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EEOC Mediation

The purpose of this paper is to provide a very brief introduction to the mediation program of the U.S. Equal Employment Opportunity Commission (EEOC). To begin, the main laws that protect employees from discrimination will be mentioned along with the rationale for the use of mediation. Among other things, the EEOC's classification system to select discrimination claims for mediation is described, as is the mediation process, the role and responsibilities of the mediator and the main requisites of any mediated settlement. This paper will then provide brief comments relative to employee and employer perspectives on the process of mediating discrimination charges.

The laws which protect employees from discrimination and are enforced by the EEOC include:

- Title VII of the Civil Rights Act of 1964. This act prohibits discrimination and requires equal employment opportunity regardless of race, color, religion, sex, or national origin;
- The Age Discrimination in Employment Act of 1967, which forbids discrimination against people age forty and over in employment;
- The Americans with Disabilities Act of 1990, which has to do with the denial of employment opportunities in the private, state and local government sectors due to ones disability;

- Section 501 of the Rehabilitation Act of 1973, which forbids discrimination toward people with disabilities in the federal government;
- The Equal Pay Act of 1963. This act prohibits pay discrimination based on gender;
- As well as various sections of the Civil Rights Acts of 1991 (Zimmerman, 2001: 66).

It is not unusual for the EEOC to review more than 75,000 work related discrimination claims annually. To reduce the time it takes to process claims and to conserve taxpayer resources, the EEOC encourages the use of an alternative dispute resolution (ADR) known as mediation (Zimmerman, 2001: 66). In contrast to the traditional investigative and litigation process, mediation is promoted as a “less contentious means of eliminating workplace discrimination” (Cohen, 2002: 24).

As part of the procedure, the EEOC’s mediation program requires a person who believes he or she has suffered employment discrimination under any of the above statutes to file a formal charge with the EEOC (Stallworth, McPherson, & Rute, 2001: 83). One of the EEOC’s intake personnel meets with the employee, who is known as the charging party, to facilitate the preparation of a short-form charge. The short-form charge simply states which statute was allegedly breached, under what circumstances, and when. If the case seems appropriate for EEOC involvement, a more comprehensive statement is assembled and the charge sheet is dispatched to both the EEOC mediation department and the employer of the charging party (Zimmerman, 2001: 66).

Some discrimination charges, however, are not eligible for EEOC's mediation program due to the EEOC's priority charge handling procedures (PCHP). The PCHP system helps to filter out unsupported discrimination claims as well as those that might not be appropriate for resolution in mediation (Cohen, 2002: 24; Keppler, 2003: 40). EEOC intake officers group charges into several classifications: C, B, A, and A1. Because they lack a *reasonable cause*, "C" cases become candidates for immediate dismissal and are not recommended for the EEOC mediation program. Claims grouped in the "B" category indicate a strong suspicion of discrimination and are in need of further investigation (McDermott, Obar, Jose, & Bowers, 2000). As a result, "B" cases are qualified for the mediation program. Claims classified in the "A" group have indications of a *reasonable cause*, are *egregious*, or deal with unsettled legal issues. Claims in the "A" classification are eligible for mediation upon the request of both parties or if mediation is deemed appropriate by the EEOC district director and the regional attorney (Keppler, 2003: 40). "Charges classified 'A1' may be ineligible for mediation, since the EEOC can choose to litigate these potentially meritorious claims" (Cohen, 2002: 24).

Within the classification types, certain "A" and "B" charges are particularly accommodating to settlement through the mediation process:

- When the parties to the dispute have continued an employment relationship;
- When mediation takes place soon after intake, before the parties become polarized over the accusations;

- Claims covered by the Americans with Disabilities Act (ADA) in which there was a failure to reasonably accommodate;
- Situations in which both parties exhibit leverage toward one another;
- When there are a small number of simple issues as opposed to a large number of complex issues;
- Charges involving individuals as opposed to groups seeking class-wide relief;
- When the individual making the claim lacks a history of making such claims;
- Those charges that are not considered novel legal issues.

Although the above conditions do not, by themselves, guarantee a certain result, they do increase the probability that a resolution can be reached through mediation (Cohen, 2002: 24-25).

Usually, the ADR unit of the EEOC communicates with the charging party first to persuade them to mediate their dispute. They are informed that mediation offered by the EEOC is a viable option to the customary investigative or litigation process and is available free of charge. In addition, the informal, voluntary process of mediation is described as well as the notion that, among other benefits, it is confidential, saves time and money (by avoiding litigation), fosters cooperation and improves communication. EEOC's mediation is touted as a positive, results oriented endeavor (Equal Employment Opportunity Commission, 2004).

If the charging party agrees to mediate the dispute, the employer is contacted to see if they will accept mediation. If both the employee and the employer agree to mediation, the EEOC's investigation of the charge is suspended and the case is scheduled for a mediation session. If the charging party or respondent does not agree to mediate, the charge will go through the usual investigation procedure, which could lead to litigation. Typically, the process of scheduling, holding and completing EEOC mediation takes 45 days after both parties have agreed to mediate their dispute (Keppler, 2003: 41). EEOC mediations can be conducted by internal mediators or external mediators. "Regardless of the source, however, the EEOC requires that all mediators be experienced and trained in mediation and employment discrimination law" (Keppler, 2003: 41).

EEOC mediations are usually held at an agreed upon neutral location, such as the EEOC's mediation department offices. Mediation's supportive and neutral setting increases the chance of compromise and may reduce frictions that inhibit the normalization of the parties' relationship (Keppler, 2003: 39, 41). Once in the mediation session, the mediators typically begin introductions by congratulating the parties for choosing to mediate and all participants are asked to introduce themselves. A respectful atmosphere is created by establishing certain ground rules that can include the following:

- All phones and pagers should be turned off;
- The charging party and respondent should talk to each other rather than the mediator;
- Parties to the dispute are encouraged to speak for themselves;

- Attorneys or other representatives are asked to act as advisors, not spokespersons;
- Participants are asked to listen and try to understand the other parties point of view;
- The parties should avoid interrupting one another, etc.

After defining the ground rules, the mediator proceeds to explain what mediation is, along with an account of their work experiences in and related to mediation. Next, the process of mediation is explained and it is emphasized that the EEOC mediation program is voluntary, neutral, enforceable and confidential (Domenici & Littlejohn, 2001: 67-68; Keppler, 2003: 41). After that, the mediator's role is explained, particularly that he or she has no authority to decide truths or impose settlements; rather, the mediator is a neutral third party whose goal it is to guide the disputing parties toward reconciliation (Johnston, 2005). "The emphasis on neutrality allows the mediators, and the mediation process, to play the special role of 'truth-teller' (Keppler, 2003: 39). In most cases, this impartial truth-teller role enables the mediator to lead the disputing parties away from unrealistic notions toward more acceptable solutions, thereby softening any initial adversarial positions (Keppler, 2003: 39).

During mediation both parties are given an opportunity to tell their version of what happened in a joint session that includes all participants. The employee typically goes first, followed by the employer. Frequently, the charging party or respondent will make their case as if they were in a courtroom. Other times, they just want to let out their frustrations (Domenici & Littlejohn, 2001: 68-71). "All the hurt and humiliation

experienced by one who feels like the victim of discrimination must be expressed” (Cohen, 2002: 25). Every so often, the parties will then put forth options and solutions to the problem. But, more often than not, “After both sides have had the opportunity to express their concerns, the mediator will often meet with the parties privately and receive additional information that the parties may have not wanted to discuss in the joint session” (Kepler, 2003: 42). These exclusive meetings, known as caucuses, give the parties a chance to respond without appearing adversarial to the other side and are often used when an impasse has been reached. Mediators will use the caucus as an opportunity to inquire about and/or suggest a resolution to the dispute. Working with each side independently, the mediator proceeds to shuttle authorized requests, information, and retorts from one party to the other. This process often guides the parties toward mutually acceptable options and solutions to the problem (Zimmerman, 2001: 67).

If the mediation is successful, the parties will have reached their own decisions, thereby creating a psychological feeling of acceptance and satisfaction toward the outcome (Kepler, 2003: 39). Their decisions are recorded on the settlement agreement, which is a contract that is enforceable in a court of law (Cohen, 2002: 24). The settlement agreement usually involves the employee withdrawing their discrimination charge(s) and refraining from lawsuit action in exchange for promised actions by the employer to settle the dispute. In addition, these settlement agreements frequently include passages stating that:

- The agreement is not an admission, by the employer, of violating laws enforced by the EEOC;

- The settlement agreement may be enforced in court;
- The right of the EEOC to investigate, and enforce in court, any alleged breach of the agreement;
- The terms of the settlement will be held confidential by both parties except in enforcement proceedings;
- There will be no discrimination, retaliation or revenge taken against the charging party or their witnesses (Keppler, 2003: 42).

If mediation is unsuccessful, the charge is sent to the EEOC's investigation department for normal processing. Even so, confidentiality is maintained through an invisible "firewall" that exist between the mediation and investigation departments. This "firewall" exists to keep the processes of investigation and mediation separate. For practical purposes, this keeps events that transpire in mediation confidential and separate from the EEOC investigators. "The EEOC's investigation unit will not be informed that mediation was attempted and will only be forwarded a copy of the original charge itself" (Keppler, 2003: 42). In addition, the mediator, both parties, and any other representatives or observers must sign a confidentiality agreement stating that information revealed during the mediation process is to remain confidential (Johnston, 2005). "The confidentiality afforded by mediation allows the parties to make the admissions and compromises necessary to reach a compromise solution" (Keppler, 2003: 39). Furthermore, all records of the mediation, excluding applicable settlement agreements, are destroyed at the end of the mediation process.

Studies have found that parties who went through mediation were pleased with the process. Of the surveyed employers, 96% indicated they would—if offered-- use the mediation program again and 91% of charging parties revealed they would do the same. The study illustrated that regardless of the type of claim filed, whether the parties were represented or not, and whether or not the mediation concluded with a resolution, the results were the same: Most participants considered the mediation program a success (Choate, 2003).

Even though employers report being satisfied with the results of EEOC mediation, many--especially those who have not used the system--have reservations that a willingness to participate sends the wrong signal to employees. In particular, employers worry about an increase in frivolous claims meant to bargain raises and promotions, or simply to squeeze a cash settlement out of the deal. But, there is no evidence indicating that employers who use mediation experience more complaints of employment discrimination for these purposes (Equal Employment Opportunity Commission, 2005). In fact, “many organizations that use mediation experience a decline in such disputes” (Equal Employment Opportunity Commission, 2005).

Thus, the mediation program of the EEOC is a resource that should not be overlooked by either the charging party or their employers. It is an impartial, confidential, voluntary and well-organized process, provided free of charge, that can facilitate the resolution of employment discrimination disputes.

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