

# Using Mediation to Resolve Title VII Disputes: Changing the Meaning of Winning

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In both workplace and nonworkplace disputes, the parties involved may become so focused on winning in court that they may lose sight of the overall costs of the conflict and the ravaging effects of the litigation on their lives and/or businesses. When the dispute concerns sexual harassment claims under Title VII of the Civil Rights Act of 1964, a court battle could be especially pricey for the employer. Litigation can go on for years, cost millions of dollars in legal fees, erode productivity, cause irreparable damage to an employer's brand, and ultimately adversely affect the employer's bottom line. This article describes a recent case that calls into question an employer's perception of "winning" and suggests that mediation is a viable alternative at all stages of the dispute, not just in cases involving allegations of sexual harassment under Title VII, but in most other potentially litigious instances as well.

## WHAT IS SEXUAL HARASSMENT?

According to a recent Equal Employment Opportunity Commission (EEOC) report, of the total number of harassment charges received in FY2015 (28,000), approximately 45 percent alleged harassment on the basis of sex.<sup>1</sup> The same report stated that "based on testimony to the Select Task Force and various academic articles ... anywhere from

25 percent to 85 percent of women report having experienced sexual harassment in the workplace." The Select Task Force noted that the disparity reflected differences in survey samples and whether the term *sexual harassment* was defined in survey questions.<sup>1</sup>

Under Title VII, it is unlawful to harass a person at the workplace because of that person's sex. Both the victim and the harasser can be either a man or a woman, and the victim and harasser can be of the same gender. The perpetrator can be the victim's supervisor, a supervisor in another area, a coworker, or someone who is not even an employee of the employer, such as a client or customer. The victim of sexual harassment does not have to be the person harassed but could be anyone affected by the offensive conduct.

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Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature all fall under the umbrella of "sexual harassment." The law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious. But such behavior becomes

prohibited conduct when it explicitly or implicitly affects an individual's employment, when it unreasonably interferes with his or her work performance, or when it is so frequent or severe that it creates an intimidating, hostile, or offensive work environment. Sexual harassment may also include conduct that results in an adverse employment decision, such as the victim's being fired or demoted, but may also occur without any economic injury or discharge to the victim. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge or testifying in or participating in any way in an investigation, proceeding, or litigation under Title VII.

It is important to take into account that Title VII is a fee-shifting statute. This means that the federal court may award attorney's fees to the "prevailing" party in an employment discrimination case. Recently, an employer who was determined to prevail in defending against a sexual harassment case was awarded more than \$4 million in legal fees and costs. The case (*CRST Van Expedited v. EEOC*) went all the way up to the US Supreme Court.<sup>2</sup> (See Key Court Cases in this issue of *Employment Relations Today* for more on the "prevailing party" issue and its significance to employers.) An employer's being awarded literally millions of dollars in legal fees and costs as the successful party in a workplace discrimination case certainly sounds like quite a win for the company—but is it? This article is intended to demonstrate that the possibility of fee-shifting to the employer's side in a Title VII case isn't really "winning" and that mediation is a far better process than litigation in resolving sexual harassment claims.

## LITIGATION: A LONG AND WINDING ROAD

CRST Van Expedited, Inc. (CRST), an Iowa-based trucking company, requires its drivers to become certified through the company's training program. Part of the training for a new truck driver is a 28-day over-the-road trip with a veteran driver. In 2005, a new female driver (Starke) filed a charge of discrimination with the EEOC and alleged that two male drivers sexually harassed her during the training trip.

Over a year and a half after the complaint was filed, the EEOC sent CRST a letter of determination in which it informed the employer that the commission had reasonable cause to believe that CRST subjected Starke and "a class of employees and prospective employees" to sexual harassment and offered to conciliate. Counsel for CRST and for the EEOC discussed conciliation of the dispute but failed to reach any agreement. The EEOC then promptly notified the company that, in the commission's view, its conciliation efforts had failed.

In 2007, the EEOC filed suit in the federal district court against CRST. It alleged that Starke and more than 250 similarly situated employees of the company had been subjected to sexual harassment and a sexually hostile and offensive work environment in violation of Title VII. The EEOC sought to enjoin CRST from engaging in discriminatory employment practices and to obtain an order requiring the company to take proactive steps to remedy and prevent sex-based discrimination in the workplace, plus damages and costs.

The federal district court for Northern Iowa disposed of the EEOC's claims on various procedural grounds,<sup>3</sup> determined CRST to be the prevailing party, and invited

the company to apply to the court for an award of attorney's fees. CRST accepted that invitation.

The EEOC appealed. The Court of Appeals for the Eighth Circuit vacated the district court's fee award and held that CRST could not be said to prevail on the claims, since the lower court's disposition of the sexual harassment claims for the EEOC's failure to investigate and conciliate was not a ruling on the merits. No surprise: CRST appealed. In May 2015, the company's lawyers filed a petition for a writ of certiorari. A year later, in May 2016, the United States Supreme Court held that a defendant need not obtain a favorable judgment on the merits in order to be a "prevailing party" and remanded the case "for further proceedings." In other words, as of this writing, there's been more than ten years of litigation over these accusations of sexual harassment, and the litigation is not over yet.

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## WHAT'S A COMPANY TO DO?

Almost immediately after the Supreme Court's decision in *CRST, Transport Topics*, the newspaper of the trucking and freight transportation industry, reported that there were some "happy people" at CRST headquarters in Cedar Rapids. International CEO Dave Rusch said that the company goes "above and beyond" to make sure all of its drivers feel comfortable. He also said that "there was no substantive allegation of any wrongdoing that we didn't deal with. We have about 2,000 trucks [with two drivers

each], so we have about 2,000 workplaces that aren't supervised. If any driver feels uncomfortable, we split [the team] up and fly the one with the allegation to Cedar Rapids, investigate and take appropriate action where needed." <sup>4</sup>

Bottom line: Even if the employer continues to be viewed as the "winner" and the EEOC is ultimately ordered to reimburse the company for its legal fees and costs in connection with this litigation, CRST's experience should serve as a warning to employers of the need to take preventative measures to avoid litigation over employment discrimination claims. Here are a few suggestions:

- Take the steps necessary to prevent sexual harassment from occurring in the first place.
- Clearly communicate to employees that sexual harassment will not be tolerated.
- Provide sexual harassment training to employees.
- Establish an effective in-house complaint or grievance process.
- Take immediate and appropriate action when an employee complains.<sup>5</sup>

## THE MEDIATION ALTERNATIVE

If, despite a company's efforts to avoid Title VII claims, the EEOC commences a lawsuit on the basis of a Title VII sexual harassment violation, there are better alternatives to litigation, which collectively are known as "alternative dispute resolution" or ADR. One alternative dispute resolution process is arbitration, which may be provided for as part of a contract between employers and employees.<sup>6</sup> Arbitration can be viewed as a "private trial" in that the parties, who are

usually bound by a contract to resolve disputes related to their agreement, select an arbitrator who acts as a judge, hears the evidence, and renders a decision (an "award"). Although arbitration is certainly more expeditious than full-blown litigation and the parties may get to choose the arbitrator, it is very similar to litigation in that the arbitrator's decision is binding on the parties, and arbitration awards may be public documents.

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Mediation is a completely different process from arbitration. In mediation, the parties themselves determine how their conflict will be resolved. The interested parties and their counsel meet with a neutral party (a mediator), who assists in helping them resolve their dispute by themselves or with the assistance of counsel. It's a process that has proven to be effective, inexpensive, and time saving, especially in matters involving accusations of workplace discrimination. Among the many benefits of the mediation process is that it can take place at any time—before the commencement of a lawsuit or at any time after a lawsuit is commenced, and even after an appeal. Mediation can be used for purposes of resolving one issue or all issues; with a few exceptions, almost any matter that is subject to litigation may be mediated.<sup>7</sup>

Another important benefit of the mediation process is confidentiality, which allows the parties to freely engage in candid,

informal discussions of their interests and concerns in order to reach the best possible resolution of the dispute. It also enables the parties to speak openly without fear that statements made during mediation will be used against them in any subsequent legal proceeding. And unlike a court's proceedings and decisions, which are open to the public and the media, if the parties agree,<sup>8</sup> the written settlement agreement reached in the mediation process can remain private.

## **MEDIATION AT THE EEOC**

In order to contribute to its ability to better manage its growing inventory of Title VII disputes and to resolve charges in a targeted time period of six months or less, the EEOC instituted a private-sector mediation program as an alternative to its traditional investigative and litigation process.<sup>9</sup> Participation is strictly voluntary and there is no fee. Since 1999, approximately 70 percent of the workplace discrimination cases filed with the EEOC were resolved through mediation in an average time of 85 days; that is nearly half the time it takes to resolve a charge through the investigative process. In fiscal year 2015, the mediation program resulted in 8,243 resolutions, through which complainants secured more than \$157.4 million in monetary benefits. Almost half of the cases that are settled through the EEOC mediation program involve a nonmonetary benefit, and since the program's inception, in approximately 13 to 20 percent of mediated cases, the *only* benefit involved was nonmonetary.<sup>10</sup> A nonmonetary benefit to an employee could involve a change in supervisor, a genuine apology, or any number of other creative ways of settling the charge—remedies that are not available through the litigation process.

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As with mediation generally, the EEOC mediation program also offers confidentiality and, if the parties agree, privacy. If mediation occurs at the conciliation stage, the EEOC sits as a participant, along with the charging party and respondent, with an independent mediator serving as a "neutral." The mediator and the parties must sign agreements that they will keep confidential everything that is revealed during the mediation. The mediation sessions are not tape-recorded or transcribed; and any notes taken during the mediation by the mediator are destroyed. In order to further ensure confidentiality, the mediation program is insulated from the EEOC's investigative and litigation functions. EEOC mediators only mediate, and are precluded from performing any other functions related to the investigation or litigation of charges. Information revealed during the mediation session cannot be disclosed to anyone, including other EEOC personnel, and cannot be used during any subsequent investigation. Also, the parties can agree that whatever settlement they reach during the mediation process can remain private and out of the public's eye.

A 2000 study conducted by outside consultants for the EEOC revealed that 96 percent of employers who participated in mediation would be willing to try it again. In fact, employers were slightly more satisfied with mediation than were employees, only 91 percent of whom were willing to give mediation another try. But when the EEOC

offered mediation for more than half of the charges it received in 2002, only 30.5 percent of employers accepted, compared with 83 percent of employees. It has been suggested that employers may be skeptical of the EEOC, which they view as being pro-employee, but the same article also points out that several employers who have actually participated in the EEOC mediation do not take such a view and said that they appreciated the informality of the mediation process, the efficiency of the program, and the opportunity to sit down to try to resolve the dispute at an early stage—before positions harden and legal fees mount.<sup>11</sup>

## **NEVER TOO LATE TO MEDIATE**

Even if early attempts to conciliate or mediate at the EEOC or elsewhere prove unsuccessful and the case goes to court, mediation still remains a viable alternative to litigation for resolving employment discrimination disputes. Under the Alternative Dispute Resolution Act of 1998, each federal district court was authorized to devise and implement its own ADR program in order to encourage and promote the use of alternative dispute resolution in its district.<sup>12</sup> For example, the federal district courts for both the Eastern District of New York (EDNY) and the Southern District of New York (SDNY) routinely refer employment-related cases to mediation.<sup>13</sup> One mediation program, the SDNY's "limited scope *pro se* program," boasts a 69 percent settlement rate for cases mediated in 2014. The EDNY reported that the settlement rate for job-related civil rights claims for the period July 2012 through June 2013 was 71 percent.<sup>14</sup>

The success rate of these particular court-annexed ADR programs only begins to cover

the benefits of the mediation process in the employment arena. Rebecca Price, Director of SDNY's ADR program, a mediator and a former litigator, described another important benefit of resolving legal disputes through mediation as follows:

As a mediator, more and more I tell parties that justice isn't something that is necessarily achievable in mediation (which, incidentally, is the same thing I used to tell clients about litigation). I tell them that mediation offers a host of other possible benefits, including closure, insight, clarity, acceptance, and, unlike litigation, direct involvement and control for the parties themselves. Those possibilities often provide what the parties were seeking when they came to court in the first place—and help them leave feeling that they have indeed had access to justice.<sup>15</sup>

To paraphrase what Justice Kennedy wrote in *CRST*, when the parties come to court, the plaintiff wants to win and the defendant seeks to prevent the plaintiff from winning. Unlike litigation, the objective in mediation is not about “prevailing” or seeing to it that the other side does not. Rather, the goal of mediation is the parties' agreement on how their dispute may be resolved. This requires a shift in focus—away from trying to win and toward achieving an acceptable resolution of the conflict.

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A mediated agreement is based on both sides' *interests*, instead of their *positions*. For

employees who believe that they are the victims of sexual harassment, this may mean giving the company a reasonable chance to fix the situation. For employers who bear a legal responsibility to see that the workplace is not an abusive and hostile environment, this may mean taking certain corrective measures. Regardless of the details of the terms of their agreement, both the employer and the employee should regard mediation as a way to avoid litigation and achieve a result that both sides can live with.

## NOTES

1. EEOC. (June 2016). Select task force on the study of harassment in the workplace. Report of co-chairs Chai R. Feldblum and Victoria A. Lipnic, Part 2, Section B, note 8. Retrieved from [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm). The figure includes charges from employees working for private employers or for state and local government employers.
2. *CRST Van Expedited v. EEOC*, 578 U.S. \_\_\_\_ (2016).
3. For example, the charges filed on behalf of 100 women were barred as a discovery sanction after the EEOC failed to produce them for deposition.
4. Elfin, D. (May 24, 2016). Supreme Court unanimously rules in favor of CRST. *Transport Topics*. Retrieved from <http://www.ttnews.com/articles/basetemplate.aspx?storyid=42066>
5. See facts about sexual harassment at [www.eeoc.gov/eeoc/publications](http://www.eeoc.gov/eeoc/publications)
6. Whether an arbitration clause in an employment contract can be enforced in the context of an accusation of sexual harassment is another issue and the topic of a different article.
7. With regard to workplace discrimination complaints, the EEOC evaluates each charge brought to it to determine whether it is appropriate for mediation, considering such factors as the nature of the case, the relationship of the parties, the size and complexity of the case, and the relief sought by the charging party. Charges that the EEOC has

- determined to be without merit are not eligible for mediation.
8. Certain stipulations need to obtain the approval of a court, in which case the settlement agreement may not be private.
  9. In fiscal year 2015, the EEOC received 89,385 private-sector charges of discrimination and had a pending inventory of 76,408 charges at the end of that fiscal year.
  10. See Mediation Q & A at [www.eeoc.gov](http://www.eeoc.gov)
  11. Barrier, M. (May 1, 2003). The mediation disconnect. *HR Magazine*, 48(5), 54-58.
  12. 28 U.S. Code §651(b).
  13. Mediators assigned by the SDNY work entirely pro bono; those on the EDNY mediation panel serve on a "low bono" basis. In matters of employment discrimination, both district courts have also established programs for unrepresented litigants to obtain free legal representation for the purpose of mediation.
  14. See USDC EDNY Mediation Report (July 1, 2012-June 30, 2013), which breaks down the percentages of settlement at mediation by cause of action.
  15. Price, R. (Spring 2016). From the Southern District of New York, a success story. *ABA Dispute Resolution Magazine*, pp. 13-15.

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