

# Employment Matters



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## With Experimental Benefits Come Additional Legal Considerations

By Hon. Ellen James (Ret.)

Corporate experimentation, combined with innovative employment practices designed to promote more flexible work environments, may be transformative. These practices, if implemented properly and with the right intention, have the potential to dramatically change the workplace for the better. However, if introduced hastily with unstated goals that are inconsistent with the goals more publicly stated, these practices may be harmful to employees

and company morale, potentially leading to lawsuits against the employer for labor and employment law violations.

These programs, which are being implemented by many start-up companies as well as larger corporations such as Netflix, Virgin America, Best Buy, Microsoft and GE, provide salaried employees with unlimited paid time off. If the company culture is aligned with stated purposes and goals,

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## Free Speech or Hostile Work Environment?

By Hon. Sherrie L. Krauser (Ret.)

### A. A Free Speech Minefield

1. A newly appointed vice-president uses a corporate decorating allowance to install a personal collection of Civil War memorabilia, including a Confederate battle flag draped on the wall, visible to visitors and employees.
2. An employee puts up a purportedly current map of the Middle East, with the region including Israel covered by the label "Palestine."

A supervisor overhears co-workers calling the employee a terrorist.

3. A transgender employee asks to change their identification in the company directory and letterhead from "Mr. Carl X" to "Ms. Carol X" before completing their transformation. The Human Resources Director denies the request, claiming the employee's identification must match Social Security and income tax records.

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employees are empowered to manage their work and personal schedules in a way that serves their needs so long as they are getting their jobs done. Employers ultimately benefit from such policies because they can lead to a more engaged workforce and reduce administrative overhead by removing the need to process and track vacation, family leave and sick time usage.

When the company culture and the practice are not so aligned, the reality can be quite different. In this environment, employees may be unsure how much vacation time they can take in comparison to their cohorts without placing their jobs in jeopardy. Under the unlimited paid time-off policy, these employees may end up taking fewer vacation days than they had previously taken, leading to higher burnout rates, lower job satisfaction, lower productivity and an unhealthy balance between work and home demands. Mutual trust, where both worker and employer agree not to abuse the system, is the key to ensuring that these new practices work effectively.

Recently, Tribune Publishing, the parent of the *Los Angeles Times*, implemented an unlimited paid time-off policy for all of its salaried non-union employees. This policy was quickly rescinded, however, after employees at the company complained and threatened to sue. According to the employees, the new discretionary policy would remove the monetary value of the vacation days that long-term staffers had accrued over the years. This would have prevented staffers from cashing out those days when they left the company. The new policy also stated that each day off would be at the discretion of the employee's supervisor, which may have lead to less actual usage.

In contrast, Evernote and Travis CI have recently implemented time-off policies that align the companies' cultures with their practices. Not only does Evernote offer its employees unlimited paid vacation each year, the company

recently implemented a policy whereby employees forfeit a \$1,000 bonus if they fail to take an entire week off at one time during the year. Travis CI recently implemented a policy setting a required "floor" on employee vacation days: Each employee is required to take at least 25 days off per year.

Similar reforms are evolving in family leave policy. Microsoft is planning to significantly increase paid family leave. Netflix recently rolled out a family leave policy providing new parents (men and women) unlimited time off during the first year after the birth or adoption of a child. Employees receive normal pay during this first year and may choose to take time off, go part-time or work full-time. These changes go above and beyond what most companies in the United States offer, but not all employees at the company will benefit from this change. Only salaried employees in Netflix's streaming division receive the new coverage. Employees who work in the DVD division or those who work in corporate customer service will not receive this benefit, which may cause a rift in the company's ranks.

It is worth noting that under the Family and Medical Leave Act, an employee's job is only guaranteed for up to 12 weeks of unpaid family leave time. The United States, contrary to most European countries, does not have laws requiring paid family leave. The benefits available to salaried versus non-salaried workers create an environment of *de facto* inequality. Further, the Obama administration is trying to restore protections for hourly workers, including extra overtime pay, requiring federal contractors to give their workers paid sick leave and addressing the misclassification of workers as independent contractors.

In today's emerging world of experimental and flexible work environment practices, there are benefits and risks for both employers and employees. With the proper policy and company culture, these practices assist high-performance organizations to recruit and retain



motivated, responsible employees who can then balance their personal and professional lives. With opportunities to take time off to refresh and recharge, employees will return to work less stressed and more committed. Companies whose policies and culture are less aligned, however, risk low morale and confusion as to what is expected. These foreseeable disputes lend themselves to mediation rather than litigation. When disagreements do arise, the impact of these innovations, whose thrust is to benefit both employees and employers, are best resolved through the flexible process afforded by alternative dispute resolution.

Many companies may innovate and adapt their procedures to accommodate an evolving market of highly sought after employees. We cannot be deluded that the visionary policies of various entities are a substitute for basic workers' rights for both salaried and non-salaried employees. Enhanced workers' protections need to be enforceable for a broad spectrum of businesses. Experimentation with vacation, sick leave and family leave, job classifications and lowered overtime pay is no substitute for the foundational fairness that laws and court decisions provide. The courts, therefore, must remain vigilant and receptive to monitoring all employees' and employers' rights. ■



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If you are an attorney consulted by an employee upset about one of these scenarios, you must consider how to best satisfy your client's concerns.

If you are corporate counsel asked for advice, you must determine how the law will treat these scenarios—and how your legal opinion may affect employee morale.

From either position, you may want to help this company reclaim a safe workplace for everyone, rather than engage in protracted, costly litigation.

## B. The Law

Federal law has prohibited an employer-sanctioned hostile work environment for more than 50 years.<sup>1</sup> The sanctions and penalties have not changed substantially, and they still prohibit pervasive, repeated discriminatory conduct based on an employee's sex, race or religion.<sup>2</sup>

But what constitutes discriminatory conduct reflects changing social mores and may expand to include criteria such as sexual orientation, gender identification and marital status.

## C. The More Things Change...

Fifty years ago, employees or supervisors might have openly told racially

offensive jokes, taunted female employees with sexually suggestive remarks or actions or denied an employee's request for leave during religious holidays.

Have things really changed? Today, sexual harassment may be based on cultural differences between American-born and African-born persons of color.<sup>3</sup> Religious and national-origin discrimination may merge in the case of foreign-born Muslims.<sup>4</sup> And in the era of anonymous, electronic contacts, some harassment may still occur in the old-fashioned way: racially or sexually charged threats in an unsigned note, ignored by an employer.<sup>5</sup>

Our increasingly diverse society brings people from different backgrounds together daily, including in the workplace. While knowledge and familiarity can and should increase tolerance and understanding, we seem to be at the beginning of a new learning curve, much like the early 1960s.

So while religious intolerance and discrimination may still be directed toward Jews, the victims today may also be Muslims, Christians and members of other religious faiths. And sexual harassment, once recognized only against heterosexual women, may now include that directed toward members of the LGBT community as well.

In the 1960s and 1970s, feminists adopted the title "Ms." to include married

and unmarried women, objecting that a woman's marital status should not be relevant in their professional lives. Today, we have a new title, "Mx.," which may refer to transgender persons, but may also be preferred by some same-sex married couples. So whether you call an employee "Mr.," "Mrs.," "Ms." or "Mx." may be either an offensive choice, an erroneous assumption or polite.

## D. What to Do?

There are many possible avenues of recourse, starting with training supervisors to recognize harassment and discrimination against any employee. Although litigation is always an option, it's not often the best option.

Each of the introductory scenarios could benefit from mediation. Skilled neutrals can help employees, supervisors and HR personnel resolve an immediate problem and build a respectful, cooperative work environment.

Social mores change; the law adapts, often through the costly and lengthy processes of litigation and legislation. Rather than enduring a costly litigation, through both money and time spent, consider employing an ADR system to defuse a hazardous work environment, reduce personnel turnover and promote business efficiency. ■



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<sup>1</sup> *Civil Rights Act of 1964*, 42 U.S.C. §2000, et seq.; Title VII, 42 U.S.C. §1981.

<sup>2</sup> *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

<sup>3</sup> *Stewart v. Rise, Inc.*, 791 F. 3d 849 (8th Cir. 2015).

<sup>4</sup> *Kamel v. Sanofi Pasteur*, 2015 WL 926427 (United States District Court, M.D. Pa. 2015).

<sup>5</sup> *Pryor v. United Air Lines, Inc.*, 791 F. 3d 488 (4th Cir. 2015).

# Joint Sessions in Employment Cases: Should Parties Make Opening Statements?

By Robin H. Gise, Esq.

When parties to an employment dispute decide to mediate, an important issue is whether they will make substantive presentations about the merits of the case at the initial joint session. Both neutrals and counsel differ significantly on this question. Although much has been written on the decline of the joint session generally in mediation, employment cases present particular dynamics that can sway parties one way or the other.

An employment dispute—whether it involves an individual employee claiming discrimination, a group of employees claiming wage and hour violations or an executive seeking payment of a bonus—often involves intense emotions on the part of the employee and the employer. Some attorneys, both employee and employer's counsel, believe that making an opening presentation to the other side will merely inflame emotions and detract from settlement efforts. An employee's lawyer may not want a client to be subjected to the employer's version of why s/he was terminated, fearing that it will be too painful. An employer's lawyer may believe that the client's position will only become more rigid and entrenched after hearing from the former employee.

On the other hand, some attorneys believe that a substantive opening statement is meaningful and necessary. It gives the employee a "day in court" and an opportunity to tell the story directly to the employer. It can also communicate a certain message or perspective. An employer's lawyer may want to convey to an employee that the termination was a result of economic factors, rather than performance, and express the client's empathy. In addition, some employees' lawyers insist that the employee (as opposed to counsel) make the presentation to the employer. By having the employee make the presentation, it sends a message that

the employee is fully engaged in the mediation process. It can also demonstrate to the employer how compelling a witness this person will be if the case does not settle.

As for neutrals, many are inclined to be guided by the parties' wishes. A neutral who senses resistance from the parties about opening statements will often not insist on it. However, some neutrals bemoan the declining use of substantive opening statements and think that parties are too quick to reject them. They feel that parties are too worried about difficult issues or emotions expressed in front of the other side and, as a result, may miss out on the potential opportunities to influence the case.

In certain employment cases, an opening presentation is not appropriate. For example, in a sexual harassment case, an employee may not even want to be in the same room as the alleged harasser. However, in most cases, there are arguments for and against a joint session. It is important to consider certain factors in making this decision.

First, are pre-mediation statements going to be exchanged with the other side, or will they be submitted only to the mediator? The joint session gives the parties an opportunity to speak directly to the other side, and it may often be the only time during the mediation that they do so. If the parties choose not to make opening presentations, it is up to the mediator to convey their position to the other side in the initial round of caucuses. If pre-mediation statements are exchanged, assuming they are detailed and contain legal arguments, a joint opening session is less critical in this regard. However, where pre-mediation statements are not exchanged, the mediator becomes responsible for all communications between the parties. If the litigation is at an advanced stage,

the parties' legal positions will be well-known, but the mediator will still be charged with conveying mediation positions.

Second, who is attending the mediation? If the insurance carrier's representative is in the room and is not familiar with the case and/or with the personalities on the plaintiff's side, a joint opening session can help bring that person up to speed. In addition, it is worth considering who from the employer is attending the mediation. Will the person who made the decision to terminate the plaintiff's employment be there? Depending on the personalities and the dynamics, it can go either way.

Finally, in cases where damage calculations are complex, such as in wage and hour cases, an opening joint session provides an opportunity for employees' counsel to explain the basis for the calculations to the employer's counsel, saving a lot of time in the initial caucuses. Even when the parties have exchanged information about damage calculations in advance of the mediation, an opening presentation focusing on the critical points of their calculation can be useful.

A more nuanced approach to determining whether to make opening statements is recommended. Rather than reflexively rejecting them, counsel should consider certain factors in each case before making their decision. ■



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# Your Client's Guide to the Employment Mediation Galaxy

By Hon. Judith M. Ryan (Ret.)

Experienced counsel, understanding the risks of litigation and the benefits of resolution, come to the mediation fully prepared with the goal of resolving the matter. How could the mediation fail? The following factors can often impact the successful outcome of a mediation and are particularly critical in employment mediations, which can be more emotionally charged than business and commercial matters. Avoiding these pitfalls can lead to a successful mediation.

## Pre-mediation Misperceptions

Issues arise when there is a misperception as to the parties' actual positions coming into the mediation. Prior to the mediation, most parties have exchanged demands, and in some cases, there have been responses to those initial demands. However, it is not unusual if there has not been any "formal" response to the demand, although there may have been discussions between

counsel. Often counsel come away with different understandings as to the positions of the parties. This can impact the process, particularly as counsel prepare for the mediation.

It is important that the parties are candid and clear in their pre-mediation discussions in order to avoid unnecessary misunderstandings at the outset of the mediation. Having these misperceptions at the start of the process impacts the credibility of the process, adds confusion and detracts from addressing the main issues and purpose of the mediation.

## The Unprepared Client

Regardless of the sophistication level of the client, he or she needs to be fully informed not only as to the case, but also as to the mediation process. Fully informing the parties about the process should first come from counsel, not from the mediator at the session. That information should include what will happen during the course of the

mediation from the caucusing, the *ex parte* communications, the issues of confidentiality and the amount of time that could be involved (and thus the patience often required).

Clients, even those with a high-level of sophistication, should always be given an overview of mediation if it is their first time going through the process. This overview can include how offers are conveyed and the fact that offers and responses may at first have little resemblance to the ultimate resolution. Additionally, it should be explained that potential settlement options may include monetary and non-monetary components.

The client should also be prepared for decisions that will be made if a settlement is reached as to the settlement agreement, disposition of the settlement funds and any potential tax considerations. These are matters that should not be discussed for the first time at the mediation.

## Failure to Manage Client Expectations

Managing the client's expectations is one of the most critical aspects of the mediation process; the failure to do so is often a major stumbling block to a successful mediation. The client needs to be educated as to what can be anticipated in the litigation process, including potential outcomes, costs of pursuing the case and a realistic risk/benefit analysis prior to coming to the mediation. The client should not hear about the potential downside for the first time at the mediation.

## Rushing the Process

The mediation process should then be allowed to work—it takes time. Some parties come to decisions faster than others. Experienced counsel have advised their clients to exercise patience prior to coming to the mediation. The matter will resolve when all parties are comfortable with the decisions they are making; not everyone comes to that determination at the same time. Remember, the time involved in the mediation process is time that is not involved in the litigation process.

## Failure to Use the Mediator Effectively

The parties have come to the mediation to seek a resolution through the assistance of a professional mediator, so use the mediator. They have been chosen because of prior background and experience in the subject matter and success in resolving such cases.

Utilize the mediator to facilitate the process. Allow them to interact with



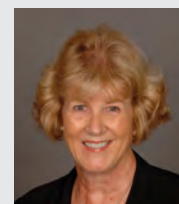
the client and give the client the ability to express their position directly. Use the mediator as a “partner” in the process to work with the client and not as an adversary. Give credence to the mediator.

clients with realistic expectations can participate with counsel in the mediation process and better achieve successful resolutions. ■

## Conclusion

Mediating an employment case should not be like going into an unknown galaxy. A failed mediation can be avoided if the above pitfalls are recognized.

A successful mediation is the result of preparation. Fully informed



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