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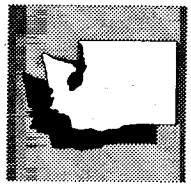

What to Do about PERSONNEL PROBLEMS

WASHINGTON EDITION

Mediation, Arbitration, What's the Difference?

In an August newsletter feature updating the status of arbitration agreements, we noted that many observers recommend that such agreements include a good mediation system to ensure their effectiveness. Both mediation and arbitration fall into the general category of alternative dispute resolution, but what's the difference between the two, really?

At a recent seminar offered by the National Employment Law Institute, speaker Jerry P. Roscoe discussed that topic, along with other aspects of mediation. Experienced in both mediation and arbitration, Roscoe is part of ADR Associates, LLC, based in Washington, D.C. He is an attorney, trains mediators and arbitrators in the private sector, and serves as an adjunct professor of law.

Roscoe listed these characteristics of mediation that serve to distinguish the process from arbitration:

- Mediation is voluntary and nonbinding. Even though some courts require parties to a lawsuit to try mediation before proceeding with litigation, all they need to show is a good-faith effort, and either can withdraw from the mediation at any point. Neither one is bound to abide by the agreement they reach in the process.
- It is facilitated negotiation between the parties, as opposed to a third-party decision process. Traditionally, mediators neither suggest what the settlement should be nor draft the agreement; they simply try to bring the parties closer together on what each wants.
- It is very flexible, allowing the parties involved to make whatever rules will govern the mediation.
- Rather than being limited to determining the legal rights of the parties, mediation can consider their personal interests as well.

Arbitration, by contrast, is like a streamlined trial, with arbitrators adjudicating the parties' legal rights and handing down a binding decision.

If we have an arbitration agreement, why mediate?

One controversial point about arbitration is its increasingly high cost. Once seen as a much better alternative than allowing employment disputes to be litigated in court, arbitration has become a more formal process than it once was, Roscoe reports. As a result, costs have escalated—to the point where some recent studies have found it even more expensive than litigation.

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Supremes Give Employees (Slightly) Less Elbow Room in Lawsuits

Just before adjourning for the season, the Supreme Court issued yet another ruling that will be of continuing importance to employers and HR pros. On June 10, the justices announced their findings about the so-called "continuing violations" doctrine of civil rights law. Some federal circuit courts of appeal had said that the phrase "illegal employment practice" in Title VII of the Civil Rights Acts must be more than one "discrete act" of discriminatory behavior. That's important, because in most cases, an employee who wishes to charge discrimination must do so within 300 days of the biased act. Let it go longer than that, according to a strict interpretation of the law, and you can no longer sue because the statute of limitations has run out—unless and until the employer does it again. But that's where it got muddy: If a new incident of discrimination occurred, and you sued within 300 days of that one, could you add the earlier instance(s) to your charge even though they were older than 300 days? Some circuits said yes and some said no. If the same type of discrimination was involved, the yes-sayers argued, an employee could invoke the continuing violations concept.

What was this case all about?

In 1990, Abner Morgan joined the staff of Amtrak (formally known as the National Railroad Passenger Corp.) as an electrician helper. A lot about Morgan's employment is contested between him and his former employer: Morgan charged that because he is African American, Amtrak at first refused to honor his skills and experience as an electrician and that he should have been given the higher title (and pay rate) from the start. Amtrak claimed that Morgan was a problem employee throughout his five years with the company—someone repeatedly disciplined for absenteeism and insubordination. In fact, his employer tried to fire him for insubordination after only one year, but Morgan's union intervened, and he was reinstated. He claimed that throughout his tenure, managers were repeatedly and continually biased, harassing him, using racial epithets, and disciplining him more harshly than other employees.

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Mediation, Arbitration *(Continued from page 1)*

Without question, mediation is a cheaper alternative; Roscoe estimates that it costs about the same as taking a deposition. OK, so it's cheaper, but will it accomplish the same thing?

Not necessarily, nor was it meant to. One good reason to incorporate a mediation system as part of an arbitration agreement is to attempt to resolve as many disputes as possible before they reach the arbitration stage. Obviously, negotiating a settlement to which both parties agree is much to be preferred. Another advantage of mediation is that sometimes what one or both parties want can't be obtained through either arbitration or litigation, because it has nothing to do with legal rights. Let's say, for example, that a high-performing employee is laid off during an economic downturn. She wants to sue for damages, claiming she was laid off because of her gender. By the time her lawsuit might have reached the courts, some 18 months later, her former employer's fortunes have turned and it is seeking qualified employees. In mediation, rather than monetary damages, she might look for a letter of recommendation from the employer as evidence that her termination was not related to her performance. Or her former employer might want to rehire her, now that it is in a position to do so. Neither option could or would be considered in court or in arbitration, but either could be the foundation of a negotiated settlement coming out of mediation.

We don't have an arbitration agreement, so why mediate?

We reported that experts do not recommend arbitration agreements for companies that have experienced few or no employment disputes. But should employers who may not need arbitration provide for mediation?

Roscoe feels very strongly that they should, for several reasons. First, he tends to doubt that there are workplaces with no employment disputes. As he puts it, "Where there are human beings, there are human issues." So either the employer is perfect (did we hear you scoff?), or the employees are too frightened to surface their disputes—a situation that will hamper productivity at the least and may explode later at the worst. So play it safe and assume that there are at least a few disputes that might benefit from mediation.

Second, he stresses, mediation can help HR pros and top management discover workplace problems before they escalate or become endemic. "Do you want to know what's really going on among your employees?" Roscoe might ask. If you do, and you want the opportunity to address and rectify potentially serious issues, then implement mediation.

In the third place, mediation can help resolve issues before either side gets hardened in its position. And finally, Roscoe points out, the employer nearly always loses in arbitration, no matter what the arbitrator's decision. If the employee wins, he or she returns triumphantly to the workplace to tell co-workers how the arbitrator agreed that the employer was unfair. If the employee loses, he or she is likely to trash the arbitration process as unfair. In mediation, by contrast, both parties are likely to support the settlement they reached. Voila—a lose/lose proposition becomes a win/win. 252cl

Supremes *(Continued from page 1)*

In describing the incident that he said led to his termination, he reported that he had been called into a supervisor's office to discuss another manager's report that Morgan had threatened him. Morgan asked permission to include either a union representative or a co-worker in the meeting (no doubt because he anticipated being disciplined). Not only did the supervisor refuse to allow him to be accompanied, Morgan recounted, but he called him a nasty name, ordered him into the office, and fired him when he refused to comply. In fact, by the time that incident occurred and he was terminated, Morgan had already complained to the Equal Employment Opportunity Commission (EEOC) of specific acts of race discrimination and the creation of a hostile work environment. After he'd been fired, EEOC issued him a right-to-sue letter, and he filed his lawsuit against Amtrak.

The California federal district court that first heard his case decided that he could sue only for acts of discrimination that had occurred within the 300 days before his EEOC complaint, and Morgan appealed to the 9th Circuit (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington). Judges there bought the continuing violations idea and said he could cite all his experiences of bias. Amtrak appealed that ruling, this time to the Supreme Court. There, the justices decided they must focus on the meaning of employment practice. Is it a single act or a continuing pattern? An argument for the continuing violations concept had been that an employee may not recognize a single biased act for what it is and may instead need the weight of several more instances, perhaps many more, to determine that the employer is knowingly discriminating.

The justices weren't unanimous—they split 5 to 4—but the majority ruled that an employment practice is a discrete act of discrimination. In other words, an employee can generally be expected to know whether a single act is biased. If he or she feels it was, the complaint needs to be made within 300 days. That limitation is necessary to preserve employers' rights so that bias charges don't arise years later, when, as Justice O'Connor put it, "evidence has been lost, memories have faded, and witnesses have disappeared."

For employers, now what?

That's not as clear a ruling as it could be, because it only applies to charges of discrimination, not to charges of creation of a hostile environment. By its very nature, the justices said, a hostile work environment is ongoing, so a plaintiff needs to be able to present the full weight of all the abuse and adverse employment actions. Unlike a discrete act of discrimination, an instance of harassment may not be "severe or pervasive" enough to create a hostile environment. So that part of Morgan's charge—and of any other employee claiming civil rights violations—can include current, recent past, and long past incidents, even if they go back more than 300 days from the formal complaint.

That's why employees' lawsuit latitude is only slightly narrower. Plaintiffs' attorneys can be expected to charge the creation of a hostile work environment in every possible case so that their clients can bring in all incidents, old and new. In just a few cases, that charge simply won't fit, and employees will have to abide by the 300-day rule. 253cl