# A Practical Guide to Representing Parties in EEOC Mediations

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AS EVEN THE casual newspaper reader may be aware, the number of employment discrimination lawsuits has exploded in recent years. Indeed, studies show that private employment lawsuits tripled in the 1990s.[1] It seems that no employer is immune from charges, whether prison or church or educational institution. In today's workplace, almost everyone—man or woman, gay or straight—in every conceivable employment situation—from hiring to firing to the assignment of office space—is potentially protected by one statute or another.

As a result, even minor personnel decisions have become a potential legal landmine. Americans are working until they are older, and, in an increasingly diverse society, have become much more aware of mistreatment and slights based on race, religion, gender, or national origin. The media have, of course, taken notice of the surge in lawsuits. Multimillion dollar settlements and verdicts in employment discrimination cases are often prominently featured, and even the filing of such a suit can generate media attention.[2]

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1. *See Job-Bias Suits in 1990 Rose More Than Threefold*, WALL ST. J., Jan. 17, 2000, at B13.

2. *See* Al Baker, *City Settles Longstanding Suit On Sex Harassment By Police*, N.Y. TIMES, Nov. 20, 2002, at B3 (reporting a $1.85 million settlement to resolve a series of embarrassing sexual harassment cases in the New York City Police Department); Ben Bolch, *Calvin Wins His Racial Discrimination Case*, L.A. TIMES, Sept. 14, 2002, at D13 (describing a $210,000 award to a basketball coach alleging discrimination at California State University Dominguez Hills); Lisa Girion, *Workers Sue FedEx, Allege Widespread Discrimination*, L.A.TIMES, Dec. 13, 2002, at C3 (regarding a class action suit alleging discrimination against women and minorities); *Goodyear Suit Alleges Age Discrimination*, L.A. TIMES, Sept. 13, 2002, at C2 (reporting a $10.6 million settlement for a forced ranking evaluation system that arguably discriminated on the basis of age); Thomas S. Mulligan, *EEOC Sues Brokerage in Gender Bias Case*, L.A. TIMES, Sept. 11, 2001, at C1 (describing the filing of a sex discrimination suit against Morgan Stanley Dean Witter).

But many of these cases are handled quietly and privately. The first step in most employment discrimination suits is an Equal Employment Opportunity Commission ("EEOC") filing. Few people realize that, for many claims, the next step is the EEOC's mediation program. It is a remarkably efficient mechanism that often produces a practical solution for workplace disputes while avoiding the time, expense, and emotional strain of a trial. EEOC mediations are now working better than ever. The University of San Francisco ("USF") Law School's Employment Discrimination Clinic ("Clinic") has extensive experience in these mediations and has learned how to function effectively in the program.

The EEOC is the administrative body responsible for enforcing employment discrimination statutes under federal law[3] and has long acted as an instrument to challenge employer workplace practices. Employees are aware that an EEOC charge is an option; there were 84,442 filings charging employment discrimination in 2002 alone.[4] An EEOC filing is required before a federal lawsuit can be filed based on the alleged discrimination,[5] and that requirement alone guarantees that the EEOC will continue to be the most important player in the employment discrimination field.

Backlogs and delays in the system convinced the EEOC to create a new role for mediation in the handling of a charge of employment

3. Specifically, the EEOC enforces the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2000); Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e–2000e-17 (2000); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621–634 (2000); and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101–12213 (2000). The EEOC has statutory authority to promulgate procedural regulations to enforce Title VII, *see* 42 U.S.C. § 2000e-12(a), and the ADA, *see* 42 U.S.C. § 12116. Those regulations are found at 29 C.F.R. Part 1601 (2002) (Title VII and ADA) and 29 C.F.R. Part 1630 (2002) (ADA). The EEOC also has promulgated procedural regulations for ADEA claims, *see* 29 C.F.R. Part 1626 (2002), federal sector employment discrimination claims, *see* 29 C.F.R. Part 1614 (2002), and other statutes over which it has administrative enforcement responsibility. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC REGULATIONS, *available at* http://www.eeoc.gov/regs/index.html (last visited March 11, 2003) [hereinafter EEOC REGULATIONS] (listing all existing, new, and proposed EEOC regulations).

4. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC REPORTS DISCRIMINATION CHARGE FILINGS UP (Feb. 6, 2003), *at* http://www.eeoc.gov/press/2-6-03.html (last visited Mar. 18, 2003) [hereinafter EEOC FILINGS].

5. *See* Love v. Pullman Co., 404 U.S. 522, 523 (1972) (holding that a person seeking relief from unlawful employment discrimination under Title VII may not file a civil suit until she has first exhausted administrative remedies before the EEOC).

discrimination.[6] Before any other action on a charge is taken by the EEOC, most employers and employees are offered pre-investigation mediation by the EEOC, with costs paid by the federal government. Since its inception in 1996,[7] the EEOC mediation program has become the largest provider of alternative dispute resolution ("ADR")[8] services for employment discrimination in the world.[9]

Under the National Mediation Program, the EEOC "has conducted more than 44,000 mediations, resolving over 29,000 charges and obtaining over $400 million in benefits for aggrieved individuals, all within an average processing time of 86 days."[10] In 2002 there were 7,858 successful resolutions of employment discrimination charges through mediation.[11] One study called the program one of the most successful ADR programs ever.[12] Ninety-one percent of those with claims and ninety-six percent of those charged with discrimination indicated that they would use the program again.[13] These numbers indicate how successful mediations have been.

An EEOC mediation provides fast and fair access to a forum where emotions may be expressed and closure may be achieved in a cost-effective way, whether those costs are measured in money, emotional distress, or business disruption. Essentially, mediations allow the person who cleans restrooms to sit down at the same table and discuss

6. *See* DR. E. PATRICK MCDERMOTT ET AL., AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM 74 (2000), *available at* http://www.eeoc.gov/mediate/report/index.html (last visited Feb. 8, 2002).

7. In 1991 the EEOC experimented with a pilot mediation program conducted in four field offices (Philadelphia, New Orleans, Houston, and Washington, D.C.). In light of the success of the pilot, by the end of 1997 each district office had a viable mediation program in place. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, History Of EEOC Mediation Program, *available at* http://www.eeoc.gov/mediate/history.html (last visited Feb. 11, 2003).

8. Alternative dispute resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation. As the number of litigants and the costs of litigation escalate, and as time delays continue to plague parties involved in lawsuits, more states have begun experimenting with ADR programs. Some programs are voluntary; others are mandatory. The two most common forms of ADR are arbitration and mediation. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MEDIATION: FACTS ABOUT MEDIATION, *available at* http://www.eeoc.gov/mediate/facts.html (last visited March 8, 2003) [hereinafter MEDIATION FACTS].

9. *See* MCDERMOTT ET AL., *supra* note 6.

10. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC LAUNCHES NEW MEDIATION PILOT PROGRAM (2003), *available at* http://www.eeoc.gov/press/3-24-03.html (last visited March 30, 2003).

11. *See* EEOC FILINGS, *supra* note 4.

12. *See* MCDERMOTT ET AL., *supra* note 6.

13. *See id.*

discriminatory behavior with executives of large and powerful corporations. Meanwhile, employers have a chance to minimize a business expense, achieve closure, and do what is fair without the tremendous cost of litigation. Although most mediations—except in the rarest of cases—will not result in the high award that a jury might give, plaintiffs, or Charging Parties ("CPs"), who achieve a fair settlement will get satisfaction and closure instead.

With the EEOC's new emphasis on mediation, it has become imperative for employment lawyers to understand how the EEOC mediation process works and how to function effectively within it. The federal statutes governing workplace discrimination—Title VII of the Civil Rights Act of 1964 ("Title VII"),[14] the Americans with Disabilities Act ("ADA"),[15] the Age Discrimination in Employment Act ("ADEA"),[16] and the Equal Pay Act ("EPA")[17]—are often difficult to interpret, and lawsuits have an uncertain result. The purpose of this article is to describe EEOC mediations and explain how to successfully represent CPs at them.

Part I briefly describes employment discrimination laws, with a focus on the most important issues and related laws that arise in EEOC mediations. Part II discusses the routine, procedural aspects of a mediation session and describes the two basic approaches used by mediators. Part III describes in depth the representation of CPs at an EEOC mediation. This section is based on the Clinic's experience in representing numerous clients in all categories of employment discrimination. Although the Clinic is available to represent either side, for the most part it has been asked to represent CPs who claim discrimination, and this article is limited to the representation of those parties. Finally, Part IV discusses the USF Law School's Clinic, including one student's experiences.

The Clinic at the USF School of Law has operated in this field for four years. This Article presents information and suggestions based on the Clinic's experience, emphasizing the most important points learned from appearing as a representative in well over 100 mediations. In addition, the techniques discussed in this article can be applied to representation in an employment discrimination mediation that is not under the auspices of the EEOC. Indeed, much that is discussed here applies to representing a party in any mediation.

14. 42 U.S.C. §§ 2000e to 2000e-17 (2000).
15. 42 U.S.C. §§ 12101–12213 (2000).
16. 29 U.S.C. §§ 621–634 (2000).
17. 29 U.S.C. § 206(d)(1) (2000).

## I. Employment Law for Non-Employment Lawyers

Employment discrimination is a complex and constantly evolving area of the law. This section provides a brief overview of the statutes enforced by the EEOC, related law that may affect EEOC mediations, and the EEOC's administrative procedures. This material is included to give the legal context for the EEOC's mediations to those unfamiliar with employment law. Also included are practice tips highlighting issues that have proved important in the Clinic's mediations.

### A. Processing a Claim Through the EEOC

Before a lawsuit based on a violation of the federal discrimination laws can be filed, the CP must exhaust her administrative remedies with the EEOC and receive a "right-to-sue" letter. A "right-to-sue" letter is a document issued by the EEOC authorizing the CP to file a lawsuit within ninety days.[18] In practice, if asked, the EEOC will generally provide a CP with a right-to-sue letter at any time after a charge has been filed. For cases that will be mediated at the EEOC, CPs must go through at least part of the EEOC's processing of their charge.

#### 1. The Charge and Initial Review

The EEOC process begins when a CP fills out a "Charge of Discrimination" form, describing the alleged discriminatory conduct.[19] After this charge of discrimination is filed against the respondent (usually the CP's employer), the charge is evaluated and categorized "A," "B," or "C."[20] The EEOC dismisses "C" status charges because on their face the EEOC can conclude that further investigation is unlikely to yield a finding of employment discrimination: there may be a technical problem, such as filing past the deadline, or the CP's statement may not describe any illegal discrimination. The EEOC takes no further action on a "C" charge and sends an immediate right-to-sue letter

18. *See* ROBERT BELTON & DIANNE AVERY, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 39 (6th ed. 1999); *see also* U.S. EQUAL OPPORTUNITY COMMISSION, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION: QUESTIONS AND ANSWERS, *at* http://www.eeoc.gov/facts/qanda.html (last visited March 11, 2003) [hereinafter EEOC QUESTIONS AND ANSWERS] (describing a right-to-sue letter and filing deadlines).

19. *See generally* EEOC REGULATIONS, *supra* note 3 (describing EEOC procedures discussed in this paragraph).

20. *See generally* Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RESOL. 153, 157–58 (1999) (describing EEOC's procedures for categorizing cases and referring them to mediation); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PRIORITY CHARGE HANDLING PROCEDURES (similarly describing procedures for categorizing cases) (on file with the author).

to the "C" party.[21] "A" charges are strong claims that the EEOC believes are likely to result in a finding of discrimination and/or may be in an area that the EEOC wants to pursue for policy reasons. The "B" charges are those which appear to have some merit but where further information is needed to determine if the charge is valid.

If a charge is categorized as "A" or "B," the respondent is notified within ten days and given fourteen days to respond. If the charge has "B" status, the parties are notified that they have the option to mediate within the EEOC's program. The ADR unit of the EEOC also contacts the parties and encourages the mediation option. If the parties agree to mediate, the EEOC assigns the case to the ADR section and freezes all other actions until the case is either mediated or sent back from the ADR section.

If the parties to a "B" charge decide not to mediate, or if the mediation is unsuccessful, the case is turned over to the EEOC's investigation unit. No information about an unsuccessful mediation may be sent to the investigation or litigation sections of the EEOC. At the EEOC, this is referred to as a "firewall" between the ADR and litigation sections.

### 2. The Investigation

EEOC investigators will seek to determine whether there has been illegal discrimination. The investigation usually begins with an identification of the applicable theories of discrimination to help focus the investigator. The investigator then prepares a Request for Information which is sent to the respondent. A Request for Information can be very intrusive.[22] The investigators will interview witnesses and may conduct on-site investigations. The witnesses are typically persons identified by the CP, the respondent, respondent's witnesses, and others with pertinent information. The respondent will be questioned about overall policies, procedures, and employment practices. An on-site investigation may also take place to see if the respondent is complying with state and federal notice requirements. During this visit, the investigator may ask to examine respondent's personnel documents to see the racial and gender makeup of employees. If a respondent is not cooperative, the EEOC has subpoena power.

21. Note that a right-to-sue letter implies no finding by the EEOC that the CP's claim is justified; it simply indicates that the CP has exhausted her administrative remedies.

22. *See, e.g.*, 42 U.S.C. § 2000e-8 (2000) (giving the EEOC wide latitude to investigate allegations of employment discrimination pursuant to Title VII).

PRACTICE TIP. Familiarity with these investigation procedures is important in understanding some of the pressures that are at play during the mediation. Employers may believe that the potential investigation will be particularly intrusive and not want their businesses disrupted should mediation reach an impasse.

### 3. Post-Investigation EEOC Procedures

After the investigation is completed, the EEOC determines whether or not there is "reasonable cause" to believe that there has been discrimination by the employer. If reasonable cause is *not* found, the CP is issued a right-to-sue letter. If reasonable cause is found, the EEOC will attempt "conciliation," which is an intense form of mediation directed by the EEOC towards employer compliance with the EEOC findings. If settlement is not reached by conciliation, the EEOC either issues a right-to-sue letter to the CP or files a lawsuit on the CP's behalf. Even if there has been a finding of discrimination and conciliation is unsuccessful, only rarely will the EEOC actually file a lawsuit on behalf of a CP.

## B. Procedural Requirements Imposed by Federal Statutes

Federal anti-discrimination statutes have many procedural requirements. Only when those requirements have been satisfied does a federal court have jurisdiction to hear a case.

One requirement concerns the number of persons employed by the business. Contrary to popular belief, not all employers are prohibited from discriminating by federal statutes. A business is obligated to comply with a particular federal anti-discrimination statute only if it has the minimum number of employees. Businesses with fifteen or more employees must comply with Title VII[23] and the ADA,[24] those with twenty or more employees must also comply with the ADEA,[25] and all businesses with employees must comply with the EPA.[26]

A CP wishing to file a civil lawsuit based on a violation of Title VII, the ADA, or the ADEA must first exhaust her administrative remedies with the EEOC.[27] To do this successfully, she must meet several important statutory timing requirements. The CP must (1) file a timely

23. *See* 42 U.S.C. § 2000e(b).
24. *See* 42 U.S.C. § 12111(5) (2000).
25. *See* 29 U.S.C. § 630(b) (2000).
26. *See* 29 U.S.C. § 206(d)(1) (2000).
27. *See* Love v. Pullman Co., 404 U.S. 522, 523 (1972).

charge with the EEOC[28] and (2) file a timely complaint in federal court within ninety days of receiving her right-to-sue letter.[29] "Timely filing," under both requirements, is treated like a statute of limitations.[30] The charge must be filed with the EEOC within 180 days of the alleged discriminatory act or within 300 days of the alleged discriminatory act if the aggrieved party had "initially instituted proceedings with a State or local agency with authority to grant or seek relief."[31] Claims arising under the EPA must be filed within two years, unless the violation is willful.[32]

PRACTICE TIP. State law may allow a longer period for filing with the state agency. For example, under the California Fair Employment and Housing Act ("FEHA"), a claimant usually has one year from the last discriminatory act in which to file a claim.

PRACTICE TIP. If a claimant has missed her opportunity to seek relief for an earlier act of discrimination due to her failure to "timely" file her complaint with the EEOC, the continuing violation theory, if applicable, may extend the time for considering past acts. This doctrine permits a plaintiff to present evidence and recover damages for acts of discrimination that took place "prior to the limitations period," so long as at least one act took place within the period.

28. *See, e.g.*, 42 U.S.C. § 2000e-5(e)(1) (regarding timely filing for Title VII claims).

29. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (regarding required proceedings under Title VII). Note that the right-to-sue letter can be issued immediately after an unsuccessful mediation has taken place. *See* discussion *infra* Part III.D.5; *see also supra* note 21.

30. *See* Zipes v. Trans World Airlines Inc., 455 U.S. 385, 393 (1982) (holding that filing a timely charge with the EEOC is not a jurisdictional prerequisite, "but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling").

31. 42 U.S.C. § 2000e-5(e)(1). The time requirement for filing an EEOC charge depends on whether the claim arises in a deferral jurisdiction or nondeferral jurisdiction. A deferral jurisdiction has a state or local agency that is authorized "to grant or seek relief" from employment discrimination or "to institute criminal proceedings" against such practices. *See* 42 U.S.C. § 2000e-5(c). The EEOC determines which jurisdictions qualify as deferral jurisdictions. *See* 29 C.F.R. §§ 1601.70–.75 (2002). In a deferral jurisdiction, the charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice has occurred, but the charge may not be filed with the EEOC before the expiration of sixty days after proceedings have been commenced under state or local law, unless such proceedings have been terminated earlier. *See* 42 U.S.C. § 2000e-5(c)-5(e). However, if a claim arises in a nondeferral jurisdiction, then Title VII provides that a charge shall be filed within 180 days after the alleged unlawful employment practice has occurred. *See* 42 U.S.C. §§ 2000e-5(e); *see also* EEOC QUESTIONS AND ANSWERS, *supra* note 18 (describing time limits for filing a charge of discrimination).

32. *See* 29 U.S.C. § 255(a) (2000).

## C. Specific Federal Anti-Discrimination Statutes

### 1. General Principles

When a CP alleges discrimination in violation of Title VII, the ADA, or the ADEA, the assertion of discrimination will fall under either the theory of "disparate treatment" or the theory of "disparate impact." The disparate *treatment* theory is used when an employer has treated some people less favorably than others due to their age, disability, race, color, sex, religion, or national origin.[33] Disparate treatment cases involve a subjective intent to discriminate by the employer.[34] The disparate *impact* theory is used when the employer's treatment of different groups appears facially neutral yet has a harsher impact on members of the protected group than on others and cannot be justified by business necessity.[35] Parties represented by the Clinic in EEOC mediations have all made disparate treatment claims.

CPs can prove disparate treatment resulting from intentional discrimination by relying on either direct evidence of a discriminatory motive[36] or on circumstantial evidence from which the fact-finder can infer a discriminatory animus (intent).[37] If a CP has *direct* evidence, the discrimination is easier to prove because direct evidence is evidence that, if believed by the fact finder, proves the fact at issue.[38] In reality, most CPs must rely on *circumstantial* evidence because the vast

33. This form of discrimination is the most commonly understood. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–06 (1973) (exploring burdens of proof in a disparate treatment claim); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1179–81 (2d Cir. 1992) (same). For a description of the factual inquiry in such a claim, see United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

34. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645–46 (1989).

35. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The theory of disparate impact is often referred to as "adverse impact," "disparate effect," "unintentional discrimination," or "statistical discrimination." BELTON & AVERY, *supra* note 18, at 161. For a thorough discussion of the theory, see Griggs v. Duke Power Co., 401 U.S. 424, 433–36 (1971); *see also* Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 985–89 (1988) (distinguishing disparate treatment cases and disparate impact cases by commenting that disparate impact cases focus on statistical disparities rather than specific incidents).

36. Few cases will have direct evidence which proves that the unequal treatment is based on membership in a class—for instance, a statement of bias made to an individual to explain why he did not receive a raise or was fired. Even if alleged, the statement has probably not been made in front of independent witnesses and will probably be disputed. Consequently, in most cases the connection between the disparate treatment and the protected class will be proved by circumstantial evidence.

37. *See Aikens*, 460 U.S. at 714 n.3.

38. For examples of disparate treatment cases where the claimant produced direct evidence, see UAW v. Johnson Controls, Inc., 499 U.S. 187, 191–92 (1991); *Tyler*, 958 F.2d at 1179; and Bell v. Birmingham Linen Serv., Inc., 715 F.2d 1552, 1553–54 (11th Cir. 1984).

majority of employers do not announce their discriminatory motives. For this reason, this section focuses on the analytical framework used for circumstantial evidence.

### 2. Title VII Actions

Title VII creates causes of action for employment discrimination based on "race, color, religion, sex, or national origin."[39] Retaliation for filing a claim or for opposing Title VII discrimination also constitutes a valid cause of action.

> PRACTICE TIP. If a CP files a charge with the EEOC under Title VII, the ADA, or the ADEA, retaliation by the employer against the CP is a valid cause of action *even if the original charge had no merit.* Retaliation against a person who assists a CP in fighting employment discrimination is also a violation of the anti-discrimination statute.

#### a. Proving Title VII Discrimination by Circumstantial Evidence

The basic analytical framework for proof of employment discrimination by circumstantial evidence was established in *McDonnell Douglas Corp. v. Green*[40] and *Furnco Construction Corp. v. Waters.*[41] Under this framework, the plaintiff has the initial burden to establish a prima facie case of discrimination. If a prima facie case is established, the burden then shifts to the employer, who must then attempt either to rebut the prima facie case or to justify the discriminatory conduct on some legally acceptable ground.[42]

The purpose of this rule is to allow a CP to use circumstantial evidence to create a permissible inference that an adverse employment action was a direct result of unlawful discrimination. For this "prima facie" case to be established, the following elements are re-

39. *See* 42 U.S.C. § 2000e-2(a) (2000).

40. 411 U.S. 792 (1973).

41. 438 U.S. 567 (1978).

42. *See id.* at 575–76; *McDonnell Douglas*, 411 U.S. at 802–03. Analytical approaches to burden of proof and burden of persuasion are complex and are not explicitly followed in actual mediation proceedings. However, should mediation not reach a settlement, if and when the case goes to trial, the district court will determine which evidentiary scheme is appropriate for the case. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989). *See generally* Robert Belton, *Burdens of Pleadings and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981) (discussing the need for a coherent framework for establishing burdens of proof).

quired:[43] (1) the CP must show that he belongs to a "protected class," a group protected by an anti-discrimination statute; (2) if an applicant for a job, the CP must show that he was qualified for the job; if an employee, the CP must show that he performed his job competently; (3) that despite his qualifications or satisfactory job performance, he was subjected to an adverse, or "tangible," employment action;[44] (4) and that there is evidence of discrimination after the employee was subject to the adverse employment action (for example, the position that the applicant applied for, and was refused, remained open, and the employer continued to seek applications from persons with the same qualifications as the CP).[45]

PRACTICE TIP. "Adverse employment action" is a broad term that covers all benefits, terms, and conditions of employment. For example, the respondent may be liable for not providing training, a recreation area, or an employee lounge, as well as hiring or firing.

PRACTICE TIP. Constructive Discharge: An employee need not actually be fired from a job to have a valid claim for wrongful discharge. If the employee leaves because working conditions are so intolerable that a reasonable person in the employee's shoes would be compelled to resign, and the employer knew of the working conditions, the employer may be liable under a theory of constructive discharge even though the employee resigned.

Once the CP establishes a prima facie case, the burden will then shift to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action.[46] For this purpose, the employer's reason need not be a good or moral one, but merely nondiscriminatory.

43. *See generally McDonnell Douglas*, 411 U.S. at 802 (establishing the framework for a prima facie case); *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) (differentiating between pleading and evidentiary standard).

44. *See generally* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (describing a tangible employment action as one causing a significant change in employment status or benefits); Sharpe v. Cureton, 319 F.3d 259, 267 (6th Cir. 2003) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002)) (holding that each discrete adverse employment action constitutes a unique and actionable "unlawful employment practice").

45. *See McDonnell Douglas*, 411 U.S. at 802.

46. *See McDonnell Douglas*, 411 U.S. at 802.

If the employer is able to come up with such a reason, the CP must show that the employer's articulated reason is pretext: a false reason used to conceal the true discriminatory animus.[47]

> PRACTICE TIP. On the issue of pretext, check whether others situated similarly to the CP have received the same treatment in similar circumstances.

### b. Analytical Framework for Harassment

Harassing employees because of their race, color, sex, religion, or national origin is also prohibited by Title VII.[48] Title VII's rules regarding harassment have developed predominantly in the context of sexual harassment.

There are two types of sexual harassment that violate Title VII: (1) "quid pro quo" (something for something), and (2) "hostile work environment." Quid pro quo sexual harassment is found when any adverse employment decision results from an employee's refusal to accept a supervisor's demands for sexual favors or to tolerate a sexually charged work environment.[49]

A "hostile work environment" is verbal or physical conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.[50] *Anyone* in the workplace—not just supervisors and managers—may create a "hostile environment." However, for the hostile environment to be unlawful, it needs to be so severe and pervasive that a reasonable person would find the conduct to be hostile or abusive.[51]

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47. *See id.* at 804.

48. *See* 42 U.S.C. § 2000e-2(a)(2) (2000). *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (holding that sexual harassment in the form of a hostile work environment violates Title VII); *Rogers*, 454 F.2d at 240–41 (recognizing for the first time a Title VII claim of discrimination caused by a hostile work environment based on national origin); Compston v. Borden, Inc., 424 F. Supp. 157, 158–59 (S.D. Ohio 1976) (describing an early case of religious harassment).

49. This is the most oppressive type of workplace sexual harassment. For an example of quid pro quo sexual harassment, see generally Nichols v. Frank, 42 F.3d 503, 506–07 (9th Cir. 1994) (describing female employee fired by male supervisor for refusing to perform oral sex).

50. The seminal cases defining how a hostile work environment may constitute sexual harassment include Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) and *Meritor*, 477 U.S. 57 (1986). *See also* Jeffrey S. Lyons, Comment, *Be Prepared: Unsuspecting Employers Are Vulnerable for Title VII Sexual Harassment Environment Claims*, 37 U.S.F. L. Rev. 467 (2003) (discussing hostile work environment cases).

51. *See Harris*, 510 U.S. at 21.

Employers have an affirmative duty to maintain a work environment free from sexually harassing practices and to take action to eliminate the practices or remedy their effects.[52] Employers may also be liable for a hostile environment when the employer does not have an effective anti-harassment policy and grievance mechanism.[53]

PRACTICE TIP. There is absolute employer liability when a supervisor makes job consequences, such as hiring, firing, or promotion, conditional on a subordinate's submission to unwelcome sexual advances. While an employer's effective anti-harassment policy and complaint procedure, and the alleged victim's failure to utilize that procedure, are ordinarily an affirmative defense to a charge of sexual harassment, the employer will not be protected when the supervisor's harassment culminates in a tangible employment action such as termination.

### 3. Actions Under the Americans with Disabilities Act

Congress enacted the ADA for the purpose of eliminating discrimination against persons with disabilities. The ADA is considered the most comprehensive disability civil rights legislation ever enacted, covering a broad range of activities. Title I of the ADA prohibits state and municipal employers, private employers, employment agencies, and labor organizations from discriminating in employment against qualified individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.[54] A CP must show that she is a "qualified individual with a disability"[55] who has been discriminated against because of the disability with regards to hiring, promotion, discharge, compensation, job training, or any other term, condition, or privilege of employment.[56] A "disability" may be a physical or mental impairment that *substantially* limits one or

52. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); *see also* 29 C.F.R. § 1604.11(f) (2002) (encouraging employers to "take all steps necessary to prevent harassment from occurring").

53. *See Faragher*, 524 U.S. at 808–09.

54. *See* 42 U.S.C. §§ 12111(2), 12112 (2000). The ADA covers employment, public accommodations, services provided by state and municipal governments, public and private transportation, and telecommunications. By comparison, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797(b) (2000) is a much less comprehensive federal statute prohibiting discrimination.

55. A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

56. *See* 42 U.S.C. § 12112(a).

more major life activities, or a record of such an impairment, or being regarded as having such an impairment.[57] Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[58] The United States Supreme Court has interpreted the ADA to hold that mitigating measures, such as eyeglasses, can be considered in determining whether the disability substantially limits the major life activity. In other words, if the mitigating measures allow the person to perform all major life activities, she will not be considered to be disabled and cannot bring suit under ADA.[59]

PRACTICE TIP. The definition of a "qualified individual with a disability," or of what constitutes a "disability" itself, may be broader under state law. For instance, FEHA is intended to be independent of the ADA and gives broader rights to CPs.

PRACTICE TIP. The theory that the employer regarded the CP as having a major disability (a perceived disability) is often available to find liability for discrimination where the employee did not have an actual disability as defined by the ADA.

Once an employer learns of an employee's disability, the employer is required to engage in an "interactive process" with the disabled employee to determine if a reasonable accommodation is possible.[60] Often employers violate the ADA merely by failing to interact with the employee concerning possible accommodation.

The affirmative obligation to "[m]ake reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual" unless doing so "would impose an undue hardship on the operation of the business of [the] covered entity,"[61] is complex

57. *See* 42 U.S.C. § 12102(2) (2000); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195–96 (2002) (discussing the definition of disability under the ADA).

58. 29 C.F.R. § 1630.2(i) (2002); *cf.* CAL. CODE REGS., tit. 2, § 7293.6(a) (2003) (promulgating a broader definition of disability in California).

59. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999).

60. The requirement that employers must engage in an interactive process to identify reasonable accommodations originates in the federal regulations accompanying the ADA. *See* 29 C.F.R. § 1630.2(o)(3).

61. 42 U.S.C. § 12112(b)(5)(A) (2000). Logically, an employer is not responsible to provide a reasonable accommodation if the employer does not have actual knowledge of the disability. However, the employer will be responsible for accommodating where the disability was apparent (i.e. employer should have known of the disability). Where the disability is not known or apparent, the employer can require documentation of the disability. "Accommodation" is not required if it would be an undue hardship to business—i.e.

and often difficult to apply. What constitutes a "reasonable accommodation" is decided on a case-by-case basis and often depends on factors such as the size of the employer's business, the needs of the business, its financial ability to provide an accommodation, or the number of alternative jobs available.[62] Some examples of a reasonable accommodation are: making existing facilities readily accessible to individuals with disabilities; modifying equipment or furniture; or restructuring jobs, including part-time work, telecommuting, or a modified work schedule.[63]

Employees may also have rights under the ADA because of prohibited inquiries. With some exceptions, an employer may not ask an applicant whether the person has a disability, or about the nature or severity of the disability, before an offer of employment is extended.[64]

Finally, the discrimination prohibited under Title I of the ADA has been interpreted to prohibit harassment due to an individual's disability.[65] Similar to Title VII, retaliation against a disabled employee after the employee has asserted her rights is also prohibited under the ADA.[66]

> PRACTICE TIP. The obligation to provide a reasonable accommodation does *not* require the employer to create a new job for a disabled employee, nor to replace another employee with a disabled employee..

### 4. Actions Under the Age Discrimination in Employment Act

The ADEA prohibits public and private employers, labor organizations, and employment agencies from discriminating on the basis of age against job applicants and employees forty years of age and older.[67] All of the ADEA complaints at the Clinic have been filed

accommodation requires "significant difficulty or expense" to implement. *See id.* Some of the factors the court will consider are the resources of the employer and the impact of the accommodation on the facility. *See id.*

62. *See* 42 U.S.C. § 12111(10)(B) (2000).

63. *See* EEOC QUESTIONS AND ANSWERS, *supra* note 18.

64. *See* 29 C.F.R. § 1630.13(a).

65. *See, e.g.*, Flowers v. S. Regional Physician Servs. Inc., 247 F.3d 229, 235–36 (5th Cir. 2001) (finding a cause of action for disability-based harassment under ADA).

66. *See* 42 U.S.C. § 12203(a) (2000).

67. *See* 29 U.S.C. § 623(a)–(c), 630(a) (2000).

under the disparate treatment theory.[68] The ADEA also prohibits retaliation against an employee filing a claim.[69]

To establish a prima facie case, the CP must show that: (1) he is at least forty years old; (2) he suffered an adverse employment action; (3) he was qualified for the position he either lost or was not hired for; and (4) a person younger than the plaintiff was selected for the position.[70] Once the CP establishes a prima facie case, the burden shifts to the employer to present evidence of a legitimate nondiscriminatory reason for the adverse action.[71] If the employer can show a legitimate nondiscriminatory reason, the burdens of production and persuasion return to the CP to produce sufficient evidence to allow a reasonable jury to find that the employer had intentionally discriminated against the plaintiff.[72]

> PRACTICE TIP. Causation must be established by the CP, who must prove that his age had a determinative influence on the adverse employment action.

### 5. Actions Under the Equal Pay Act

Congress enacted the EPA in 1963, requiring covered employers to pay women and men equal pay for equal work in the same establishment.[73] The EPA and Title VII offer alternative, but complementary, bases for challenging pay differences based on a worker's sex.

For a prima facie case under the EPA, a CP must show that: (1) in the same establishment[74] (2) the employer pays different wages to employees of the opposite sex, (3) who perform equal work on jobs requiring equal skill, effort, and responsibility, and (4) the jobs are

68. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (stating that the disparate treatment theory is available under the ADEA).

69. *See* 29 U.S.C. § 623(d).

70. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) (accepting the *McDonnell Douglas* analytical framework for an ADEA case).

71. Though not heavily relied upon by employers, the defense of "reasonable factors other than age" (RFOA) might be raised at this point. RFOA provides that an action otherwise prohibited under the ADEA is not an unlawful employment practice "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). For a historical description of the RFOA defense, see generally Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. REV. 155 (1986).

72. *See* Greene v. Safeway Stores, Inc., 98 F.3d 554, 558–60 (10th Cir. 1996).

73. The objective of equal pay legislation is to raise women to the wage levels enjoyed by men. *See* 109 CONG. REC. 2714 (1963).

74. The term "establishment" has been construed to mean "a distinct physical place of business." A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945).

performed under similar working conditions.[75] Discriminatory intent is *not* an element of an Equal Pay Act case.[76] Ordinarily, EPA complaints are not mediated as part of the EEOC's program.

> PRACTICE TIP. The definition of "establishment" has been broadly construed by the courts. Where the employer maintains centralized control and administration of separate job sites, they will be considered a single establishment under the EPA.
>
> PRACTICE TIP. To establish the "equal work" element in the prima facie case, a female plaintiff does not have to establish that her job is identical to a higher paid job held by a male but rather that the two jobs are "substantially equal."

For purposes of this article, only the four federal anti-discrimination statutes that the EEOC administers have been discussed. However, additional legal claims often become part of an EEOC mediation. These additional claims often bolster the alleged claim of discrimination and are of independent importance to the settlement of the CP's case.[77]

## D. Remedies

### 1. Types of Remedies

The twin goals of employment discrimination laws are to put the CP in the position she would have been in but for the discrimination and to prevent future discrimination.[78]

To accomplish these goals, there are generally three types of money damages available as remedies for employment discrimination: (1) compensatory damages for items such as medical expenses and emotional distress;[79] (2) back pay, the money that the CP would have

75. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (setting forth the four elements needed to establish a prima facie case).

76. *See* Peters v. City of Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987).

77. *See* discussion *infra* Part I.E.

78. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–21 (1975) (enunciating the "make whole" remedial principle governing employment discrimination cases); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.21, 767–68 (1976) (enunciating a secondary remedial principle, "rightful place" relief, to put the employee in the position she would have been in had the discrimination not occurred).

79. *See* BELTON & AVERY, *supra* note 18, at 807. However, compensatory damages are not available under Title VII in disparate treatment cases involving mixed-motive claims, where the adverse employment action was motivated by both a legitimate non-discriminatory reason and an unlawful discriminatory reason. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2000). In mixed-motive cases, an employer will not be held liable if it can prove that even if it had not taken the plaintiff's "protected status" into account, it would have come to the

earned if the discrimination had never taken place, and the CP had not been either refused employment or terminated from employment;[80] and (3) front pay, the amount in wages and benefits that the CP will lose *after* the judgment date (or, for the purposes of this article, the mediation date).[81] In a particularly strong case, punitive damages may also be available.

> PRACTICE TIP. Compensatory damages are often the basis of high initial demands in a negotiation or mediation. Damages for emotional harm, however, can be recovered only up to a "cap" that depends on the size of the employer. It is often advantageous for a CP to sue under state law rather than federal law, as there may be no such caps under state law.
>
> PRACTICE TIP. Mitigation Requirement: A CP is responsible for mitigating damages for lost wages. The amount of wages the CP earned or could have earned with reasonable effort is subtracted from any back pay owed by the respondent. However, unemployment compensation is NOT subtracted from back pay.

There are a number of equitable remedies that courts can fashion to achieve goals other than financial compensation for the harm a CP has suffered. Correction of a discriminatory policy may be available as a remedy. Adequate protection from retaliation is another remedy, for instance, by directing supervisors not to take retaliatory action, or by transferring either the supervisor or the CP. Other remedies may also be available. However, not all federal anti-discrimination statutes permit these additional remedies.[82] In a negotiated settlement, of course, any remedies acceptable to the parties are possible.

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same decision regarding that plaintiff. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989). Compensatory damages are defined under the Civil Rights Act of 1991 to include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." 42 U.S.C. § 1981a(b)(3) (2000).

80. Back pay is based on the make-whole principle of compensating victims of unlawful employment discrimination for the economic losses they have suffered from the date of the occurrence of the discriminatory act to the date of the entry of judgment (or settlement). *See* Thorne v. City of El Segundo, 802 F.2d 1131, 1133–34 (9th Cir. 1986).

81. Where special circumstances justify a denial of reinstatement, the courts generally award the employee front pay, often considered a substitute to reinstatement. *See, e.g.*, Avitia v. Metro. Club of Chi., 49 F.3d 1219, 1231–32 (7th Cir. 1995) (discussing the use of front pay). Front pay may also be awarded if the job the CP should have had is not available.

82. For example, a reinstatement order may be issued by a court as an affirmative injunction directing the defendant to re-employ (or employ) the plaintiff in the job that

### 2. Attorney's Fees

All major federal statutes prohibiting workplace discrimination allow prevailing parties to collect their attorney's fees.[83] There have been only a few cases in which courts have found unique circumstances that warranted a denial of fees to prevailing plaintiffs.[84]

## E. Related Federal and State Actions

Ordinarily a respondent will agree to a mediation agreement only if it includes a global release that releases the respondent from any and all liability to the CP.[85] The release covers any cause of action the CP may have, whether or not the CP is aware of the claim, including any state employment discrimination claims. A global release also covers all rights based on facts not known to the CP—even though state law ordinarily protects a party from surrendering rights based on unknown facts.[86]

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she had or would have had but for the discriminatory act. *See* 42 U.S.C. § 2000e-5(g)(1); *see, e.g., In re* Nevada Consol. Copper Corp., 26 N.L.R.B. 1182, 1235 (1940) (ordering persons discriminatorily refused employment hired with "any seniority or other rights and privileges they would have acquired, had the respondent not unlawfully discriminated against them"); *In re* Phelps Dodge Corp., 19 N.L.R.B. 547, 603 (1940) (ordering employees reinstated "without prejudice to their seniority or other rights and privileges").

83. For example, Title VII provides that a "court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States" to recover reasonable attorney's fees (including expert fees) as part of costs. *See* 42 U.S.C. § 2000e-5(k). The ADA incorporates the same provision of Title VII. *See* 42 U.S.C. § 12117 (2000). "Prevailing parties"—whether plaintiffs or defendants—can be awarded fees under Title VII and the ADA. *See* 42 U.S.C. §§ 2000e-5(k), 12117. However, under the EPA, only a prevailing plaintiff is entitled to benefit from the fee-shifting provision. *See* 29 U.S.C. § 216(b) (2000).

84. *See* Phelps v. Hamilton, 120 F.3d 1126, 1133 (10th Cir. 1997) (remanding where District Court refused attorney's fees). *See generally* Michael J. McNamara, Note, *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320, 320–21 (1982) (contending that courts should always determine if "special circumstances" exist that would make the award of attorneys' fees unjust).

85. A typical global release signed by Clinic clients may read as follows:

> In exchange for the above payment and other promises and agreements set forth herein, Employee does hereby completely release and forever discharge employer, its officers, directors, agents, employees, attorneys, successors and assigns from all claims, rights, demands, actions, obligations, liabilities and causes of action of any and every kind, nature and character whatsoever, whether based on a tort, contract, statute, or any other theory of recovery, and whether for compensatory or punitive damages which Employee may now have, has ever had, or may in the future have, arising or in any way connected with her employment with Employer, or the manner in which that employment terminated.

86. *See, e.g.*, CAL. CIV. CODE § 1542 (West 1982) (barring a general release for claims in his favor that a creditor does not know about when signing the release). To protect

For this reason a representative must be familiar with related claims that a CP may have against a respondent. Sometimes settlement of these related actions is more important to the parties at a mediation than the possible breach of one of the federal anti-discrimination statutes.

> PRACTICE TIP. The statute of limitations for common law and other statutory claims is not ordinarily tolled during an EEOC investigation, so attorneys need to be careful not to lose rights under these claims during the EEOC process.

### 1. Typical State Actions

This section focuses on actions available under California law. They may be considered typical of remedies available in many states.[87]

#### a. State Fair Employment and Housing Law (FEHA)

California's FEHA is similar to federal law under Title VII, ADA, ADEA, and the EPA. It is often advantageous for employees to bring a discrimination lawsuit in a California state court. Under FEHA there is no cap on damages, and the employer is vicariously liable for acts by supervisors.[88] There is also *personal liability* for supervisors if there is retaliation or harassment but no personal liability for discrimination.[89] The state statute of limitations for FEHA is tolled while charges are investigated by the EEOC.[90]

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against future claims, a global release typically includes language specifically waiving rights under this section. Typical language in releases signed by Clinic clients might be:

> Employee will surrender all rights to unknown claims or actions and expressly waives any rights or protection she may have under California Civil Code section 1542 which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

87. For a comprehensive guide to workers' rights, see generally LEGAL AID SOCIETY OF SAN FRANCISCO, EMPLOYMENT LAW CENTER, WORKERS' RIGHTS CLINIC: EMPLOYMENT LAW MANUAL (Sept. 1999) (on file with the author).

88. *See* Fiol v. Doellstedt, 58 Cal. Rptr. 2d 308, 316 (Ct. App. 1996).

89. *See* Reno v. Baird, 957 P.2d 1333, 1335–36 (Cal. 1998).

90. *See* EEOC v. Farmer Bros. Co., 31 F.3d 891, 902–03 (9th Cir. 1994).

PRACTICE TIP. Under FEHA, disability rights are explicitly broader than under federal law. For example, FEHA protects all employees with *any* "limitation," not only those with a "substantial limitation," of a major life activity. Also, the "limitation" is determined without respect to any mitigating measures, such as eyeglasses.

PRACTICE TIP. FEHA also covers discrimination based on sexual orientation.

### b. Wrongful Termination

Employment in California is "at will."[91] There is, however, a limited right to sue for wrongful termination if the termination is in violation of public policy,[92] generally in these four categories:

- An express prohibition of termination by statute or regulation (for example, termination because of failure to testify untruthfully in a FEHA investigation, when FEHA specifically enjoins any obstruction of an investigation);[93]
- Exercise of a constitutional or statutory right or privilege, such as taking family leave for medical emergencies;[94]
- Refusal to engage in unlawful conduct;[95] and
- Whistleblowing: reporting an unlawful activity to a governmental agency.[96]

### c. Breach of Contract

There are four possible state causes of actions available in this category:

- Breach of express contract. The express contract may be in the employment contract, the employment manual, the collective bargaining agreement, or memos of understanding. The statute of limitations for breach of a written contract is four years in California.[97]

91. *See* CAL. LAB. CODE § 2922 (West 1989).

92. *See* Tameny v Atl. Richfield Co., 610 P.2d 1330, 1336–37 (Cal. 1980) (holding that the employer was subject to tort liability when, in violation of public policy, it terminated an employee who refused to commit criminal acts.)

93. *See* Gantt v. Sentry Ins., 824 P.2d 680, 688–89 (Cal. 1992).

94. *See generally id.* at 683–88 (discussing bases of the public policy exception).

95. *See Tameny*, 610 P.2d at 1331.

96. *See* CAL. LAB. CODE § 1102.5 (West 1989).

97. *See* CAL. CIV. PROC. CODE § 337 (West 1982).

- Breach of implied contract to terminate only for good cause.[98]
- Breach of any other implied term, such as an agreement not to demote.[99]
- Breach of the implied covenant of good faith and fair dealing.[100]

### d. Workers' Compensation Laws

Any employee who suffers a work-related injury, illness, or disability is entitled to worker's compensation.[101] In addition, section 132a(1) of the California Labor Code prohibits an employer from discriminating or retaliating against an employee for filing or announcing an intention to file a worker's compensation claim.[102] If an employer does so, an employee can recover an additional penalty from the employer.[103]

PRACTICE TIP. If an employee has retained an attorney who has filed a workers' compensation claim against the employer for penalties, alleging retaliation or discrimination under section 132a, that attorney should be contacted before the mediation to see if the attorney will consent to negotiation of the section 132a claim as part of the overall settlement in the EEOC mediation.

PRACTICE TIP. The surrender of worker's compensation rights ordinarily cannot be negotiated as part of a mediated settlement agreement. Respondents have been willing to except those rights from a global release.

98. *See* Pugh v. See's Candies, 171 Cal. Rptr. 917, 927–28 (Ct. App. 1981). Note that the statute of limitations is two years for this action. *See* CAL. CIV. PROC. CODE § 339 (West Supp. 2003).

99. *See, e.g.*, Rabago-Alvarez v. Dart Indus., Inc., 127 Cal. Rptr. 222, 225 (Ct. App. 1976) (allowing employee to proceed with wrongful discharge action upon a showing that she had been hesitant to leave her previous job, but had agreed to do so based on employer's promise of permanent employment).

100. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 401 (Cal. 1988) (holding that remedies for such a breach will sound in contract, not in tort.)

101. *See* CAL. LAB. CODE §§ 3600–3602 (West Supp. 2003).

102. *See* CAL. LAB. CODE § 132a(1) (West Supp. 2003).

103. In California, the exclusive remedy for a claim of employer retaliation for filing a workers' compensation claim is to file a petition with the state Workers Compensation Appeals Board. *See id.*; Angell v. Peterson Tractor, Inc., 26 Cal. Rptr. 2d 541, 545 (Ct. App. 1994). However, section 132a does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies. *See* City of Moorpark v. Superior Court, 959 P.2d 752, 758 (Cal. 1998).

### e. Wage and Hours Rights

Employee claims for the violation of overtime pay laws[104] have sometimes been part of EEOC-mediated agreements.

### f. Statutory Whistleblowing Claims

Under statutory whistleblowing laws, an employer may neither prevent an employee from reporting non-compliance with state or federal law nor take an adverse employment action as a consequence of such a report.[105]

### g. Right of Privacy

There may be a violation of the common law right to privacy if an employee is placed in a false light, such as being wrongfully accused of dishonesty or some other act that publicly portrays her in a negative light.[106] Also, public disclosure of facts of a private nature and engaging in prohibited inquiries, such as asking questions about an employee's disability, may violate the privacy rights of an employee or prospective employee.[107]

## 2. Related Federal Actions

### a. Family Medical Leave Act

The federal Family Medical Leave Act[108] makes available leaves of absence for medical reasons and family care.[109] Some states have their own related laws. In California, for instance, a leave of absence is available for a woman who is unable to work because of pregnancy, childbirth, or a related medical condition.[110]

A private employer of fifty or more workers must grant a request by any eligible employee to take up to twelve work weeks off in a twelve month period.[111] To be eligible, an employee needs to have had twelve months of service from date of hire and at least 1250 hours

104. *See, e.g.*, CAL. LAB. CODE § 510 (West Supp. 2003) (setting the maximum number of hours an employee can work per day (eight hours) and per week (forty hours) without overtime compensation); CAL. LAB. CODE § 512 (West Supp. 2003) (requiring that employees receive a 30-minute meal period for every five hours worked).

105. *See* CAL. LAB. CODE § 1102.5 (West 1989).

106. *See* B.E. WITKIN, 5 SUMMARY OF CALIFORNIA LAW § 584 (9th ed. 2002).

107. *See id.* § 583. Examples of such private facts include sexual relations, a medical diagnosis, or other intimate details of personal life.

108. 29 U.S.C. §§ 2601–2654 (2000); 5 U.S.C. §§ 6381–6387 (2000).

109. *See* 29 U.S.C. § 2612(a)(1) (2000).

110. *See* CAL. GOV'T CODE §12945(b)(2) (West Supp. 2003).

111. *See* 29 U.S.C. §§ 2611(4)(A), 2612(a)(1) (2000).

of service during the previous twelve months.[112] Leave may also be taken because of an employee's own serious health condition that makes the employee unable to perform one or more essential functions of her position.[113] The employer must guarantee the employee the same or a comparable position on termination of the leave and must continue to provide medical benefits during the leave;[114] the employer may require certification from a health care provider.[115] Family medical leave is sometimes at issue during mediations, especially in ADA cases.

### b. Employee Retirement Income Security Act of 1974 ("ERISA")[116]

This federal statute establishes the rules for pension plans set up by private employers and guarantees rights to the beneficiaries of those plans. An employer cannot discharge or take other actions against anyone to interfere with any right the person has under an employee benefit plan.[117]

### c. Consolidated Omnibus Budget Reconciliation Act ("COBRA")[118]

Under this amendment to ERISA, an employer whose workers lose the health benefits provided through their employment due to a "qualifying event" must be given the option of buying coverage for themselves and their families for limited periods of time through the employer's group health plan.[119] "Qualifying events" are termination of employment, reduction in hours, death, divorce, legal separation, Medicare entitlement, child ceasing to be a dependent, and, for retirees, the employer's bankruptcy.[120] Termination of employment will not qualify if it is for "gross misconduct."[121] If the mediated agreement involves the CP's voluntarily leaving his employment, subsequent health benefits are often one of the CP's important concerns.

112. *See* 29 C.F.R. § 825.110(a)(1)–(2) (2000).
113. *See* 29 U.S.C. § 2612(a)(1)(D).
114. *See* 29 U.S.C. §§ 2614(a)(1), (c) (2000).
115. *See* 29 U.S.C. § 2613 (2000).
116. 29 U.S.C. §§ 1001–1453 (2000).
117. *See* 29 U.S.C. § 1140 (2000).
118. 26 U.S.C. § 4980B (2000).
119. *See* 29 U.S.C. § 1161(a) (2000).
120. *See* 29 U.S.C. § 4980B(f)(3).
121. 29 U.S.C. §§ 1163(2) (2000).

## II. The EEOC Mediation Process

The EEOC describes mediation in this way:

> Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated resolution of a charge of discrimination. The decision to mediate is completely voluntary for the charging party and the employer. Mediation gives the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into resolutions. A mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. The mediation process is strictly confidential. Information disclosed during mediation will not be revealed to anyone, including other EEOC employees.[122]

This description only outlines the process and does not precisely describe how a particular mediator conducts a mediation. These mediations do not have a set format, and there are no procedural rules governing the order and scope of what happens at any given stage. Some of the variables that determine what actually happens at a particular EEOC mediation are:

- The specific discrimination law under which the CP has filed a claim. If the law is unclear, it can result in arguments during the mediation about the analytic framework for legal liability.
- The mediator's style and experience and whether he is a lawyer. An attorney-mediator tends to be more directive than a non-attorney mediator.[123]
- Whether attorneys represent either or both of the parties and the negotiating style of the parties and/or representatives. Attorneys tend to take a more legalistic approach; parties representing themselves tend to be more emotional about the charges and countercharges. A negotiating style can be aggressive and place more emphasis on litigation or be more conciliatory.
- Whether the CP is still employed by the respondent and the financial state of the employer. If the CP is still employed, a mediator will tend to focus on the continuing relationship; when all ties have been severed, the ability of the parties to get along in the future is not a factor. The financial condition of the respondent is often relevant to the amount of money availa-

122. MEDIATION FACTS, *supra* note 8.
123. *See also* discussion *infra* Part II.A.

ble for immediate settlement but might also be related to the respondent's fear of others' filing suit.

On the whole, however, the way the various personalities react and interact during the mediation shapes the process as much as anything else.

No two mediators have exactly the same approach or follow the exact same format. In fact, an effective mediator will probably change his approach and format from case to case. Mediators develop their own techniques to help the parties come to an agreement. For example, one mediator may make food available during the mediation, while another might feel the chances for agreement are better if the parties are hungry and avoid taking a lunch break.

Nevertheless, there are definite patterns in mediators' approaches and the formats they choose to follow.

### A. Mediator's Approach

Even though a mediator does not "impose a decision upon a party," everything she does can influence the ultimate result. To achieve a successful mediation and maximize the result for a client, a representative should try to understand the mediator's underlying approach.

There are two basic styles, or approaches, that mediators follow: the facilitative approach and the directive approach. In a *facilitative* approach, also called an "interest based" or "transformative" approach, the mediator approaches the process in an accommodating and non-judgmental manner.[124] In a *directive* approach, also called an "evaluative" or "rights-based" approach, the mediator approaches the process by expressing her opinion regarding the strengths and weaknesses of each party's position based on legally cognizable rights. An extreme example of each of these approaches would sound something like this:

> Facilitative mediator: "I'm here to help the parties communicate. I will make no predictions as to what might happen in court and will not discuss the law. My role is only to facilitate communication in the hope that when the parties understand each other and their real interests, they will want to come to a fair agreement."
>
> Directive mediator: "I'm here to tell the parties what will happen to this case down the road. I will point out the strengths and weaknesses in each party's case and communicate those strengths

124. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 41–46 (1996) (analyzing different styles of mediation).

> to the opposing party. When the parties understand this and my prediction as to the likely outcome of the case, they will come to an understanding and an agreement that makes sense."

Very few, if any, mediators operate on the extreme ends of these approaches, but a tendency towards one or the other approach will influence what happens during the mediation. For example, the facilitative mediator will want the parties to stay together as long as possible, speak about their feelings, and lay out their cards, with the attorneys having smaller roles. Much the opposite is often true for the directive mediator, who may feel uncensored communication between the parties will lead to hardening of positions and conflicts that will doom the mediation. Which of these approaches the mediator takes is significant in preparing for the mediation.

### B. Format of the Mediation

A mediation does not have a fixed format compared with a trial or even an arbitration. A mediator will often tell the parties that it is their process and that what happens will be determined by what is or is not working. However, a mediator's approach often influences the format of a mediation. A facilitative mediator will encourage openness and try to effect a "transformative" outcome.[125] A directive mediator will tend to separate the parties as soon as possible and focus on settling based on costs weighed against benefits. A common format for mediation includes the following procedures.

#### 1. Separate Meeting

The mediator meets with the parties separately for a short time to answer questions and ensure that the parties are comfortable.

#### 2. Opening Joint Session

Both parties and their representatives meet together with the mediator. The mediator explains what will happen and attempts to create a relaxed, non-combative atmosphere. Some mediators set ground rules at this meeting, but they are generally limited to do not interrupt, show respect, and listen carefully to the other side. The parties

125. A "transformative" outcome occurs where a mediator successfully provides "empowerment" and "recognition" to each party by encouraging each party to develop empathy for the other side, which gives effect to a fair settlement agreement that satisfies both parties. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION—RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 12 (1994).

will be required to sign a confidentiality agreement, if this has not happened previously.[126]

Either the parties or their representatives then deliver opening remarks presenting their view of the case. The CP's representative discusses the basis for the discrimination charge; the respondent's representative usually gives a nondiscriminatory reason for any adverse employment action. These statements can help each side understand the other side's point of view.

The mediator may ask some follow-up questions and may allow each side to ask for clarifications. No cross-examination is permitted.

### 3. Separate Meetings

The mediator separates the parties and meets with each alone in what is called a "caucus." The initial meeting with the CP is generally longer than the session with the respondent. The CP is usually not experienced with litigation and often sees the mediator as someone who needs to be won over.

### 4. Shuttle Diplomacy

The mediator moves back and forth between the parties and, like a true diplomat, tries to present information from one side to the other in a sensitive way. It is during these separate meetings that the mediator is ordinarily the most helpful to the negotiation process.

The mediator during this phase must have the ability to present offers and counteroffers and tell one party the other's point of view in a non-threatening, non-confrontational way. Many mediators do this difficult diplomatic task very well. Each side is able to express its negative feelings about the other to the mediator, but the negotiation can still move forward because the parties do not hear the negative comments directly.

During this phase the mediators also provide a reality check for both sides. If a CP expects $100,000 for an insensitive comment, or a respondent thinks a serious case will settle for $2,000, and the mediator—a neutral party who has heard both sides—says "no way," this can help check such wishful thinking. Mediators vary in their willingness and ability to evaluate cases. Some never give an opinion, others do if asked, and others may even offer a mediator's proposal.

126. See Appendix C for an example of a confidentiality agreement.

### 5. Another Joint Meeting

In some cases the mediator may interrupt the private meetings and bring the parties together for face-to-face discussions. To break a deadlock, it might be important for the parties to hear factual or legal arguments directly from each other.

### 6. Agreement

If parties agree to the basics of a settlement, the mediator will continue to shuttle back and forth working out details that are important for each side.

A memorandum of agreement may be handwritten or typed, and it may include only basic provisions or the entire agreement reduced to a writing. Sometimes the parties are brought together for the signing; sometimes they are kept apart even during this phase.

### 7. Continuing Mediation When No Agreement

If the mediation is not successful—that is, it does not result in a signed agreement—the process is not necessarily over. One option is for the mediator to ask the respondent to keep the last offer open and to give the CP a few days to think it over. Sometimes the CP's representative will ask the mediator to do this even if the client is not interested. If it seems that there is a chance for further movement, another option is to keep the negotiation process open and continue it by telephone. Rarely will a mediator ask the parties to return for face-to-face negotiations.

If it appears that there is no hope that the parties will reach agreement, the mediator can declare an impasse and give the CP two options: One is that the mediator will send the case to the EEOC investigation unit, which will give the respondent fifteen days to file a response to the charge. The other is to have the CP provided with an immediate right-to-sue letter, with the EEOC taking no further action.

In any event, there is a "firewall" between the mediation unit and the investigation/litigation unit of the EEOC: the mediator is bound by the confidentiality agreement and will have no communication with anyone at the EEOC about what took place during the mediation.

## III. Representing a Charging Party in an EEOC Mediation

The CP's representative in an EEOC mediation plays several roles. The goal of the representative is a successful mediation with a

fair settlement for his client. To reach that goal, the representative may have to function as an investigator, advisor, advocate, representative, negotiator, and collaborator. All of these roles must be undertaken without the benefit of any formal discovery mechanisms or power to subpoena or present witnesses.

### A. Gathering Information

The most difficult part of a representative's job often takes place before the mediation. There is much to do in a relatively short time. Assuming no lawsuit has been filed before the mediation, there is no discovery available to gather information. There are neither depositions, interrogatories, formal requests for production of documents, nor the ability to subpoena witnesses. While the CP is always free to hire a private investigator, this is unlikely to happen at such an early stage. Despite these limitations, a representative can still learn a good deal if he knows where and how to look.

#### 1. The Client

The representative's primary source of information is ordinarily the client. This person is obviously not an objective source. The client has a stake in the outcome of the dispute and strong emotions about what has taken place, as well as practical and material needs. Many CPs are in a fairly desperate state economically, and this may have an effect on the information they provide.

The USF Clinic usually schedules at least two hours for the initial interview. The student assigned to the case or the Clinic Director has usually had some contact with the client before the interview and already knows something about the case. The interview starts with some small talk, during which the representative tries to establish rapport and make the client feel comfortable. The interviewer might also answer some general questions. After that the client is asked to describe the alleged discrimination.

It is important to let the client initially tell the story from her point of view. The client may need to pour out factual information, legal theories, economic worries, and sensitive physical and mental problems. If the client has been "divorced" (terminated) from the workplace, the associated stress and perceived disrespect may be highly emotional and traumatic, particularly if the client had worked there for many years. The representative needs to know the person as well as the relevant legal facts. A good interview allows the client to tell her story. Cutting her off too quickly may frustrate her and damage

her rapport with the Clinic, which could hurt chances of resolving the case later.

Even if the client has brought documents to the interview, she should first be encouraged to explain the events in her own words. Of course, if there is a document that might be key to the case, it should be studied right away. The representative should then probe for details that are legally relevant. For more complex claims, such as an ADA claim, the Clinic uses a checklist to ensure that important points are not forgotten.[127]

The representative should be alert for types of discrimination other than those checked off on the EEOC intake form. Often the client goes to the EEOC focused on certain facts and one theory of discrimination, but other claims may prove even stronger. For example, often there has been some form of retaliation, which might be easier to prove than the discrimination itself. When a client is at least forty years old, there might be a valid age discrimination claim or there might be a "perceived disability" claim. Since there is a short time period for filing a claim,[128] a representative has to be ready to have the client immediately file any new charges. Other claims may also have short statutes of limitation. If an ADA claim involves an on-the-job injury, for example, a client may need to be advised to file a workers' compensation claim before the statute of limitations runs out.

After the initial interview, the representative continues to probe for information, either on the telephone, by e-mail, or in person. Sometimes the information gathering process goes on until the time of the mediation and sometimes into the mediation itself. It is not uncommon to learn new facts at the last minute. In one claim that included age discrimination, the representative learned that the true age of the client was under forty. In another, a representative found out that a client had previously filed a related federal lawsuit. In yet another case, the representative learned that the client had a work-related illness. All of these revelations took place on the day of the mediation.

During the early interviews, the representative should never forget to probe for weaknesses in the client's case. Many clients will want to hide facts that they believe are harmful to their case on the theory that the Clinic will do a better job if the client provides only the infor-

127. See Appendix B for an example of a checklist.

128. *See* discussion *supra* Part I.B.

mation that she believes will help win her case. Just as a litigator never wants to be surprised by the cross-examination of her witness, a representative does not want to be surprised at mediation by information that hurts the client's case. If the representative knows all the information—good and bad—in advance, it is far easier to be properly prepared.

Surprise is not the only problem when a client hides harmful information: the loss of the client's and the representative's credibility can be even more damaging. In a jury trial, if evidence hurts the credibility of a party, the jury may disbelieve everything else that they say. In a mediation, if there are misstatements during the CP's presentation, the respondent's attorney may halt serious negotiating or might spend an inordinate amount of time focused on the misstatement. A respondent who may have been somewhat sympathetic to a CP might become very negative because he believes he is dealing with "a liar."

Clients are often afraid to tell their representatives that they have done anything wrong on the job. The client should be told that even if she has made job-related mistakes, violated rules, or performed poorly on occasion, discrimination or harassment may still have occurred. Although the respondent's attorney is likely to focus on "poor performance," tardiness, or any other evidence available to show that the "adverse employment action" was caused by the client's behavior, this does not preclude a valid claim.

If the client has made mistakes, the representative needs to explore if she was treated or punished differently from others who made similar mistakes. Few employees have perfect job performance. If the client has been treated differently from others, and if there is a connection between that treatment and a protected category under employment discrimination laws, these laws may have been violated.[129]

Another point the representative needs to explore is whether the client complained about the discrimination or harassment. If so, the representative needs to know how the employer responded to the complaint. If the employer investigated the allegation, the representative needs to get as many details as possible to ascertain if the investigation was reasonable and could serve as a defense for the employer.

Particularly if the respondent is a small company, the client may know the demographic makeup of the workforce. In an age discrimination case, for instance, if the client who was terminated is over sixty

129. *See* discussion *supra* Part I.

and the rest of the workforce is under forty, this can be very persuasive evidence.

### 2. The Client's Supporters

Often a client comes to an interview with a spouse, partner, relative, co-worker, or close friend, who may be able to supply useful information. If the representative thinks something important can be learned, a supporter should be interviewed that day.

Whether the person should remain in the room during the interview should be decided on a case-by-case basis. Sometimes they provide information and perspective. In other instances they may dominate the interview. This cannot be allowed to happen: they should not interrupt the interview unless they are specifically asked for information. If this is too difficult for them, they may have to leave while the client is being interviewed. The representative should assure them that they will be consulted in the future. However, they should be told that since they will not be permitted in the mediation, it is better to see how the client does without their help.

### 3. Documents

The client is asked to supply her representative with any documentation that supports her claim. Often a client will come to an initial interview with a briefcase full of papers: e-mails, memos, notes, and any other papers the client thinks are relevant. Although some of this material may be helpful, often the documentation simply does not support the inferences that the client thinks it does. Still, it all needs to be checked in case there are good leads or even the rare "smoking gun." Documentation of any kind often helps to fill in the blanks so that the representative can learn what actually happened.

Usually the most useful documents are performance reviews, doctor bills or releases, medication receipts, and other records that relate to either liability or damages. Employee manuals and union contracts may be extremely helpful, since many employers do not follow their own written procedures. That may bolster the claim of disparate treatment and may provide a basis for a claim under a contract theory or other labor law provision.[130] Finally, the representative should always ask for documents that hurt the client's claim, as well as those that support it.

130. *See* discussion *supra* at note 121.

The Clinic requires its student representatives to ask for documentation as soon as possible. The personnel file is particularly important. Even if the client believes it contains nothing of value, it should be checked. An employee, or ex-employee, has the right to inspect her own file,[131] and sometimes interesting information—both helpful and harmful—will turn up in the file.

### 4. Witnesses

Witnesses, particularly independent witnesses who are not parties or related to parties, can be a key to success in mediations. The importance of a written statement, or even an oral one, from a witness who supports the client cannot be overemphasized. Such a statement can transform the case from a "he said, she said" scenario, with the burden of proof on the CP, to one where the respondent perceives serious exposure to a damaging lawsuit.

The client needs to provide specific names and a description of likely testimony from each person. A representative is *always* hoping for a supporting witness who previously worked for the employer but who no longer does. Such a witness is most likely to tell the truth in support of the CP's case. The other side knows this, too. A written, sworn statement from such a witness can change the complexion of the entire mediation.

On the other hand, if a witness to the discrimination still works for the employer, often his help cannot be relied upon. Clients almost always say in interviews that current employees will surely back up their story. In fact, except in rare instances, current employees do not want to be involved in any action against their employer. Often all the representative can get is lukewarm support, a statement far different from what the client described, and a request from the witness not to reveal his name. Nonetheless, even a vague statement is helpful.

If the client was a union member, the union might help find witnesses or other valuable information. Union representatives often know where "the bodies are buried." They can be a gold mine of information and may know of other problems the company has had with harassment or discrimination or other questionable business practices, all of which may be detrimental to the respondent's negotiating position.[132]

131. *See* CAL. LAB. CODE § 1198.5 (West Supp. 2003).

132. Even if the client has lost a union grievance or arbitration about the claimed discrimination, this does not affect her rights under employment discrimination statutes.

Other helpful witnesses not connected with the workplace might be a spouse, fiancée, relative, or friend. Such witnesses, however, will not necessarily advance the prospects for a successful mediation. Sometimes they are level-headed and realistic and remember details. But often they are unrealistic and vindictive and push clients to make demands well beyond what is reasonably achievable at the mediation.

### 5. Assessing Damages

The representative should start working on a realistic assessment of damages as early as possible. It is never particularly helpful if a client goes into a mediation with only a demand for a large lump sum. Clients need to know that there must be a basis for any amount that is claimed: What economic harm has the client suffered in the past and what are future anticipated costs because of the discrimination? If the representative feels that the client is ready to hear it, it should be explained that large amounts for compensatory damages—mental or physical pain and suffering—and for punitive damages are almost impossible to receive in a mediation. It is even more difficult to receive compensation for pain and suffering when there is no concrete evidence to support the claim, such as psychiatrists' bills or medications for stress-related ailments. But this discussion must be handled with care, as the representative does not want to lose the client's confidence before rapport and trust have been established.

## B. Preparing for the Mediation

### 1. The Assigned Mediator

In EEOC mediations, a mediator is assigned to the case and supplied to the parties free of charge by the government. This mediator might be a full-time EEOC employee or might be a private mediator who has contracted to handle the case, on either a paid or pro bono basis. The mediator might be an attorney with experience in employment issues or might be a non-attorney with a background in psychology or conflict resolution. If the mediator has a conflict of interest because of a prior relationship with one of the parties, she will remove herself from the case. Also, if a party feels for any reason that the mediator assigned would be a poor choice, he can ask for another. This happens rarely.

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Rights under union contracts are not the same as rights under federal law. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47–49 (1974).

It is important for the representative to know the mediator's approach and the format used. These are not difficult to ascertain. There are no rules against ex parte contacts with the mediator. Representatives at the Clinic almost always speak with the mediator before the mediation and are able to ask as many questions as time permits. In fact, mediators often want to do extensive work with representatives before the mediation, in hopes of making the process more efficient. The more information the mediator has and the more details that can be worked out in advance, the better the chance for success during the mediation.

If the representative cannot get information directly from the mediator, she can try to find someone who has worked with that mediator previously. Others who have worked with a mediator may be extremely helpful in providing information about her mediating style. Even simple information, such as whether to expect a lunch break, helps eliminate surprises and, in turn, reduces the client's stress.

### 2. Legal Preparation

A textbook view of a mediation is that its purpose is to come to an agreement that both sides think is fair and that is not necessarily dictated by the law.[133] However, in the context of an employment discrimination mediation, the potential for high defense costs and legal liability are usually the respondent's most important concern. To have credibility with the opponents, a CP's representative must be thoroughly familiar with the applicable law and be ready to show how it supports her theory of the case. Rarely does an abstract sense of fairness encourage a concrete offer.

First, the representative must know thoroughly the specific employment discrimination statutes that the CP claims were violated and the relevant case law interpreting those statutes.

Second, the representative needs to know how other related law applies to the case. Although the road to an EEOC mediation starts with a charge under federal employment discrimination statutes, if the mediation results in a settlement, the respondent will almost always want a global release of all claims.

The representative must be ready to talk about any and all legal issues to protect the client's interests and achieve a fair settlement. In some cases, the respondent's primary motivation for a settlement

133. *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 245 (1984).

comes from the release of rights in statutes the EEOC does not administer.[134]

In most cases the legal rules are fairly straightforward, particularly under the federal statutes. The application of the "facts" from the client's perspective is fairly straightforward, too. If the basis of the case is that the client was fired because of race, there will probably be factual conflicts, but there are not going to be any legal conflicts. Terminating an employee because of race is illegal. Period.

In other cases, the legal answers might not be that clear. Examples of interesting legal issues in recent mediations include: In a harassment case, who is a "supervisor"? What constitutes "constructive termination"? What is a disability? What is a reasonable accommodation? Has there been discrimination based on a perceived disability? Was harassment away from the workplace work-related?

### 3. The Mediation Brief

The written results of a representative's preparation go into a mediation brief. The briefs are written for the mediators to inform them of the client's legal and factual claims. The brief also supplies the mediator with ammunition to persuade the other side that the case is serious. The respondent's representative also prepares and submits a brief. The briefs are almost always confidential and rarely are exchanged by the parties before the mediation.

A representative should speak with the mediator beforehand to determine what should be included in the brief. Some mediators need more information than others about legal issues, particularly if there are issues that do not often arise in employment discrimination cases. The Clinic always includes a detailed fact statement. It is important that the mediator understand the facts from the CP's perspective. If there is relevant material from the employment manuals, union contracts, or other sources, these also should be included in the brief. Once the mediator has a good understanding of the facts, she can function more easily as both an informed neutral and a "devil's advocate," who can point out the possible exposure of each side. A solid grasp of the facts also allows the mediator to spend more time listening to the concerns and the underlying interests of the parties.

In many ways the statement of facts is the most important part of the brief. Most employment discrimination cases are about factual conflicts, where credibility is the central concern. Some examples:

134. *See* discussion *supra* Part I.E.

Was the harasser actually functioning as a "supervisor" even without the title? Was there physical contact? Was there consent? Nonetheless, the brief usually does not include witness statements, since witnesses often wish to remain confidential.

The representative should also be prepared to deal with factual issues the other side may raise. For instance, if the representative anticipates that the respondent will say that the employee was terminated because she missed a day's work or refused to follow orders, counter arguments and evidence should be prepared before the mediation and even included in the brief.

### C. Preparing the Client for the Mediation

The representative must always let the client know what to expect in the mediation. This is a big day for the client, who may have been anticipating it for months. Clients often do not sleep the night before; they may wear lucky outfits and even get sick before, during, and after a mediation session. Letting them know what to expect helps reduce pre-mediation anxiety and may make for a more successful outcome.

#### 1. Assessment of Credibility

The representative should assume the opposing lawyer will be assessing the client's credibility and that everything the client says or does will affect that assessment. This in turn may determine the settlement value of the case. Even how the client sits and listens may affect how the opposing attorney evaluates her credibility and how that attorney thinks a jury will respond. Indeed, sometimes the primary incentive for parties to choose mediation is to allow attorneys to look at and listen to the people involved and assess their credibility.

#### 2. Warning the Client About Danger Points

One of the most difficult moments in the mediation occurs when, in joint session, a client hears the other side's position. A representative does not want the client to be shocked or angry because of what the other side says about her. Clients need to be prepared to hear things they are not going to like and should be instructed to ignore the opposing party's characterizations and threats. The respondent will almost always have an alternate theory for the adverse employment action, usually related to misbehavior by the CP. The respondent often implies that the case has almost no settlement value. Preparing the client for this is crucial. Important decisions have to be

made at the mediation, and the client should not be upset and defensive when those decisions are being made.

The client also has to be ready for a joint session that may be held in a small room and require her to sit across the table from supervisors, human resources managers, and company lawyers. This can be terrifying for the client and may cause a reaction that will not enhance her credibility. A representative can never underestimate the strain of a mediation. Clients have become physically ill, frozen, and had other undesirable reactions even when they knew what was going to happen.

In preparation, what has to be emphasized is that most of the mediation will be spent in private session, away from the respondent's people. A client needs to be told that if at any time she feels uncomfortable in a joint session, she can tell her representative to ask for a caucus with the mediator, or ask the representative to talk privately. This is one of the great advantages of mediation: participants really do have some control over the process.

If for some reason the representative thinks it will be too difficult for a client to have *any* contact with the other side, the representative can ask for the entire mediation to be conducted in caucus. The mediators have always agreed. A representative may lose something by doing this—the chance for the other side to evaluate the client's credibility and an opportunity to look at who might be testifying for the respondent in court—but the circumstances may be such that these advantages are not worth the risk.

### 3. Confidentiality

The representative needs to explain to the client the rules regarding the confidentiality of the mediation. Nothing that is said in the mediation can be used in court, but what the other side learns will not be disregarded if the mediation is unsuccessful. Even though the mediation is confidential, if the case does go to trial, the client can be asked on deposition for the information.[135] The representative often shows clients the confidentiality agreement in advance and goes over any terms that might be confusing.[136]

### 4. Preparing for the Likely Results of Mediation

A representative needs to prepare clients for the likely results of mediation without losing their confidence. This may not be easy. Cli-

135. *See* CAL. CIV. PROC. CODE § 2017(a) (West Supp. 2003).

136. See Appendix C for an example of a confidentiality agreement.

ents often anticipate that a mediation will be a trial-like process where truth will win out in the end. This simply is not the case. Only rarely does one side admit that the other is right, and the mediation settlement will seldom come close to a generous jury award. Also, clients sometimes find it hard to understand that the mediator will not make a decision about who is right and who is wrong.

Clients' ability and willingness to understand mediation outcomes vary greatly. Many clients initially want a settlement as high as the jury verdicts they have heard about and a strong advocate who beats down the other side. They may be somewhat disappointed when they learn that the goals of mediation are negotiation and collaborative problem solving, which will not happen if their representative attacks the other side. A representative needs to deal with unrealistic expectations as early as possible, but should do so in a low-key way so that the representative does not lose the confidence of the client.

### 5. Money Damages

One of the most difficult tasks is to develop a logical demand for damages. Clients will almost always want the representative's opinion of what the case is worth. Clients sometimes want a lot of money—six-figure demands are not uncommon. Others bring the action as a matter of principle and are genuinely uninterested in money even when the law entitles them to compensation.

To develop realistic numbers supported by the law and facts is not always easy. Employment discrimination verdicts range from millions for the plaintiff to a verdict for the defense, very often depending on the composition of the jury. Astronomical settlements and awards are the exception. A huge verdict at trial can happen, but a CP cannot make up damage numbers by relying on newspaper accounts.

The representative must always make sure that money demands are "principled." It is easy to calculate back pay, front pay, medical costs, and other economic damages. But once in the realm of compensatory damages—stress, mental pain and suffering, humiliation—and/or punitive damages, there are no firm guidelines. If the facts of a particular case are particularly horrific, provable, and could infuriate a jury, and if there is a low chance of summary judgment, the settlement value could be quite high. Such cases are rare.

Jury verdicts and settlements for similar lawsuits in the jurisdiction can provide some guidance and help create realistic client expectations. These are summarized in on-line databases and other commercial services.

### 6. Other Client Interests

A representative needs to explore all of a client's interests before the mediation. The more the representative can broaden the client's perspective on the scope of the mediation, the more likely the mediation will be successful. Sometimes the money a client wants may be much more than the respondent is willing to pay. However, the client may have important interests other than money, and thinking about them in advance of the mediation can be helpful. Respondents are often more willing to agree to terms other than high dollar amounts.

If the client is still employed by the respondent and wants to remain on the job, the representative needs to know what the client needs from the other side to make working at the company bearable. Also, the client's current and future job prospects might be very important in determining what is in her best interest.

Here are some common terms from mediation agreements that involve interests other than money:

- Employment records will show that the client resigned, not that she was terminated.
- Employer records with negative evaluations of the client will be removed or sealed.
- Any money received by the client will not have taxes deducted at the time of receipt. The client will have the responsibility to pay the taxes herself.
- If there has been physical contact, this will be reflected in the agreement as payment for personal injury and therefore not subject to tax.[137]
- The client will receive a positive or neutral letter of reference.
- All questions about the client's job performance will be referred to a person whom the client trusts to give a positive recommendation or neutral reference (name, dates of employment, and "we don't give any other information").
- The employer's personnel will receive sensitivity training relating to the discrimination.
- The client will be transferred to another department.
- The client will be rehired. (It is rare for this to happen after a termination and the filing of a discrimination charge—and even rarer for the client to both be rehired and receive money. But it is not impossible in the right circumstances.)

137. *See* 26 U.S.C. § 104(a)(2) (2000).

### 7. Understanding Litigation

Litigation is something that few parties really understand unless they have personally experienced it. It is easy for a party to talk tough before litigation, but the representative needs to make sure that clients understand the reality—and the strain—of litigation. The costs—in time and money, as well as stress—cannot be overemphasized.

## D. Representing a Charging Party During an EEOC Mediation

In the courtroom, the lawyers do most of the work. In an EEOC mediation, it is the mediator who takes the most active role. Some mediators are even explicit in saying that the lawyers are there primarily as advisers. (This is often only the mediator's wish, since the lawyers for both sides are there specifically to speak for the clients.)

The representative can help shape the mediation process. There is an established order of events in a courtroom, and the judge is in control throughout. Mediators, however, are usually open to considering different ways to make the process work. If a representative is in joint session and believes a caucus with the mediator would be more productive, he should request it. If the representative thinks it would be better to be in joint session, that too should be requested. Sessions other than the opening joint session are usually limited to the mediators and the representatives

One of the strong points of mediation is the quality of participation by the parties. To maximize the client's participation and sense of empowerment, the representative needs to ensure that the client knows what is going on at all times and is part of the entire decision-making process.

In deciding how much client participation there will be, one of the most important factors is whether the client is still working for the employer. When there is a continuing relationship, it is often helpful for the client to present concerns directly. On the other hand, talking on an equal footing with management and supervisors may cause future problems. There is almost always a good deal of direct participation by the client in the caucus sessions.

On the whole, successful representation during mediation always depends on preparation and the ability to evaluate what is happening under the surface.

### 1. Opening Joint Session

Even though opening remarks in a mediation do not have the same formality as they do in a trial, they are still very important and should be thoroughly planned. The rare client who is articulate and will not be intimidated may be offered the option of making the opening remarks.

The opening remarks should be organized and clear. The client who presents her own case should be forceful but must also be extremely careful. An opening statement should never attack an opponent too harshly. In particular, a CP does not want to create a situation where the respondent feels that a settlement will be an admission of a horrible wrong, nor create a mindset of confrontation and defensiveness. If the client is rude or disrespectful, it will only hurt the prospects for collaborative problem solving.

The CP's representative almost always makes the opening statement in Clinic cases. There is always the possibility that the client will misspeak in the heat of the moment and either unnecessarily give information or create antagonism. For example, a client once said that the job was beneath him. The other side seized on the expression and insisted that the discrimination charge was a cover for the client's getting out of a job he did not want. In another instance, a client accused a married supervisor of having an affair with another supervisor. This remark ultimately doomed the mediation.

However, sometimes brief opening remarks by the client during this joint session can be helpful. After opening statements by the parties' representatives, many mediators will ask the CP, "Do you have anything to add?" If the question is anticipated and the response focuses on damages to the CP, it might help the respondent gain new insights about the case.

### 2. Separate Meetings

#### a. The First Caucus

Ordinarily, the bulk of time in EEOC mediations will be spent in separate sessions. CPs often need to talk strongly about their sense of hurt and injustice in the first caucus. Mediators may ultimately be concerned with the practical considerations of the mediation, but clients often need time to express their pent-up feelings to a neutral third person, and experienced mediators will allow this to happen without losing sight of the overall purpose of the mediation.

However, this is not always necessary. Some clients simply want to discuss legal theory, evidence, and justifications for claims of damages. The Clinic encourages this in the caucus, as a good deal of work has usually been spent by the client preparing this information, and presenting it can help provide closure for the client. The Clinic generally follows the mediator's wishes as to whether to present a specific demand at the end of the first caucus.

### b. The Second Caucus

The second caucus with the mediator is valuable for gleaning more information about the respondents. It is an excellent time to hear not only as much as possible about the respondent's case but also what the respondent says about the CP's case. Clients need to hear this as a reality test, particularly when the mediator can present the opposing position in a way that is less harsh than a direct presentation from the respondent.

During this caucus, it is important to collaborate with the mediator. The mediator should be told about witnesses, if any, and asked to convey that information to the opposing side. The mediator can be told what the witnesses will testify to, or shown their statements, without revealing the identity of the witnesses or the details of their testimony. The representative decides what to reveal, and that decision is based on what is happening in the mediation process. Mediators generally believe that they work best when both sides reveal as much information as possible, but it is the representative's decision exactly how much to reveal and when.

In consultation with the client and perhaps the mediator, the representative can decide whether the other side is negotiating in good faith. One not uncommon possibility is that the other side is just there to gather information and/or to try to intimidate the client into submission. If a good faith negotiation is not taking place, the representative should be very cautious about disclosing information.

If the CP has not made a specific money demand, this would be the time to give the demand to the mediator to convey to the respondent.

## 3. Joint Meeting Advocacy

Initially, the respondent will almost always deny liability. If this continues in a way that stalls the mediation, and the respondent's offer is not even close to the client's settlement range, the representative may want to meet again with the respondent's lawyer to advocate

the client's position. Sometimes the respondent's position changes after hearing directly from an advocate for the client. If the question is one of law, the legal arguments need to show why there is some theory of the case under which the respondent will have exposure. That theory does not have to be based on federal employment discrimination laws, because if there is an agreement, almost invariably the CP will be required to sign a global release. Practically speaking, experienced attorneys will either be aware of potential exposure under other laws or be able to check those laws quickly.

Most factual issues ultimately turn on credibility. A CP's representative hears over and over that the respondent has witnesses to the CP's poor performance, tardiness, insubordination, or other failures that led to the adverse employment action. The representative needs to show that the client will be believed, demonstrate the jury appeal of the case, and point out the weaknesses of the opposing position. For example, the respondent's witnesses may be the same people being charged with the discrimination. If the representative has witnesses that can confirm the CP's story, the representative might be able to demonstrate their significance more forcefully than the mediator.

In employment discrimination lawsuits, once the case survives summary judgment, costs for the business will be much higher. If a respondent is convinced that the CP's case is strong enough to survive a summary judgment motion, the chances for a fair settlement are greatly increased. This may be more effectively conveyed by the representative than the mediator.

### 4. Disagreement as to the Facts

Very often there is sharp disagreement as to the facts. The purpose of the mediation is not to resolve that disagreement, but simply to allow each side to understand the other's point of view. However, sometimes the disagreement is such that the mediation stalls.

In one case where there was such a disagreement, a mediator broke the deadlock by halting the mediation for an investigation of a particular critical fact: whether the employee had been to work on a particular day. The mediation was scheduled to resume two weeks later, and an independent investigator was hired for the limited purpose of investigating the crucial fact. After the mediation resumed, the parties were able to agree on a settlement with the help of the investigator's report.

### 5. Evaluating Offers

There is usually an offer to the CP at the mediation, and it will almost always be delivered through the mediator during a separate session. The initial offer is invariably low in dollar terms and is often based on what the respondent says is the nuisance value of the case.

In reality, there are numerous reasons why a first offer by the respondent may be unrealistically low. It may be a message that the CP's initial demand is too high, it may be a standard negotiating technique, or the respondent's attorney might have been told that the company did nothing wrong. The respondent's representative may also be an in-house attorney who was part of the decision-making process that led to the EEOC filing. If the attorney is outside counsel, he may want to impress the respondent with his toughness and ability to make a good deal or may want continued business if the matter goes into further litigation.

As noted, usually the CP is upset and angry after hearing the first offer and may even need to be persuaded to stay at the mediation. CPs have said that offers are "an insult," "a slap in the face," and "a punch in the stomach." A representative needs to make sure a client stays relaxed and understands that first offers are rarely the bottom line. The negotiation might not get to the bottom line for hours, and all parties need to be patient.

It is easy for a CP, in the heat of confrontation, to lose sight of what will happen if the mediation is not successful. The CP may want "to spend every cent I have, even if it takes twenty years, to get justice." This attitude rarely lasts more than a few weeks. What will happen in court is always unclear, and even if there is ultimately vindication, it may not be worth the sacrifice.

If the representative feels the offer is reasonable under the circumstances, the representative can ask to have the mediation continued so that the client can consider the offer for a few more days.

If an offer is much too low, the representative should so advise the client. Even if the mediation is unsuccessful, there will be an EEOC investigation that will cost the respondent money. The EEOC may even find some information that is not favorable to the respondent's case or in the best interests of his business. If the representative believes an investigation will not be in the client's best interest, the client can be advised to take a right-to-sue letter immediately and proceed with litigation.[138]

138. *See* discussion *supra* Part I.B.

### 6. Agreement

Even after there is an agreement over the money and other primary concerns, there will still be negotiations about other items. For example, the parties may disagree about whether taxes will be taken out by the employer, whether full payment will go to the CP along with a 1099 tax form,[139] or what will happen if there is a breach of confidentiality. Penalties should be mutual for breach of confidentiality of settlement terms, and the confidentiality clauses should include exceptions for close family and tax advisors. They may also detail how—and who—decides whether confidentiality has been breached.[140] If the agreement or a draft agreement is to be signed the day of the mediation—and all mediators will try to insist on that—the representative needs to review it to make sure that the client is protected. That is often difficult when it has been a long day for both the representative and the client.

## E. Representing Charging Parties After a Successful Mediation

Not much needs to be done after a mediation that has ended successfully, but "it ain't over till it's over."

Even if a memorandum of agreement is signed at the mediation, often the drafting of the final agreement is left to the respondent's attorney. If that is the case, a representative should never depend on the terms being drafted correctly. The respondent's attorneys ordinarily want to draft the agreement to ensure that the CP is indeed releasing the employer of all liability, that the confidentiality clauses are thorough, and, if there has been a termination of employment, that the severing of relations with the CP is permanent. The representative stays in touch with the respondent's attorney to make sure that the agreement is drafted in a timely matter, then reads the agreement carefully to ensure it reflects exactly what was decided at the mediation. The draft agreement received after the mediation almost always contains some language that is different than expected. The respondent's attorney is an advocate, and if there is ambiguity about any terms, they will be written in a way that benefits their client. Sometimes the agreement will need input from the client.

139. A 1099 form is used for payments to outside vendors. Often the client prefers to receive the full amount, either because she believes that taxes will not be owed, or because it seems like more money.

140. Often the Clinic asks that an arbitrator decide whether confidentiality has been breached. If the Clinic feels that the mediator is fair and legally astute, the Clinic might ask that the mediator be the arbitrator in this situation.

Once the agreement satisfies the representative, it is forwarded to the client, who signs it. Copies are then sent to the mediator and the respondent's attorney. The representative stays in touch with the client, even after the agreement has been signed, because she might still need to advise him. The ADEA gives clients who are over the age of forty one week to negate the contract.[141] If the client does have some remorse, the representative should be available to discuss matters and give advice.

The representative also stays in touch with the client to make sure that the terms are carried out in a timely manner. If the client is entitled to money, timely payments may be extremely important. Many clients have had to spend children's college money, skip mortgage payments, or borrow on credit cards just to stay afloat.

A letter of thanks to the mediator and the respondent's attorney are often appreciated and might help future mediations.

## IV. Mediation in a Law School Setting: The USF Clinic

### A. The Clinic's Relation to the Law School's Structure

The USF School of Law's Mission Statement reads in part:

> The University of San Francisco School of Law strives for excellence in education underscored by a deep commitment to justice. . . . providing students with the practical skills they need to become effective and ethical lawyers and leaders in today's complex world . . . .creating innovative law school programs and training skilled lawyers to serve our local San Francisco community, the region, the nation, and an increasingly global society . . . inspiring our graduates to pursue justice as ethical professionals and to engage in practice or public service activities that help those in need.

The Clinic is modeled on this tradition, emphasizing both community service and the practical training of lawyers.

Without the Clinic, many of its clients would probably not be represented in their employment discrimination cases. At the same time, Clinic involvement provides a benefit to many respondents who would like to negotiate seriously and in good faith. If a CP has a well prepared case and realistic expectations, a fair settlement is more likely, saving a respondent the time and expense involved in an investigation and possible litigation. The Clinic has received many letters from respondents thanking it for helping in the mediation.

As USF is a relatively small private school, costs of clinical education are an important consideration. The Clinic's costs are very rea-

141. *See* 29 U.S.C. § 626(f)(1)(G) (2000).

sonable compared to its benefits. Its administrative expenses are low, below $10,000 per year, and there are no litigation or discovery costs.

### B. Clinic Structure

The Clinic is a two-semester program. Students receive three units per semester. A new group of students starts each semester. There are ordinarily eight students in each group, and students do not receive credit until they complete both semesters' work. In the first semester, students learn mediation techniques and work as small claims court mediators in San Francisco for one court session per week. In the second semester, students begin representing parties in EEOC mediations while continuing to work as mediators in small claims court every other week, when they are not appearing as representatives in EEOC mediations. The first semester's experience increases the students' confidence in their ability to handle legal problems for real people and prepares students quite well for their work in the second semester, when the financial stakes are generally higher. As a result, even when the students are opposing associates from large law firms or handling cases involving as much as $100,000, they have not been intimidated or overwhelmed.

In the second semester, in addition to their case work, all students are required to attend weekly seminar meetings. These weekly seminars consist of topics directly related to Clinic work. Students also discuss the facts and legal theories of their cases and rehearse opening statements and legal arguments. Seminar topics include: representing parties in mediation, federal employment discrimination law, California employment discrimination law, related causes of action, mock mediation, special problems in ADA and sexual harassment cases, union issues, and investigation techniques.

The Clinic is available to represent either side in EEOC mediations, but most of its work has been done with CPs. In eighty to ninety percent of its cases, the Clinic has achieved a mediated agreement that has been implemented. In the 2002-2003 academic year the Clinic had a 100 percent success rate for the first time.

During their second semester at the Clinic, each student is usually responsible for two or three employment discrimination cases. The Clinic Director always accompanies the student representative to the initial client interview and all mediations. Students are encouraged to spend as much time as possible working with their clients, to make sure their case is fully prepared and because many of the clients are in great need of emotional as well as legal support.

There is a basic protocol for Clinic cases, provided in the form of a checklist. While there may be some variation in dealing with individual problems, on the whole the protocol has worked well.[142]

### C. Pedagogical Value

Working as a representative in employment discrimination mediations has been an important educational experience for students at the Clinic.

#### 1. Substantive Law

Employment discrimination law has many advantages in a clinical setting. The statutes and cases are interesting in themselves, touching on difficult and important policy questions. Most cases develop complex, legally challenging issues. If a student chooses a career in the labor or employment field, her clinical experience will, of course, be directly related to her work. If the student is employed by a business or corporation as in-house counsel, she will constantly be dealing with material she has worked with in the Clinic. Employment discrimination issues can come up at any time in general practice or in a general litigation practice.

Because of the frequency of labor and employment conflicts, this is an area of the law that all students should be familiar with.

#### 2. Practical Skills Development

Representing a client in a mediation requires students to develop and practice many lawyering skills. An advantage is that a representative at an EEOC mediation is not legally required to be a member of the bar.

The representation of parties in EEOC mediations requires substantial interviewing, research, and writing as part of the representation. Students are also required to prepare witnesses and to undertake some investigation. The students learn how to determine damages. As complex agreements are the end product of a mediation, the students need to be able to both draft and analyze agreements.

The Clinic also gives a student the rare opportunity to work with a case from the beginning to the end in one semester. Some cases are ready to go at the beginning of the semester and have mediations scheduled within three weeks. Cases that are referred to the Clinic

142. See Appendix A for the case checklist.

after the semester begins can be completed within thirty to forty-five days.

The opportunity to argue against associates from top law firms is, for many, the highlight of the semester.

### 3. Mediation Experience

This Clinic gives students the opportunity to work in a mediation environment. Mediations are becoming increasingly important in legal practice and are often the preferred way to deal with cases. This is particularly true of cases where credibility issues are central.

In a mediation, the goal is to work towards a win-win solution in a relatively non-hostile setting. The approach fits the personality of many students who are not interested in litigation but want to work with people rather than do transactional work.

Also, if students want to work in a mediation context, they are more likely to represent a client than be a mediator early in their career. The Clinic gives students a unique opportunity to represent clients, an experience often not open to law firm associates until they have been with their firm for a few years.

### 4. Service to Community

Although the law school's main function is to educate students, the Clinic helps people who need help at a crucial time. In most cases, the clients who are referred to the Clinic would not be represented at the mediations if the Clinic did not provide this service.

## D. Top Ten Challenges

As in any law school clinical experience, the crossover from theory to practice holds many challenges for students. The following challenges come up repeatedly.

- Trusting clients. Students tend to believe a client implicitly. It is often difficult for a student to probe for the weaknesses in the client's case. Students too quickly assume that the facts of the case are as the client describes them.
- Assessing damages. Students have no experience from their course work in developing realistic numbers for the settlement value of a case. Explaining these realities to a client can be a difficult task for students.
- Knowing substantive law. Even if a student has taken courses in employment discrimination and labor law, the substance is difficult. Causes of action often arise in areas that the students

have not studied. Some concepts, such as what is a reasonable accommodation in an ADA case, are difficult even for seasoned employment attorneys.

- Dealing with unreasonable demands by clients. Clients whose expectations are well beyond anything that can be realistically accomplished is often a problem.
- Becoming overly litigious. Law schools train students to argue every point. Some students carry this over into the mediation when opposing attorneys are aggressive. The Clinic is fortunate in this regard, in that all students in the Clinic are required to work as mediators the previous semester.
- Seeing clients' needs in broad terms. Understanding what a client might need in the big picture is something that is rarely taught or practiced in law school.
- Responding to various negotiating tactics. Students have not been in negotiations with experienced lawyers who specialize in the employment field. Evaluating and responding to various tactics is difficult for most students.
- Responding to the emotional needs of clients. One of the requirements of the Clinic is getting to know the client well. Managing to keep a professional perspective and not overidentifying with the client's needs are sometimes problems.
- Remembering practical details. The numerous practical details that have to be considered in any case—from having papers photocopied to clients' getting lost and not making it to an interview or the mediation itself—is something new to many students.
- Following through after settlement. The mediation is never really finished when students think it is. Keeping focus on a case even after a settlement to make sure that all of the details are resolved is something that is new and difficult for many students.

### F. A Student Perspective[143]

USF's Employment Mediation Clinic provides no ordinary educational experience. Although it is true that in a short amount of time students learn quite a bit of employment discrimination law, develop essential dispute resolution techniques, and integrate their own independent research and writing, the experience is not confined to the

143. This perspective was written by Yesenia Gallegos, Class of 2003.

inner walls of a classroom nor is the experience restricted to a fixed and simple syllabus. In fact, it is likely that on the very first day of class a student will be given her very own client file. The student will have just one semester to become intimately familiar with the client's alleged claim of employment discrimination, to research the applicable law, to apply the law to the client's factual situation in a mediation brief, to prepare the client for the mediation, to prepare herself for the negotiations with opposing counsel, and once at the mediation, to attempt to successfully settle the claim in a way that meets the client's best interests. To those students who participate in this unique clinic, the opportunity is invaluable.

### 1. Own Assigned Client

Getting to know a real client is nothing like reading the facts in a case buried in a textbook. It is only when you meet the client that you discover the frustration, fear, humiliation, and confusion an individual is faced with after having possibly been a victim of employment discrimination. You might learn about the children and the family members who rely on your client's income, or you may learn about your client's health conditions and the loss of the medical benefits he relied on while employed. There is an emotional reality in working with a client that even the most well written cases cannot depict. Though it is rare that students are assigned a case where an easily provable legal violation has occurred, one thing is certain—as a student, you are not dealing with a mere fact pattern but a real human being who is depending on you to educate him about the law and to advocate for his rights.

### 2. Negotiating with Attorneys

Regardless of whether opposing counsel runs a small practice or is an attorney at a large and prestigious law firm, students must confidently and professionally advocate for the client's rights. Often that requires challenging opposing counsel's assertions and legal conclusions.

Although a mediation session is not set up in an adversarial manner, you must nevertheless be prepared to convey the client's story in a clear and understandable way, and logically explain to opposing counsel why an employment discrimination violation has occurred. Although there may be little debate about the law itself, there will always be a debate about how the facts should be perceived. Soon thereafter, negotiations begin and you must be prepared to justify any monetary

or non-monetary requests made by our client. In effect, students learn how to represent their client's interests while working with opposing counsel in a cooperative yet persuasive manner—something that some second or third year associates at law firms have yet to experience.

### 3. Handling a Case from Beginning to End

Finally, unlike other clinics where students may only get to contribute a small amount to a case that has been ongoing for several years, the Clinic allows students to work on their own case from beginning to end. The students develop and frame the theory of the case, organize the facts, identify the legal issues, investigate the facts, obtain witness statements, research the applicable employment laws, and draft the mediation brief. Once those tasks are complete, they must still be prepared to present the case at the mediation, negotiate a settlement, and conduct any post-settlement work that may be necessary (for instance, verifying that the client received her settlement check). Although the students are supervised and are offered plenty of input and support from the faculty, they are the sole navigators of our client's case.

As a final point, law students have different reasons for having pursued a legal education. However, for most of us, it certainly was not for the thrill of learning how to spot issues in a fact pattern or for the delight of discovering the "rule" in a case. Although those are necessary initial steps in any law student's academic career, a clinic like this one allows us to leap into the real-world practice of law through research, writing, zealous advocacy, and arduous negotiations with opposing counsel. No ordinary law school course can provide this kind of academic and practical empowerment.

## V. Conclusion

The free mediations provided by the EEOC for employment discrimination disputes have proven to be valuable to everyone concerned. For settling problems of workplace discrimination outside of the courts, the mediations have been a great success.

To represent a party effectively during the mediation, the representative needs to think more broadly than is typical in a strict adversarial approach. The job of an advocate in the courtroom is to maximize the client's interests. In a mediation, the representative's job is to engage in collaborative problem solving and help create a solution that both sides think is fair, while still protecting the client's interests.

If the attorney or other representative has as a goal the positive benefits that can be accomplished and does not expect to achieve perfect justice or receive a financial "killing," much can be accomplished in a short day of mediation. Thorough preparation for the EEOC mediation is crucial. Because of the relatively short period leading up to the mediation, and the limited time in the actual mediation, there is a lot of pressure to make an important decision quickly with limited information. The preparation and plotting of options in advance through knowledge of the law and facts become critical.

As a law school clinic, USF's program has been a great success. Clients who might not otherwise have a voice are represented, and students are given an opportunity to learn and to do justice.

# *Appendix A*

# EEOC Mediation Log

*File in clinic office must be kept current throughout mediation process.*

**Client Name:**
**Mediator:**
**Mediation Date:**
**Location:**

- ☐ Make copies of contents of client's folder.
- ☐ Administrator will establish interview date convenient to you, Clinic Director & client.
- ☐ Contact client.
  Note all contacts with client on contact form.
  Establish rapport (do not interview yet).
- ☐ Confirm date of interview.

**Interview Date:** _____

- ☐ Make sure client has directions to USF.
- ☐ Give client directions from Kendrick parking lot to library access desk.
- ☐ Remind client to bring copies of all relevant paperwork.
- ☐ Let administrator know if visitors' pass needs to be reserved.
- ☐ Reserve library conference room for interview.
- ☐ Notify Clinic Director of room number.

**Room # Reserved:** _____

## DAY BEFORE INTERVIEW

- ☐ Give client reminder call and refresh directions, if necessary.
- ☐ Remind to bring relevant paperwork.

## POST-INTERVIEW FOLLOW-UP

- ☐ Discuss legal theories with Clinic Director.
- ☐ If necessary, have client amend complaint to include any additional charges (SOLs: EEOC/300 days, DFEH–1 yr)
- ☐ Alert mediator to additional charges and be sure opposing counsel is alerted to these amendments pre-mediation.

- ☐ Get sample briefs to review.
- ☐ Begin legal research, contact Professor RT and/or Professor O if needed, as additional resources.
- ☐ Set date for brief review with Clinic Director.

**Brief Due:** _____

- ☐ Contact client to read back facts, as you understand them, in preparation for writing brief; make changes as necessary.
- ☐ Remind client of mediation date, time and place and remind client you will meet 30 minutes in advance of mediation.

## WEEK BRIEF DUE

- ☐ Meet with Clinic Director with long draft of brief.
- ☐ Make necessary changes in brief.
- ☐ If required, make shortened brief for exchange with opposing counsel.

**Short Brief Due:** _____

- ☐ Have Clinic Director review shortened brief.

## DAY BRIEF DUE (one week prior to mediation)

- ☐ Fax brief (long or short as required) to EEOC mediator.
- ☐ Place hard copy of brief in client's file.
- ☐ E-mail or deliver disk version of brief to administrator.
- ☐ Set date for Clinic Director to review Opening Statement

**Opening Statement Due:** _____

- ☐ Decide with client and Clinic Director who will make Opening Statement.

## WEEK OF MEDIATION (no later than 2 days prior to mediation)

- ☐ Have Clinic Director review Opening Statement draft/make changes as necessary.
- ☐ Review with client, if necessary.
- ☐ Place hard copy of Opening Statement in client's file.
- ☐ E-mail or deliver disk version of Opening Statement to administrator.

## DAY BEFORE MEDIATION

- ☐ Call client to confirm date, time and place of mediation.
- ☐ Call client to remind of meeting time and place prior to mediation.

## MEDIATION DAY

- ☐ Meet with client early to review brief and opening statement.
- ☐ Review agreement with Clinic Director and client, if completed that day.

## POST-MEDIATION

- ☐ Get Clinic Director approval of contract and client's approval and signature.
- ☐ Fax signed agreement to attorney of respondent.
- ☐ Confirm client's receipt of settlement check.
- ☐ Thank you letter/certificate to participating attorney, if applicable.

# *Appendix B*

# Checklist for Disability Under ADA and FEHA

## I. Is the CP an individual with a disability?

A. What is the physical or mental impairment?

B. Does the physical or mental impairment substantially limit one or more major life activities (ADA) or does it limit one or more major life activities? **OR** Does the CP have a "record of such an impairment"? **OR** Is CP regarded as having such an impairment?

1. Does CP use mitigating measures? e.g., medication, insulin, prosthetic limb, hearing aid (ADA only)
2. Do the mitigating measures control the symptoms of the impairment? (ADA only). If yes, there is no ADA claim. If yes, there is still a FEHA claim.
3. What major life activities are affected? E.g., of major life activities—thinking, concentrating and other cognitive functions; walking, standing, and lifting; seeing, eating; caring for oneself; sleeping, performing manual tasks (fine motor skills); reproduction; and working (ADA requires impact on a class of jobs or broad range of jobs; FEHA requires impact only on CP's particular job).

## II. Is CP qualified? Can CP perform essential functions of job with or without accommodations?

A. Has CP requested reasonable accommodation or is the need for accommodation obvious?

B. Has employer engaged in interactive process? (Interactive process is dialogue clarifying individual needs and appropriate reasonable accommodation. Independent liability for failure to engage in process.)

C. Is accommodation reasonable?

- Job restructuring—reallocating or redistributing marginal job functions or altering how or when essential or marginal functions are performed

- Unpaid leave
- Modified or part-time schedule
- Modified workplace policy, e.g. permit eating or drinking at workstation for diabetic or modification of workplace, e.g. move filing cabinets from path of visually impaired employees
- Reassignment to a vacant position

## III. Is an accommodation an undue hardship to employer?

Consider the following factors: nature and cost of accommodation; overall resources, number of persons employed and effect on expenses and resources of facility; if employer is part of a larger entity, overall financial resources, size, number of employees, and type and location of facilities; type of operation including structure and functions of workforce, and geographic separateness; impact of accommodation on operation of facility; and availability of tax credits or deductions to offset cost and/or funding available from outside source such as state rehabilitation agency.

*Prepared by* RUTH SILVER TAUBE

# *Appendix C*

# Example of Confidentiality Agreement

CHARGE NUMBER:

1. The parties agree to participate voluntarily in mediation in an effort to resolve the charge(s) filed with the EEOC.

2. The parties agree that all matters discussed during the mediation are confidential, unless otherwise discoverable, and cannot be used as evidence in any subsequent administrative or judicial proceeding. Confidentiality, however, will not extend to threats of imminent physical harm or incidents of actual violence that occur during the mediation.

3. Any communications between the ADR Coordinator and the Mediator(s) and/or the Parties are considered dispute resolution communications with a neutral and will be kept confidential.

4. The parties agree not to subpoena the mediator(s) or compel the mediator(s) to produce any documents provided by a party in any pending or future administrative or judicial proceeding. The mediator(s) will not voluntarily testify on behalf of a party in any pending or future administrative or judicial proceeding. The parties further agree that the mediator(s) will be held harmless for any claim arising from the mediation process.

5. All information including all notes, records, or documents generated during the course of the mediation shall be destroyed at the conclusion of the session. EEOC will not maintain any such notes or records as part of its record keeping procedures.

6. If a settlement is reached by all the parties, the agreement shall be reduced to writing and when signed shall be binding upon all parties to the agreement. If the charge(s) is not resolved through mediation, it is understood by the parties that the charge(s) will be transferred to the investigative unit for further processing.

| | |
|---|---|
| Charging Party/Date | Respondent/Date |
| CP Representative/Date | Respondent Representative/Date |
| CP Representative/Date | Respondent Representative/Date |
| Mediator/Date | Interpreter/Date |