Parties

By Lawrence R. Mills, Esq.

Federal and state laws protect the right of individuals to obtain and hold employment without discrimination. Courts and administrative agencies are increasingly referring cases to mediation to resolve employee claims of discrimination resulting in the alleged wrongful termination of employment. Mediation is well-suited to resolving employment discrimination disputes because of its flexibility.

It is in the interests of both the employee and the employer to mediate as early as possible. The privacy and confidentiality of mediation allows the parties to preserve their reputations and focus on putting the matter behind them. Early mediation reduces disposition time by months and litigation costs by thousands of dollars. A skilled mediator can address the following common issues in an employment

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Six Steps to Arbitrating an Age Discrimination Case

By Louis M. Marlin, Esq.

Fifty years ago, in 1967, the Age Discrimination in Employment Act (ADEA) was passed by Congress. According to the Department of Labor, it protects "employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation or terms, conditions or privileges of employment." California has its own version of this law, codified as part of the Fair Employment and Housing Act (FEHA).

Because of the proliferation of employment contracts that mandate that litigation of age discrimination claims be resolved in arbitration, understanding the arbitration process is increasingly important. This article will offer several steps to consider when handling an age discrimination case, with the caveat that it is assumed that the practitioner is familiar with the procedural prerequisite for commencing an action under the FEHA or the ADEA.

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Making the Most of a Half-Day Employment Mediation

By Hon. Gail A. Andler (Ret.)

Parties opt for half-day mediations in employment cases for a variety of reasons. Such mediations are often scheduled in close proximity to hearing dates for summary judgment motions, class certification motions or even arbitrations or trials. Of course, there are other reasons to set a half-day rather than full-day mediation, such as calendaring or travel logistics, finances and strategy.

Pre-mediation telephone conferences between the neutral and counsel can be very helpful in making the most of the half day you will actually spend in session. Ideally, the call will take place after the mediator has had a chance to read the mediation briefs of both the employer and the employee. Separate calls allow for a candid and confidential conversation where the mediator can ask whether there are any client control issues or unusual party dynamics. The mediator can also find out if everyone necessary to a successful resolution will be there. Other areas for exploration in the pre-mediation call may be the presence or absence of insurance and whether there are issues relating to coverage, policy limits, SIRs, etc. The mediator may also want to confirm the amount of the last offer and demand and whether non-monetary relief is being sought.

Taken together, a good brief and candid phone conversation can help the mediator determine in advance the approach best suited to resolving that particular employment case within the specified time frame.

The duration of the call will likely depend on the amount of detail provided in the pre-mediation brief. Taken together, a good brief and candid phone conversation can help the mediator determine in advance the approach best suited to resolving that particular employment case within the specified time frame. For example, one mediation might need to provide a forum for a client to tell their story to a judge, while another case might warrant a direct, evaluative approach from the start of the session. Still other mediations just need to continue the progress already made toward settlement before the session.

Finally, counsel can make the most of a half-day mediation by bringing a draft term sheet or template for a Memorandum of Understanding (MOU) to the session.

With this advance preparation, the likelihood of a successful resolution at a half-day mediation can be increased, leaving the participants with not only a settlement, but also a feeling that their time was well-spent. ●

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Best Practices for Advocates in Wage and Hour Mediation

By Robin H. Gise, Esq.

Wage and hour claims represent a rapidly growing category of employment litigation. These cases address violations of the Fair Labor Standards Act (FLSA) and state and local wage and hour laws, such as failure to pay overtime or misclassification of employees. Wage and hour cases are increasingly going to mediation and are often being referred by mandatory court ADR programs. Cases can involve single or multiple employees, as well as class or collective actions. In order to get the most out of the process, advocates may want to keep in mind the following best practices when mediating wage and hour cases:

1. Consider mediating early. Because the FLSA and other wage and hour laws allow recovery of the prevailing plaintiff's attorneys' fees, wage and hour disputes typically become more difficult to settle the longer litigation continues. That said, make sure you have sufficient information about the claims in the absence of full discovery to make mediation worthwhile. Court rules generally require initial disclosure of relevant records and damage calculations. If information revealed through initial disclosures needs to be supplemented, work with the other side and the mediator to get what you need.

2. Be familiar with the relevant statutes and case law governing wage and hour claims in your area. While the FLSA imposes strict record-keeping requirements and provides for liquidated damages, among other things, some state and local laws provide more expansive protections and more potential liability. For example, New York's labor laws protect certain fringe benefits, impose specific penalties for failure to provide employees with detailed wage statements and contain a longer statute of limitations than the FLSA. In addition, federal circuit courts impose varying requirements for approval of settlement of wage and hour cases.

3. Engage in pre-mediation information exchange. If you represent the employer, share payroll records (if you have them) with plaintiff's counsel. Plaintiff's counsel should prepare detailed weekly damage calculations and share them with employer's counsel. Employers should consider sharing any rebuttal damage calculations. In larger cases, consider preparing representative evidence of a certain subset of employees.

4. Select a mediator with experience in wage and hour disputes. Wage and hour disputes often involve technical and detailed information. A mediator with experience in contract disputes or employment discrimination claims may not be familiar with the specific statutory claims and manner of calculating wage information, i.e., using Excel spreadsheets. Mediators should be prepared to engage with the data and dive deep into the damage calculations. Indeed, court ADR programs referring wage and hour cases to mediation often require mediators to have wage and hour experience.

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Best Practices for Advocates in Wage and Hour Mediation (Continued from page 3)

Be mindful of the parties' emotions in wage and hour cases. Although some advocates consider wage and hour cases to be purely financial transactions, it is a mistake to ignore emotional considerations.

5. As in all mediations, make sure the right people are in the room. It is helpful if the employer's representative is familiar with the working conditions giving rise to the claims and with the record-keeping practices. In general, named plaintiffs should attend the mediation, although in cases involving numerous employees, representative employees' attendance is sufficient. In cases involving non-English speakers, make sure there is an interpreter.

6. Be mindful of the parties' emotions in wage and hour cases. Although some advocates consider wage and hour cases to be purely financial transactions, it is a mistake to ignore emotional considerations. In employment discrimination mediations, there is usually a lot of emphasis on the plaintiff's emotional state, but in wage and hour cases, it is often the employer who is experiencing feelings of shock at the significant financial consequences of wage and hour requirements and feelings of betrayal by employees.

7. Don't give up if the first mediation session ends in impasse. Wage and hour cases, especially complex ones, can be difficult to settle in one day. Often, one or both parties need to do additional analysis or obtain more information. If the case does not settle on the day of the mediation, work with the mediator on a plan for follow-up. ●

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Six Steps to Arbitrating an Age Discrimination Case (Continued from page 1)

Step 1: Determine Which Arbitration Rules Apply

Many, if not most, employment arbitration agreements specify the rules to be applied in the event of a dispute. For example, the agreement might designate the JAMS Comprehensive Arbitration Rules as controlling, as opposed to the JAMS Employment Rules. Or the agreement may call for arbitration without specifying which rules will apply, in which case JAMS will apply the rules of the designated administrator. The parties may agree to choose a different set of rules, or a different company to administer a specific set of rules.

Step 2: Gain a Comprehensive Understanding of the Applicable Rules

It is critical that the practitioner review and analyze the selected rules at the commencement of a case. By example:

a. As referenced above, JAMS has several sets of arbitration rules and sample arbitration clauses at **www.jamsadr.com/adr-rules-procedures**. JAMS will accept any matter wherein JAMS is indicated in the arbitration clause, wherein another provider is indicated in the arbitration clause but the parties stipulate to JAMS or wherein no provider is indicated in the clause and parties either stipulated or the respondent does not object when the matter is submitted to JAMS.

b. Under JAMS rules, the respondent may file a response and counterclaim within 14 days of

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Six Steps to Arbitrating an Age Discrimination Case (Continued from page 4)

service of notice of a claim. Other providers have different time frames. This could impact the filing of a timely counterclaim.

c. Understand the discovery limitations. For example, Rule 17 of both the JAMS Employment and Comprehensive Arbitration Rules is a comprehensive, multi-paragraph rule that covers discovery. Other providers have differing standards.

Step 3: Pay Attention to Preliminary Conference Orders

For JAMS cases, see Rule 16 of both the JAMS Employment and Comprehensive Arbitration Rules for a discussion of what is called a preliminary conference. The topics and issues addressed in these conferences include scheduling the arbitration hearing and issues critical to the case. It is the roadmap for the arbitration process.

Step 4: Understand the Multi-Part Process for Establishing or Defending an Age Discrimination Claim

Both the ADEA and FEHA look to traditional discrimination claims (e.g., race, religion, etc.) for direction as to the nature of the claims that can be raised. There is a difference between a disparate treatment claim, which seeks recovery for age discrimination directed at the claimant, and a disparate impact claim, which (broadly speaking) alleges that an employer's actions, although non-discriminatory on the surface, have a discriminatory impact on employees or prospective employees 40 years and older.

Except where there is direct evidence of discrimination, discrimination cases, including those claiming age discrimination based on either disparate treatment or disparate impact, are subject to a three-part burden-shifting analysis. Once a prima facie case is established, the burden shifts to the employer to offer a legitimate non-discriminatory reason for its actions. At that point, the burden shifts back to the claimant to show that the reasons offered by the employer are a pretext for age discrimination. Understanding this process is important in planning the presentation of your case, regardless of whether you are representing the employer or the employee.

Step 5: Limit Your Evidence

Arbitration is supposed to be a speedy and efficient methodology for handling cases. That benefit, which is a huge one for both sides, is lost when attorneys treat an arbitration as if it were a jury trial. It is not. First, the normal rules of evidence do not apply in most arbitrations unless the parties have specifically stated that they will in the arbitration agreement. Thus, objections as to the form of a question or even relevancy are rarely appropriate and merely delay the hearing. Similarly, the effectiveness of motions in limine should be questioned. What is the benefit of presenting such a motion to the ultimate trier of fact when a simple objection can be raised at the hearing?

Step 6: Curb Closing Briefs

At the close of evidence, most attorneys in age discrimination cases are prepared to give comprehensive closing arguments, summarizing the key evidence for their side to the arbitrator. This is an effective tool. However, some attorneys ask for the authority to file comprehensive closing briefs. If the case is complex, or the facts are somewhat convoluted, or the arbitrator appears unsure of the applicable law, then a brief—in the true sense of the word—can be helpful. But 25, 30 or 50 pages of argument should not be necessary. •

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Mediation in Employment Discrimination Disputes

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discrimination dispute by creatively structuring the mediation process.

Appearing weak

Mediation, whether voluntary or court-ordered, is now accepted as a part of the litigation process. The suggestion by a party that a mediator be engaged to guide the dispute resolution process is no longer a sign of weakness or lack of confidence in the merits of one's position.

Disparity of resources

Employment claimants may be out of work or facing an uncertain employment future and therefore balk at paying for a mediator. It may be in the interest of the employer to pay the costs of the mediation or limit the mediation expense payable by the employee.

Dealing with emotions

Employment discrimination cases are highly emotional. Losing one's job can be a very stressful life event. A mediator can help the parties vent their anger and frustrations in a private, non-judgmental setting that allows them to feel they have been heard. The parties can then move to a more productive, problem-solving process.

Fact-finding

The mediator can assist the parties in developing an agreed-upon procedure under which the mediator meets separately with each side and conducts interviews with the claimant and the individual alleged to have created the hostile work environment. After conducting the interviews and reviewing relevant documents and information, the mediator could proceed to mediate either in joint sessions or in separate meetings with each party to try to achieve resolution. If requested, the mediator can draft a report with findings of fact for use in further mediation or negotiation sessions.

The suggestion by a party that a mediator be engaged to guide the dispute resolution process is no longer a sign of weakness or lack of confidence in the merits of one's position.

Assessing the merits

If agreed to by the parties, the mediator could prepare a written neutral evaluation based on the facts and legal arguments presented by the parties in written submissions and oral arguments by counsel. The evaluation would reflect the mediator-evaluator's belief as to the most likely result at trial based on the information available at that time. The neutral evaluation would be non-binding and serve as an aid to further negotiation in the mediation.

Orchestrating the mediation conference

The mediator can carefully structure the mediation conference to avoid a joint opening session if it would be divisive, or can encourage a joint session to facilitate constructive, direct communication. The mediator can also ensure that the employer representative at the mediation conference with settlement authority is not the individual who allegedly discriminated against the claimant.

Recognizing non-monetary factors

Although wrongful termination claims may result in a substantial recovery of economic damages, including back pay, front pay, lost fringe benefits and emotional distress damages, plus costs and attorneys' fees, the mediator may assist in identifying non-monetary actions that have value in settlement. In employment discrimination cases, the resolution may involve such things as an apology, remedial employment policies, a positive reference letter and assistance with future employment.

Practical considerations of reduced time and costs to resolution make mediation of employment discrimination disputes an attractive alternative to risky litigation, in which the recoverable costs and attorneys' fees of a successful claimant may dwarf the value of the claim. The parties will be well-served by the early involvement of a skilled mediator who can conduct a mediation process that efficiently addresses the impediments to settlement. ●

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