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PERSPECTIVE

Mediating emotional employment disputes during COVID-19

By Stephen Sonnenberg

Before the pandemic, in workplaces different than many today, there was no shortage of employment disputes. Allegations of discrimination, harassment, retaliation, unpaid wages and pay disparity, among others, often led to legal battles. Litigation or the threat of litigation typically evoked intense emotions in employees and employers alike.

What was true then is true now, except the emotional fallout from employment disputes is, like other aspects of our lives, complicated by the pandemic. For many employees and managers, the threat that they or their loved ones may fall ill gives rise to anxiety. When illness occurs, the experience for some is traumatic. For others, changes to the job and workplace, or the loss of employment altogether, evoke a different set of reactions. For business owners and managers suddenly faced with fiscal hurdles, shifting guidance from government agencies and leaders, and a new set of parameters for their relationships with employees, the challenges have been many. Now, in the time of COVID-19, when employees and employers turn to a mediator in the hope of resolving their disputes, the emotions they bring to the table often are substantial and complex. And, like the underlying legal issues, they are not one-size-fits-all. While a workplace dispute may cause anxiety and depression in one person, it may spur anger and outrage in another.

Emotional reactions to the pandemic also vary, as is apparent from media reports and the comments of our friends, colleagues and neighbors. Mental health professionals have observed, however, that a common factor impacts how individuals cope with sustained adversity. Resilience, or the capacity to withstand

and recover quickly from challenges, whether life-threatening or purely economic, differs from one person to the next. An experience that engenders long-term trauma within one individual may give rise to only mild discomfort within another.

For the mediator, understanding how the parties' emotions can impact their perception of their legal claims and defenses is critical. Knowing what can trigger a strong emotional reaction is equally valuable. Deciding whether, how and when to address the various emotions that individuals bring to a session, particularly those that may stand in the way of resolving an employment dis-

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pute, is often the key to a successful mediation. As a former psychotherapist, employment lawyer and now mediator at JAMS, I believe it is important to recognize and assess the impact of the pandemic on the parties, both economically and emotionally.

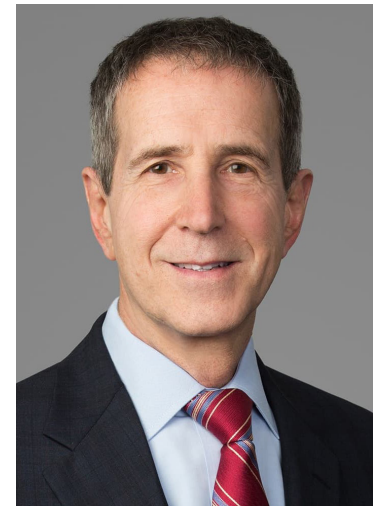
Consider the emotional reactions of indignation and outrage, for example. These reactions have never been in short supply in employment litigation. Workers who bring discrimination or retaliation claims, as well as those who stand accused, often come to mediation with anger and a profound sense of having been treated unfairly. Since March 2020, however, I have mediated with employees whose anger over the loss of their jobs or other adverse employment actions is stoked by their belief that they have been

treated unjustly, in part, because they have soldiered through the pandemic and fulfilled their duties at work while risking not only their own health and safety but that of their families. I have mediated with supervisors, managers and business owners who are indignant at having to defend employment litigation after shifting to remote work, allowing flexible schedules, paying full-time wages for part-time work, extending leaves of absence and granting other accommodations to their employees. These employees and employers may feel betrayed by each other, and it is difficult for them in mediation to step into the shoes of the other to consider

related claims that arise under laws and regulations that address disability discrimination, reasonable accommodations and leaves of absence. In June, the Equal Employment Opportunity Commission issued rather extensive comments on these topics, titled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." Many of the EEOC's Technical Assistance Questions and Answers focus on disability-related inquiries and exams, reasonable accommodations, pandemic-related harassment and return-to-work issues, including vaccinations. Alleged violations of these rules and claims by employees attributing their depression and anxiety disorders (including posttraumatic stress disorder) to their employers are making their way to mediation with increased frequency.

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ment mediation, as have disputes over requests for accommodation of a preexisting mental illness or disorder. One difference now is that the pandemic may be exacerbating people's preexisting conditions. In mediation, employees may attribute their distress to their employers' alleged unlawful acts, and employers may point to the pandemic as the source of their employees' emotional problems. In its recent publication, the EEOC leaves plenty of room for arguments by all parties in mediation: "Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic." When a mediator discusses with the parties their disagreements over the cause of an employee's emotional distress, or a requested accommodation related to COVID-19, strong emotions often are front and center.

Recognizing and acknowledging these emotions in mediation does not mean that the mediator is acting as a psychotherapist. Mediation and psychotherapy both focus on the ways in which individuals feel, think and make decisions, but they do not involve the same process or purpose. A psychotherapist treats mental or emotional disorders by psychological means, whereas a mediator helps individuals involved in conflict to come to an agreement. Mediators must quickly build trust and rapport with parties and their counsel in order to explore the risks inherent in their positions; psychotherapists develop a therapeutic relationship with their clients over the course of multiple sessions. Mediators hear from all parties about their perspectives on the facts and the law; psychotherapists rely primarily and often exclusively on their clients' own descriptions of their experiences.

Paying attention to and openly acknowledging intense emotions in employment disputes will likely increase the chance of resolution.

The reason is simple: Emotions affect not only the ways in which individuals feel and express themselves, but also the ways in which they think, and therefore how they negotiate. The expression of intense emotions with the mediator need not impede resolution; rather, it offers an opportunity for the mediator to convey an understanding of and respect for the parties. This, in turn, supports the parties' ability to engage in a critical part of the mediation. They can consider the legal claims and defenses from different perspectives, evaluate their options and make clear-headed decisions informed, but not dictated, by their emotions.

During the pandemic, I have been surprised to learn that all of this can be accomplished through virtual mediation. Over the last year and a half, mediations have proceeded largely by video-conference; only recently have in-person mediations resumed. Conducting all mediations virtually was unimaginable before the pandemic. I have now mediated with parties appearing from their homes, their back yards and even

their cars, depending on where their Wi-Fi signal was strongest. Dogs and cats regularly attend my mediations. Children occasionally enter the room, curious about what their mom or dad is doing.

Surprising as well are the results. In my experience, virtual mediation has had the same resolution rate as in-person mediation. That is true for disputes involving harassment, discrimination and retaliation, as well as class-based wage-and-hour law claims. As the pandemic subsides and we proceed with our new normal, some employment lawyers and their clients will elect to mediate certain types of disputes in person, perhaps those that are, at their core, intensely emotional. In the time of COVID-19, the ability of the employment law bar and their clients to adjust quickly to mediating all types of workplace disputes virtually, and to do so with flexibility and determination, is a measure of our collective resilience. That bodes well for the utility of mediation of employment law disputes, virtually or in person, moving forward. ■