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Seven (Sometimes Surprising) Facts About Mediation

By Jennifer Achtert (San Francisco)

If you have ever been part of a lawsuit, you are probably aware that somewhere in the range of 95% of employment-related lawsuits are settled, dismissed, or otherwise resolved before trial. While some cases are resolved through direct negotiation between the lawyers, or through motions filed with the court, a significant number are resolved through mediation.

Mediation is, essentially, a formalized negotiation process with the assistance of an experienced lawyer, retired judge, or (in court-ordered mediations) a magistrate judge. The parties to a dispute hire the mediator (or, sometimes, are provided with a mediator by the court), and then the attorneys and one or more client representatives from each side meet with the mediator to try to work toward a resolution of the dispute. Many courts require parties to attempt to resolve their disputes through mediation before proceeding to trial.

Clients who have never participated in a mediation are sometimes surprised by the process – and occasionally worried about mediation before they understand what it will involve. Here are seven facts that are most frequently surprising to clients when we start preparing for mediation:

1. The mediator can't force you (or the other side) to do anything. A mediator's job is to help the parties resolve their dispute. Most mediators will point out the weaknesses in each side's case, and try to get each side to move toward the other side's position. Some mediators will give an opinion of what the case is "worth," but that evaluation is not binding or enforceable in any way – although it can be useful to get a neutral third party's view of the case.
2. You might not ever see the opposing party. Depending on the mediator and on the particular facts of the case, you may not even see the other party to the dispute during the mediation. Some mediators conduct a joint session for both sides at the outset, but many others – especially if there are emotional issues involved – do not.
3. There is a lot of waiting involved in a mediation. For most (or sometimes all) of the mediation, you and your attorney will be in one conference room, while the opposing party and the other attorney will be in another conference room. The mediator will spend time in each of those rooms, talking with the parties and their lawyers, listening to their positions, asking questions, and so on. Obviously, when the mediator is talking to the other side in a separate room, he or she is not talking to you. While you will undoubtedly have discussions with your attorney during these breaks, and may need to research facts, contact others at your company, or otherwise work toward resolving the case – you will likely have a fair bit of down time.

4. Most cases settle in the last hour of the scheduled mediation, or later. It is a near-universal rule that negotiations expand to fill the time allotted to them. If you are scheduled for a half day mediation, most often the parties will settle – if at all – just before the end of your half day; if a full day is scheduled, don't be surprised if the case settles at the very end of the day, or if everyone needs to stay late because negotiations are finally getting somewhere.
5. Sometimes settlement isn't the only purpose. While parties almost always go into mediation with the goal of resolving the dispute, that is not always the only goal, and a mediation that does not resolve the case is not necessarily unsuccessful. Sometimes mediation serves other purposes: it might allow the parties to agree on steps to be taken before further discussions will be productive; it might give the parties more information about their opponent's position; it might allow the parties to narrow the dispute, by eliminating some claims or some parties; or it might – although less often – confirm that the parties' positions are too far apart and too hardened to make further discussions useful.
6. Even if a mediation is unsuccessful, there may be further negotiations. Most mediators will follow up at some point – some sooner than others, some more diligently than others – on cases that do not settle. And your attorney may contact the other side or the mediator to try to continue discussions, or to find out what made negotiations break down (if it wasn't obvious). Even if the parties leave a mediation without any plan for further discussions, that doesn't mean that negotiations are over forever.
7. Every mediation is different. Your role will vary, depending on the facts of the case, the claims being brought, the personalities of the parties, attorneys, and mediator, and numerous other factors. At a minimum, your attorney needs you to show that you (and your company) are taking the case seriously, and that you are an honest, trustworthy businessperson. Your attorney may also need you to provide information and answer questions from the mediator – or your attorney may need you to sit quietly while he or she discusses the case with the mediator. Follow the lead of your attorney – but don't hesitate to ask in advance if you aren't sure of your role.

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Work-Faith Conflicts And The EEOC

By Regina Petty (San Diego)

It's been nearly two years since the Equal Employment Opportunity Commission (EEOC) issued a compliance manual update on religious discrimination. Religious discrimination involves disparate treatment, harassment, retaliation or refusal to reasonably accommodate religious beliefs or practices. At the time of the release of Section 12 of the new Compliance Manual on "Religious Discrimination" on July 22, 2008, the EEOC announced that it "issued this section in response to an increase in charges of religious discrimination, increased religious diversity in the United States, and requests for guidance from stakeholders and agency personnel investigating and litigating claims of religious discrimination." Since 2000, religion-based charges filed with the EEOC increased from 1,939 to 3,386 in 2009.

Employers seem to be especially challenged by the duty to accommodate and the EEOC appears to be particularly interested in pursuing enforcement of the accommodation requirement. An EEOC regional attorney observed in a Commission press release: "This should not be a difficult question for employers to address in a constructive manner." Yet, a federal district court judge presiding over EEOC litigation in Florida noted in a July 2009 ruling against the EEOC that the law regarding what an employer may or may not do in handling accommodation requests "is undeveloped and far from settled."

Let's take a look at where we are today.

Statutory Background

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to fail to reasonably accommodate the religious practices of an employee or applicant unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

Religion is defined very broadly for purposes of Title VII. Theistic beliefs that are new, uncommon, or not part of a formal church are included as well as non-theistic moral or ethical beliefs as to what is right and wrong which are held with the strength of traditional religious views. This gives rise to the possibility of a "religion of one."

Those who profess no religious belief are also entitled to accommodation, but social, political or economic philosophies and mere personal preferences are not protected by Title VII. Whether an observance or practice is religious depends on the employee's motivation. For example, dietary restrictions may be engaged in for either religious or secular reasons.

The EEOC acknowledges conflicts between judicial decisions and EEOC guidance on religious accommodation. The courts and the Commission often comment upon the fact-specific nature of the reasonable accommodation analysis. Determining whether or not a practice or belief 1) is religious, 2) is a sincerely held belief, and 3) whether a reasonable adjustment to a work requirement can be made without undue hardship may be a daunting task at times.

This three-prong accommodation analysis is triggered by the employee informing the employer that a religious accommodation is needed due to a conflict between work and religion. But the employee need not explicitly ask for a religious accommodation. If you have a good reason to suspect an accommodation request is not made for religious reasons, you may look into the circumstances. The EEOC's written guidance cautions that this should be a limited inquiry. What that means isn't clear. In contrast, EEOC trial attorney Meaghan Shepard stated "It is not an employer's place to formulate its own interpretation of an employee's religious beliefs and base its accommodation decision on misguided and uninformed conclusions about that employee's religion." This seems to suggest that a detailed inquiry would be called for, in order to avoid making an accommodation on "misguided and uninformed conclusions."

The EEOC considers a reasonable accommodation to be one that eliminates the work-religion conflict and does not adversely affect the employee's terms, conditions or privileges of employment. Thus, an employer is not required to provide the employee's preferred accommodation if there are other reasonable options. An employee's Saturday Sabbath observance may be accommodated by offering Sunday work hours even though the employee requested weekends off. A religious objection to certain work assignments may be accommodated by a transfer instead of simply relieving the employee of the assignments as requested. And you are not required to grant an accommodation request that is merely related to a religious practice. For example, a parent's request to attend the rehearsal for her children's church play does not qualify for an accommodation.

The greatest area of conflict emerging within the courts, and between the courts and the EEOC, is with respect to dress and grooming policies. On the one hand, the EEOC and some courts hold that denying an employee's request for a policy exception for religious dress or grooming, based on health, safety and security situations is unacceptable. On the other hand, some courts have approved employer prerogatives regarding "public image" as a sufficient showing for undue hardship for denying a religious accommodation. The EEOC considers the latter tantamount to customer-preference bias in violation of Title VII.

An employer never has to provide a religious accommodation that would pose an undue hardship. The undue hardship defense to providing a religious accommodation requires a showing that the accommodation poses a "more than de minimis" cost or burden. This is a different, and lower standard for the employer to meet than under the Americans with Disabilities Act.

Still, employers must carefully consider accommodation requests based upon sincerely held beliefs. The EEOC fact sheet for religious discrimination advises that an undue hardship claim is permissible if the accommodation "requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation."

EEOC Enforcement Of Religious Accommodation

Recent EEOC enforcement actions have focused on traditional organized religions notwithstanding the significant increase in religious pluralism in the workplace. The cases described below were filed or settled by the EEOC within the last several months.

Sundays off. A retail employer denied an employee's two written requests for a religious accommodation not to be scheduled to work on Sunday, the sabbath for Baptists. The EEOC filed suit.

Saliva Drug Test. The EEOC sued an employer who refused to allow an employee to undergo alternative forms of random drug testing after the employee told the company that the beliefs and practices of his Santeria religion forbade him from submitting to a saliva test.

Halloween Carnival. The EEOC sued an ambulance service that fired an emergency medical technician for declining to take part in a community

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March Mayhem Bracket For Employers

Final Four Revealed!

By Rich Meneghello (Portland)

The votes are in, the contests have been played – we are down to the Final Four Biggest Workplace Headaches for 2011! We received bracket entries from employers across the country telling us about their biggest frustrations, and after tallying all of the submissions, we can reveal the most annoying four situations that employers face every day. Here are the winners, along with some practical tips for dealing with them.

Documentation Region:
Supervisors Forgetting To Document Warnings

This was a very close contest, as the #4 seed edged the #6 seed "Whiners" in a thrilling contest that came down to the wire. In the end, the frustration of having to deal with supervisors who forget to document warnings won out as one of the country's biggest workplace headaches. This is such a big problem for employers because as many have experienced first hand, juries often follow the "if it's not in writing, it didn't happen" line of thinking.

What you can try to do when you become aware of the problem is prepare a written statement supporting the discipline in a way that "captures" the past undocumented discipline – for example, "As you know, two weeks ago, your supervisor talked to you about your attendance problems. Last week, your supervisor issued you a verbal warning for coming to work late. This final warning is to notify you that …." You may also want your supervisor to document the past discipline as best as possible at this point and take written statements from other witnesses if possible (file this under "better late than never").

You will also want to search through emails, text messages, personnel logs, and other places to see if the incidents in question can be supported by other documentation. Finally, it goes without saying, train your supervisors on documentation and discipline, or set up a better system to capture their thoughts.

Litigation Region:
Hostile Work Environment Allegations

In somewhat of a surprise, the #11 seed ground out an upset victory over the #9 seed "EEOC Complaints." In the end, however, the tournament veteran "hostile work environment allegations" – which rose to fame in the early 1990s and has been a steady presence ever since — rode to a fairly comfortable victory.

Many harassment claims originate with seemingly-friendly interactions, and it is only after the employment relationship sours that one employee claims they have been "harassed" by being subjected to inappropriate chatter. Don't make the mistake of allowing "friendly" teasing in the workplace, especially between supervisors and employees, as these conversations are often taken out of context down the road. If a hostile environment complaint is lodged, the worst mistake you can do is sit on the complaint or ignore it – immediately investigate and document every step along the way.

And once the investigation is concluded, present complainants with a letter informing them that an investigation was conducted; note that actions have been taken to ensure that the employees will not experience a hostile work environment in the future, and remind them about your anti-retaliation pledge. If you simply verbalize this conclusion, unscrupulous employees may later claim that they never knew you conducted an investigation at all.

Medical Issues Region:
Employees On Intermittent Leave

This wasn't even close. The dominant #1 seed dispatched all challengers and rolled to a convincing victory; although the #4 seed "Hangnail workers' compensation claims" gave its best shot, it was no match for the headache that is intermittent FMLA leave.

There was little surprise that this topic proved to be such an employer headache – it is perhaps the most oft-abused tactic by employees looking to game the system. But there are a few definite steps employers can take to tighten the reins. First, make sure that the certification requesting intermittent leave is properly documented and contains the detail required by the regulations, and if there are legitimate questions remaining, have your company doctor communicate with the employee's doctor to see if treatments or absences can be scheduled around work time.

Second, make sure that the employee offers a good-faith effort to schedule absences so that they do not conflict with work time. If the time off is needed for treatment, it should be scheduled far enough in advance to provide you with reasonable notice. Finally, the law allows you to require re-certification every 30 days to ensure the need for intermittent leave still exists. If your state law allows you to require the employee to pay for these doctor visits, that could offer an incentive for an employee to reduce intermittent requests.

Everything Else Region:
Employee Theft

A dramatic finish in this region saw the #5 seed "Employee Theft" hit a buzzer-beater shot to claim the tightest of victories over the #10 seed "Open Enrollment Time." No contest was closer, with only a few votes separating the two.

Just as with many employee problems, the best way to prevent thieving employees is to not let them in the door in the first place – hire the right people by conducting criminal-background checks and pre-employment drug tests. Once hired, make sure that those with access to tangible items and money are aware of your tight audit and examination procedures, and make sure to implement them regularly to keep an eye on things. Employees will be less apt to risk theft if they are aware of the safeguards in place.

Company computers are often treasure troves of information about employee theft, so make sure your company policies allow for monitoring without risking privacy claims, and take advantage of surveillance opportunities. In those industries where client lists, contact information, and other proprietary data are theft risks, require non-solicitation and non-disclosure agreements. Make sure your IT department monitors computer use and emails for irregularities, and restrict access to and dispose of consumer reports regularly.[1]

[1] For more on the topic of stealing, read the article "Common Mistakes When Terminating Employees For Theft." It appeared in the March 2011 issue of the Fisher & Phillips *Retail Sales Update* and is also available on our website www.laborlawyers.com.

For those who want to keep playing, even if your "favorite" has been eliminated, please help us decide the ultimate winner by voting for one of these tournament champions. Just send an email with your pick to **finalfour@laborlawyers.com.**

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Work-Faith Conflicts And The EEOC

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Halloween Carnival on behalf of the company because as a Jehovah's Witness she did not celebrate or participate in holiday celebrations.

Red Shirt Fridays. A retail franchise that required employees to wear red shirts on Fridays as a show of support for the armed forces, fired an employee after denying his request to be excused from complying because he was a Jehovah's Witness. The suit filed by the EEOC settled with a payment of $21,500 to the former employee.

Mennonite Head Scarf. A security company paid $49,556 in May 2010 to settle an EEOC suit filed in March 2010 for firing a security guard rather than accommodating her religious practice of wearing a head scarf.

Sabbath. The Seventh Day Adventist Sabbath runs from sundown on Friday to sundown on Saturday. The EEOC sued a construction company for discharging employees who refused to work on Saturday for religious reasons.

Temporary Sunday Schedule. The EEOC filed suit when a Christian employee's accommodation of Sundays off was temporarily modified for two months.

Pilgrimage. The EEOC reached a $70,000 settlement of a lawsuit on behalf of a practicing Muslim who was denied the use of earned vacation time for an extended vacation to make a pilgrimage to Mecca.

Grooming. A newly-hired driver's Rastafarian religious beliefs prohibited him from cutting his hair or shaving his beard to comply with the grooming policy. The EEOC sued the trucking company for terminating him and the case was settled for $46,000.

The EEOC tends to be aggressive in court. A sandwich shop server was terminated under a no-facial-jewelry policy after she began wearing a nose ring which she said was a practice of the Nuwaubian religion. She did not comply with the employer's request for documentation of the religious nature of the practice. The case went to trial and the jury found that the nose ring was not based on a sincerely held religious belief.

Despite the verdict in favor of the employer, the EEOC still wanted the trial judge to award punitive damages and issue an injunction of the employer's practice of asking employees for documentation supporting requests for religion-based waivers arguing that requiring employees to prove that a practice is required by their faith is itself a violation of Title VII. The court denied both the injunction and any punitive damages award.

Finally, the EEOC sued a temporary employment agency for failing to refer a Muslim woman for work at a commercial printing company because she refused to remove her khimar. The printing company's dress policy prohibited permanent and temporary workers from wearing headwear and loose-fitting clothing to prevent apparel from getting caught in the machinery's moving parts and injuring workers. Agreeing with the lower court, the appellate court held that requiring the printing company to make an exception to its safety-driven dress policy would impose an undue hardship on the printing company's business.

Our Advice

You can help reduce the risk of religious accommodation claims by using these tools:

- inform employees that reasonable efforts will be made to accommodate religious beliefs and provide specific instructions for obtaining a religious accommodation in the employee handbook;
- train managers on handling religious accommodation requests, including using an interactive process and considering effective alternatives to the particular accommodation requested if it would pose an undue hardship;
- avoid assumptions about what constitutes a religious belief or practice;
- avoid narrow or inflexible requirements for information to establish that an accommodation is necessitated by a religious belief or practice;
- consider adopting flexible leave and scheduling policies;
- carefully evaluate requests for exceptions to dress and grooming rules for religious reasons;
- allow workplace facilities to be used in the same manner for religious and non-religious activities not related to work; and
- if the accommodation request is denied, explain why it is not being granted.

Following these guidelines won't eliminate potential work-faith conflicts, but they can significantly reduce your company's legal exposure in handling them.

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Seven (Sometimes Surprising) Facts About Mediation

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Mediation gives you an opportunity to participate directly in efforts to resolve your lawsuit. Mediation can also put you in an unfamiliar, and potentially uncomfortable, situation. With some advance planning, you will be better prepared for the process and its ups and downs.

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