

Choosing Mediation Over Employment Discrimination Lawsuits

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Picture this scenario: An employee receives her first disciplinary write up. She is upset and concerned about what this means for her job stability. Then, she gets angry-- she can think of two other employees who did what she did without being disciplined. She wonders why she is being treated differently. Is it because of her race? Is it because she is a woman? She remembers that one manager who told the joke about women being less intelligent than men. She goes to the human resources department to complain.

What is the employer's next step?

Option 1: The human resource director takes down the complaint. A few weeks later, the director reports that she found no evidence of discrimination. The employee feels slighted and files a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC investigates, disrupting the business. The charge is followed by a discrimination lawsuit. The company must use its employees to provide testimony, answer discovery requests and compile documents.

At the end of the litigation, the employer loses and is subject to a money judgment and negative publicity. Or, the employer wins, but only after spending many tens of thousands of dollars on attorneys' and experts' fees and lost revenue.

Option 2: After the employee complains, the employer wants to get rid of the troublemaker. The employer finds some basis upon which to terminate the employee, or simply makes the environment so uncomfortable for the employee that she has to leave. Now, the employee also has a cause of action for retaliation, which is often easier to prove than discrimination. The employer faces even more liability and more disruption to its business.

Option 3: After the employee complains to the human resources department, the employer asks the employee if she would be willing to address this issue in a neutral environment with the aid of an outside mediator. The employee is pleased that the employer is taking her concern seriously. The employee feels that the mediation will be fair because the mediator is not part of the company.

The employer sets up confidential mediation and invites the employee's supervisor. At the mediation, the participants communicate. Perhaps the employee comes to understand that the discipline was fair. Or, perhaps the employer determines that it should not have issued the discipline, or even that one of its managers is acting inappropriately.

Where some action has to be taken, the participants, with the help of the mediator, consider creative solutions and enter into a binding and confidential agreement. The employee feels respected. As a result, the employee returns to being a productive team member, the employer experiences less job turnover and averts a lawsuit.

Employment discrimination lawsuits are a big problem for employers. The Bureau of Justice Statistics reports that there was a 300 percent increase in the amount of employment discrimination cases filed in Federal Court between 1990 and 1998. HR Watch, D'Ancona & Pflaum, LLC, February 14, 2000. The Society of Human Resources Management found that, out of 616 businesses polled, 57 percent had faced at least one employment related lawsuit in the previous five years.

[New Developments In employee Lawsuits, The Labor Research Association, January 4, 1999.]

Employers do not have to sit passively by waiting for the first, or next, lawsuit. Employers can avoid lawsuits by dealing with the conflict at its onset and by showing its employees that it cares about their concerns. Mediation offers that option.

At the initial stages of conflict, the employer can use a mediator to address the problem. Mediators, trained in conflict resolution and bound to neutrality, assist both the employee and the company to resolve conflict. Mediation is immeasurably less expensive and intrusive than litigation. Further, most mediations are successful.

So why don't more employers use mediation? It may be because not all companies embrace change. Some companies only know how to respond to threats of litigation with a team of attorneys. However, statistics demonstrate that lawsuits are only increasing. Changing times require changing strategies.

Some companies appear fearful that using mediation demonstrates weakness and other employees will then lodge complaints. In fact, mediation is a confidential process, so other employees will not know about any agreements reached in mediation. Employees will likely see an employer's mediation policy as its effort to provide its employees with a safe and comfortable environment.

Employers have a choice in this new era of increased lawsuits: it can be controlled by conflict or it can control conflict. Mediation offers businesses an alternative to litigation.