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Resolving Sexual Harassment Matters via Mediation

BY GARY FOWLER AND CECILIA MORGAN

The U.S. Congress and the Texas legislature recently enacted new laws to expand remedies to employees alleging sexual harassment. This new legislation will require practitioners to consider new options in resolution of such cases. Mediation offers the opportunity to resolve these sensitive cases in an appropriate environment for early resolution.

Recent Changes in Federal Law

In March 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which allows employees alleging sexual harassment or sexual assault to avoid arbitration of their case under an arbitration agreement entered into prior to such time as the claim arose. The statute provides that a court, not an arbitrator, shall determine whether the Act applies to a dispute. While employees and their counsel will elect to go to court in many cases, the Act allows employees to choose arbitration under a pre-dispute arbitration agreement, and some may do so to obtain an earlier resolution in a confidential proceeding.

New Amendments to Texas Law

In 2021, the Texas legislature amended Chapter 21 of the Texas Labor Code, which is the state version of Title VII of the Civil Rights Act of 1964.

These amendments expand the remedies available to employees in sexual harassment cases. The new statute also expands state sexual harassment law to apply to all employers, regardless of the number of employees. (Title VII—and Texas law before September 1, 2021—applied only to employers with 15 or more employees.) The new law also makes individuals acting “directly in the interests of the employer” personally liable; Title VII and previous Texas statutory law applied only to employers, not supervisors or individual owners. The new Texas law mandates that employers who know, or should know, of unlawful conduct take “immediate and appropriate corrective action.” Finally, the new law lengthens the statute of limitations for filing a charge of sexual harassment with the Texas Workforce Commission from 180 to 300 days.

Mediation Merits Greater Consideration

The expansion of remedies under amended sexual harassment laws, along with an ongoing effort to unclog dockets as juries return to courthouses, has led to greater focus on mediation to resolve sexual harassment disputes in a timely manner. Employers and their counsel should give greater consideration to mediation to avoid the uncertainty of the new laws and potential jury verdicts in sexual harassment cases. Small employers, previously not liable under Title VII or Chapter 21, now face liability as well as attorneys’ fees and costs in defending suits.

Employees and their counsel will want to start considering mediation if

other attempts at early resolution are unsuccessful.

Non-Monetary Benefits of Mediation

Non-monetary considerations can be especially important in resolving sexual harassment cases out of court. Mediation allows parties to agree on terms that may not be readily obtained in court. For example, an employee may require confidentiality from the employer and the accused individual. Additional non-monetary considerations may include how to address employee discipline issues, handling post-employment references, mandating a written apology, or requiring that the accused avoid further contact with certain persons.

Preparation for Mediation

Prior to mediation, counsel should consider and discuss with their clients a realistic assessment of the potential damages, costs, and remedies. Counsel may wish to consult a tax expert on issues such as the allocation of a potential settlement payment (e.g., to determine which portions of a settlement may be allocated to wages, compensatory damages, and fees) and the tax deductibility of certain settlement amounts. Counsel can assist their clients and the mediation process by providing the mediator with a brief, well-written mediation statement that professionally describes the facts of the case. In drafting position statements, counsel can control costs by focusing on advocating for settlement rather than writing a lengthy pre-trial brief with unnecessary legal citations and legalese.

Bullet points and brief summaries are often more effective.

Other Considerations

An effective mediator will conduct a pre-mediation conference with the parties and their counsel to discuss potential options and issues in advance. Throughout the process, the mediator will facilitate discussions on risk assessment, non-monetary considerations, and the advantages of early resolution.

Parties should also consider whether they want a virtual or hybrid mediation. A hybrid mediation is where some participants appear in person and others appear via videoconference. Virtual mediations were a necessity during the pandemic and remain commonplace. Attorneys and mediators, many of whom were initially reluctant to mediate via videoconference before March 2020, are now quite familiar with and comfortable using the technology.

Virtual/hybrid mediations are uniquely suited for sexual harassment cases. For example, these mediation formats provide an environment where the victim and accused can participate without having to be in the same physical location. A hybrid mediation may be less tense and easier to facilitate when, for example, the accused appears in person and the victim appears virtually. With the recent changes made to Texas law, accused individuals in sexual harassment cases are now more likely to be sued, and their participation in mediation is essential to obtaining a complete resolution. **HN**

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