

Mediation Of Workplace Tiffs Is The Way Of The Future *from THE PRACTITIONER by LAURA FARROW*

A major trend emerging on the American employment scene is the creation of workplaces that are more collaborative and less confrontational, more team-oriented and less hierarchical. Employers and employees alike are realizing the absurdity of dealing with each other as adversaries when they must produce goods or perform services together. Forward-looking companies are investigating management and production systems that emphasize informed participation, decentralized authority and expanded responsibility. Consistent with these goals, they are finding that mediation is the best dispute resolution process.

Mediation of workplace disputes is also useful for companies that have no plans to change the structure or philosophy of their organizations. Employment litigation is enormously costly, in terms of dollars spent, time and energy lost, and relationships destroyed. Mediating disputes as they arise in the workplace can help avoid those costs.

Workplace mediation offers important benefits to employers and employees alike. It provides fast, creative, mutually satisfactory resolutions. When a dispute is mediated shortly after it arises, the chances of optimal resolution are much greater: the parties' differences have not had a chance to fester, the situation is generally more fluid, and the parties have more resolution options available to them. Mediated resolutions work better and last longer than authoritatively imposed resolutions because everyone involved buys into them. Moreover, mediation fosters mutual respect through improved communication. Mediation can mend and preserve frayed working relationships, even when the parties are extremely angry.

Mediation within the workplace generally looks very different from mediation within the context of litigation. The primary goal of workplace mediation is to leave the parties better able to work together. Traditional "settlement conferences," in which the mediator separates the parties and shuttles back and forth between them, often will not be adequate to this task; the parties will need to work through their differences together.

Many disputes arise out of a failure by either party or both parties to communicate, understand or consider the needs and interests of the other. People fix their attention on the question, "Who is right and who is wrong?" and become blind to the possibility that both may have a legitimate point of view. The mediator's task is to open communications between them about the reasons for the positions they have taken with each other, helping both parties to understand as fully as possible their own and the other's view of the situation. The mediator encourages both to look at the dispute through different lenses: What do they think will work as a practical matter? What do they think will be fair? What do they think will best honor and promote a good working relationship? As the parties gain an expanded understanding of the situation, their ability to work together toward resolution—and after resolution—increases.

Many human resource professionals have been mediating workplace differences for years, generally informally and often without appropriate recognition or value accorded to their efforts. Some of these managers are now seeking mediation training in order to be able to provide a more formal, structured mediation process to coworkers in conflict. As their understanding of the

mediation process deepens, these managers are also finding that there are some disputes in which they cannot function as effective mediators, no matter how skilled they are. Sometimes one or both parties cannot trust another company employee to be neutral or to maintain confidentiality, both of which are essential to a successful mediation. In these cases, managers are bringing in outside, professional mediators. Especially where the dispute could end up in litigation if not resolved, this assistance is well worth its relatively low cost.

Virtually any difference that arises in the workplace can benefit from mediation if the parties are willing to deal directly with each other and if the company has the resources to provide a mediator. Indeed, over time, a workplace in which mediation is the preferred or presumed dispute resolution mechanism is likely to become a workplace in which colleagues and coworkers need less assistance in working through differences and begin to be natural collaborators. However, there are certain types of workplace conflicts in which any company would be well-advised to offer mediation. These include:

1. Sexual harassment complaints. People often assume that parties to a sexual harassment complaint cannot work together to resolve the dispute. That assumption can do both parties a disservice. Many hostile environment complaints arise as a result of differences in perception about what is funny or flattering and what is offensive behavior, or they arise as a result of one person's failure to respect the other or to understand the effect of his or her behavior on the other. If the parties are willing to talk with each other, these complaints can be mediated to excellent conclusions. The employer can save its relationship with both employees and avoid an expensive and painful lawsuit.
2. Disputes between employees. Sometimes interpersonal differences prevent coworkers from functioning effectively together. If the company needs both employees and needs them working together harmoniously, mediation can be very effective. The employees are offered a controlled setting in which to air their differences, guidance in communicating effectively about them, and a chance to make agreements about how they will function together in the future.
3. Deteriorating performance. A good employee can stop performing well for many reasons. Often, when the manager attempts to address the problem, the employee responds with fear and defensiveness, resulting in further deterioration. Mediation between them can help each understand the other's needs, requirements and requests and can yield an agreement about how they will work together in the future. Both are more likely to observe such an agreement because both had a hand in creating it.
4. Terminations. When an employer chooses to terminate an employee even though the termination poses litigation risks, mediation on the terms of the separation can be very helpful. Through the mediation process, the employee has a chance to communicate severance needs and to affect the nature and quality of the severance package, while the employer has an opportunity to eliminate its litigation exposure. Mediation can also be beneficial emotionally: the employee may never agree that the termination was warranted but will more likely feel that he or she had a fair hearing, and may come to understand the reasons for the employer's action. These realizations can make it easier for terminated employees to move ahead with their lives.

Implementing an effective workplace mediation program will require a company to undertake two basic tasks: establishing a panel of mediators and promoting general workplace acceptance of mediation as a dispute resolution mechanism.

The first task is relatively easy to accomplish. The company should select one or more employees who will serve as in-house mediators and provide them with professional mediation training. Those selected should be people who are known in the organization for being discreet, fair-minded and neutral. Ideally, they should already possess good communication skills, though these can be acquired through training. If the company trains several in-house mediators, it should select people from different levels of the organization, so that parties will not be mediating with someone too far above or below them in the reporting structure.

For those disputes needing an outside mediator, the company should be ready with a list of professional mediators from which the parties may choose. The company should have information about each mediator available and may wish to allow the parties to talk briefly with potential mediators before deciding whether to work with them.

The second task can be more complex. It is important to generate acceptance of the idea of mediation before a dispute arises in which it will be proposed: once parties are in a dispute, it is normal for one to reject automatically any suggestion made by the other. If the employer wants to mediate, the employee thinks it must be a bad idea, and vice versa.

Two steps can help here. First, mediation should be incorporated into the company personnel policies in some way that makes sense for the particular company. One way that works well is to write mediation into an internal complaint review process: the highest reviewing authority can be given the option to refer the matter to mediation or the Human Resource Department can be given authority to offer mediation at any point in the review process.

Second, the company should offer an educational program about mediation, which most mediators are willing to conduct. The program could include demonstrations of hypothetical mediations, role-play exercises in which employees experience the mediation process firsthand, and opportunities to ask questions about the process. If the program is offered by the company's panel of outside mediators, it can have the added benefit of giving employees the opportunity to observe those mediators at work so that they will feel comfortable selecting one of them if and when they are involved in a mediated dispute.

Mediation of workplace disputes is the way of the future. It achieves the most satisfactory, timely and cost-effective resolution of disputes. It is also helpful in creating a collaborative workplace culture. Employers interested in bringing these benefits to their workplaces should incorporate mediation into their dispute resolution programs.

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