

Expanding the Pie in Employment Mediations¹

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Mediation of employment disputes offers an excellent opportunity for creativity in generating options for resolution. Non-traditional or non-monetary issues that address the underlying interests of one or both parties increase value in a negotiation or “expand the pie” in an otherwise distributive bargaining session. While good strategy for mediation includes discerning the underlying interests of both your client and opposing party, too often non-monetary interests are not adequately explored in this analysis.

Employment disputes have a profound impact on the lives of the parties. As a result, underlying issues that are not necessarily legal or monetary may serve as barriers to settlement in employment mediations. Full resolution and more satisfying outcomes in mediation result from negotiations that include direct discussion of the parties’ underlying interests and settlement components that address those interests.

For example, in a sexual harassment case involving a woman who had PTSD due to earlier sexual abuse and was severely traumatized by the work environment, the employer agreed as a component to the monetary settlement amount to pay plaintiff’s future psychotherapy bills up to \$10,000. In a disability discrimination discharge case set in a very small town in a rural area, plaintiff could not accept leaving her employment after 30 years without a retirement party. In addition to the settlement amount, the employer agreed to host a retirement party for plaintiff and to give her the company’s traditional retirement gift – a riding lawn mower. In an age discrimination/constructive discharge case involving a high level executive, as part of a severance package, plaintiff agreed to be available to work as a consultant on a contractual basis to alleviate defendant’s business concerns during the acquisition of another entity.

The parties’ underlying interests in any given mediation vary greatly and provide opportunity for the advocates and mediator to be creative in identifying options for resolution and expanding the pie for bargaining. The following is a nonexclusive list of non-traditional or non-monetary components of resolution in employment mediations:

REPUTATION CONCERNS

Confidentiality clause with enforcement mechanisms

Non-disparagement clause

Agree on content of statements to press

Joint press release

Change basis of employment separation from termination to resignation or layoff

Expunge (or seal) negative personnel records

Agree to oppose public disclosure requests for sensitive documents relating to plaintiff

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Destroy all copies of investigator's report and all supporting documents
Agree on announcement to other employees regarding the separation/departure of plaintiff

PAYMENT

Agree to specifically characterize settlement amount for tax purposes
Payment of bonus or other delayed monetary component of salary
Structured payment of settlement amount to minimize tax consequences and/or accommodate defendant's cash flow concerns
Deposit of settlement amount to education fund or other annuity with tax benefits to employee
Contribute portion of settlement amount to charity of plaintiff's choice
Contribute to pension/retirement account
Payment of future therapy/medical costs
Reimburse future tuition costs
Reinstate annual leave/sick leave for severance payout

PLAINTIFF'S FUTURE EMPLOYMENT

Letter of recommendation (positive information only about plaintiff's performance)
Neutral reference letter (dates of employment, position held)
Agree on response to inquiries from prospective employers
Identify specific individual to respond to reference calls from prospective employers
Agree on date of employment separation
Outplacement assistance
Renegotiation of non-compete agreement
Notification of future job openings with defendant

POLICY CHANGES/REMEDIAL MEASURES

EEO training or other training to perceived offenders/management
Institute/improve process to handle discrimination complaints or accommodation requests
Institute/improve process for reporting and investigating harassment complaints
Institute and disseminate religious accommodation policy and request procedure
Investigate and take appropriate disciplinary measures against perceived offenders
Appoint high level manager to remain involved to monitor and prevent similar problems
Post/disseminate antidiscrimination policies/procedures

OTHER CLAIMS

Mutual release
Agree not to challenge claim for unemployment benefits or workers' compensation benefits
Agree to facilitate eligibility for long-term disability benefits or medical retirement
Agree to assist in future litigation

EMOTIONAL/RELATIONAL

Apology (written or oral)
Employer's recognition or acknowledgement of difficult outcome for, or impact on, plaintiff
Direct conversation between parties at mediation

EMPLOYMENT STATUS

Reinstatement to former position
Hire plaintiff as contractor for finite projects
Reinstate/transfer plaintiff to a different position as reasonable accommodation
Employ accommodation consultant to identify potential disability accommodations
Agree not to reapply or accept reemployment with defendant
Continue employment status with new title for finite period to assist in job search
Continue employment status with or without pay until vesting of retirement benefits
Agree to retain seniority status and avoid break in service for future employment

TRANSITION

Inventory of and return of company property by plaintiff
Continued assistance and cooperation by plaintiff to train replacement
Agree on timing and manner of removal of plaintiff's name from employer's website
Agree on wording of automatic reply to e-mails sent to plaintiff's e-mail address with employer
and agree to timing of ending functionality of plaintiff's e-mail address

BENEFITS and PERKS

Continue health insurance coverage at employer's expense or payment of COBRA benefits
Continue employee benefits and perks (i.e. gym membership, employee discount)
Provide company services/products at no cost (i.e. free annual cruise on defendant cruise line)
Continue access to professional development training offered to current employees
Certificate of appreciation recognizing plaintiff's long tenure
Company sponsored retirement party

Nancy Maisano, founder of Maisano Mediation, LLC in Seattle, has worked exclusively as a mediator since 2001. Nancy has mediated more than 700 federal and state employment discrimination claims and other employment-related claims including wage and hour violations, breach of contract, FMLA and whistleblower violations. She can be reached at Nancy@MaisanoMediation.com.