

Mediating employment disputes in a #MeToo world



Hon. Sherrie Krauser (Ret.), JAMS mediator and arbitrator

Reports of sexual harassment and abuse allegations have become almost routine in news reports over the past few months. Some recent surveys estimate that as many as 70% of women have been subjected to some form of unwanted sexual harassment or abuse, and that 10% of women, and fewer men, allege such incidents in their workplaces.

The #MeToo movement has drawn our attention to these issues and empowered those experiencing sexual harassment or abuse to express their concerns. At a recent JAMS conference on employment law, employment mediators and attorneys noted a marked increase in the number of disputes that include allegations of sexual harassment or abuse—from women, men and transgender persons—over

the past year. Previously unreported or unacknowledged concerns are at the forefront of everyday disputes, including those in the work arena.

Employment disputes, like divorces, are rarely just about the money. Unlike other commercial litigation, these disputes are often complicated by the personal, trusting relationship the parties formerly enjoyed. An employer trusts that an employee will fulfill work obligations; an employee trusts that an employer will treat the employee fairly and respectfully. When an employee believes that he or she was treated unfairly or improperly, that mutual trust dissolves and legal action may follow.

That legal action will, inevitably, reveal any breach in the fundamental trust within the work family. When an employee alleges sexual harassment or assault, that breach becomes even more personal—and more difficult to discuss calmly and openly.

As a trial judge, I was rarely privy to the financial costs of litigation. But I too often saw that the emotional toll on litigants, particularly in family and employment cases, far exceeded any monetary cost. Regardless of the sensitive nature of the issues involved, the parties must present their cases through testimony in an open courtroom,

recorded in the public record. The stress of a trial, the testimony that can't be erased or forgotten, and the judgment entered inevitably alter the parties' lives much more than they anticipate.

As a mediator, I have found that employment mediation is often more akin to family and divorce mediation than to other commercial mediation. Working adults often spend more of their waking hours with their "work family" than with family members and close friends. The relationships we develop with our coworkers are integral to our working lives, and often determine whether those hours are pleasantly productive or unnecessarily stressful.

In mediation, we can provide participants with a safe, private environment conducive to candid communication about even the most sensitive issues. We can assure that all participants are treated with courtesy and respect. We can encourage the parties to consider creative outcomes, in addition to or in substitution for a monetary award.

Even the most self-confident litigants are rarely eager to testify and face cross-examination in open court about allegations of sexual harassment or abuse. Mediation, requiring privacy and confidentiality, provides a protected environment for resolving their disputes. And, a

skilled, neutral mediator can promote forthright discussion of sensitive issues without condoning or condemning an alleged harasser or abuser, and without advocating for or denouncing a claimant.

Mediation also affords the parties an opportunity to design a resolution particularly suited to their dispute. In court, an employment dispute involving sexual harassment, abuse or discrimination may result in a monetary award. In mediation, that same dispute may be resolved with a monetary award—with or without extra-judicial options, such as changes to an employment manual, future employment assistance, new training within the employer organization, or anything else the parties choose. The imagination and willingness of the parties, not legal restrictions, provide the only limitations on a mediated resolution.

The breakup of a family, even a work family, involves uniquely personal issues. Although allegations of sexual harassment or abuse may make an employment mediation more challenging, mediation can empower the parties to create their own resolution and significantly reduce the financial and emotional cost of a public trial.

Hon. Sherrie Lavine Krauser (Ret.)

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