

Employment Mediation: Special Considerations When the Employee is Staying on the Job

BY ROBIN H. GISE, ESQ., JAMS

Many employment mediations involve employees who have already separated from the company or who seek to negotiate a severance package as part of a settlement. But mediation can also be used to resolve disputes with current employees, where the employee is interested in remaining employed and the employer wants to retain the employee. To be sure, mediation with current employees is more common where the employer maintains a dispute resolution program that provides for, or in some cases requires, mediation. In the absence of such a program, employers may not be willing to bring in an outside mediator until the dispute has resulted in litigation or the threat of litigation, and more often than not, by that time, the employee has been terminated or has resigned. Accordingly, mediation

with a current employee outside of an established dispute resolution program is far less common. However, under the right circumstances, it can produce a good result for the employee and employer. Circumstances where mediation of a dispute involving a current employee may be appropriate include:

- An employee who has allegedly suffered sexual harassment or discrimination at the hands of someone at the company, but wants to continue to work for the employer if working conditions can be made acceptable;
- An employee who was passed over for a promotion and alleges a discriminatory motive by the employer, but wants to continue his/her career with the employer; or
- An employee who claims the employer has not accommodated a disability, but wants to find a solution for continued employment.



Mediating with a current employee provides a unique opportunity for the employer and the employee. It gives the employer an opportunity to maintain or reestablish a good working relationship with the employee. The employee gets assurance that her or his concerns and allegations have been heard and addressed, and the benefit of ongoing employment.

However, in order for continued employment to be successful, the resolution must address the alleged workplace harm. If harassment or discrimination was claimed, the resolution must include a plan for how the employee will interact with the alleged harasser/discriminator or whether they should be separated. It may mean that the employee is transferred to a different department or a different supervisor or employer transfers or removes the alleged harasser. In a failure to promote claim or failure to accommodate claim, a resolution could include a future promotion or a plan for accommodation. Indeed, the harms cited by the employee may include issues that are not directly related to potential legal claims, but need to be addressed in order for the employment relationship to move forward. As such, it will be important for the employer to bring someone to the mediation who is familiar with the employee's work situation.

To be sure, there are potential pitfalls of mediating disputes with current employees. The employee may be too angry or demoralized to continue to work successfully even if the parties reach a resolution for

continued employment. Moreover, the venting on both sides that often takes place in mediation could have a poisonous impact on the employment relationship going forward. Finally, if mediation fails, it could trigger litigation (obviously, this is true in any mediation).

Even though there may not be lost wages, monetary compensation may be an element of the resolution. The settlement may include compensation for an emotional distress claim or a failure to promote claim. If there is cash consideration as part of the settlement, there are various options for how will it be paid—whether in the form of a bonus, vacation, or future severance. In addition, separation may lurk in the background. Even if the employee does not intend to separate, a separation option may be discussed in the negotiations as leverage for either side.

As is true with any mediation, the experience and quality of the advocates and the mediator will be critical. However, mediating a dispute involving a current employee provides an opportunity for the employee and employer to negotiate a settlement that allows the employee to continue a productive

career with the employer and allows the employer to retain a valuable employee. Mediating ongoing relationships is difficult, but under the right circumstances, and with creativity and flexibility, it can produce a lasting and satisfying result.

***Robin H. Gise, Esq.** is an experienced mediator and arbitrator with JAMS based in New York. She specializes in business/commercial, employment, insurance and construction/real estate disputes. She has extensive experience with employment disputes including discrimination claims, executive compensation and FLSA/wage and hour claims. You may reach her at rgise@jamsadr.com.*

