HUMAN RESOURCE LAW FROM START TO FINISH

ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT CONTEXT

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I.

INTRODUCTION

Upwards of 90-95% of all cases settle before ever being litigated at trial, including employment matters. Successful trial attorneys, defense counsel, general counsel and human resources professionals, therefore, must have a thorough understanding of the mediation process and be aware of the opportunities to resolve cases early and inexpensively.

In the employment context, there are at least two (and often times more) opportunities for resolution of employment disputes. Here we will address mediation and conciliation opportunities, pre-litigation, in the administrative processes before the Idaho Human Rights Commission ("IHRC") and/or the Equal Employment Opportunity Commission ("EEOC"). We will also discuss more formal mediation opportunities once litigation is commenced before a private mediator or judge.

II.

MEDIATION AND CONCILIATION OPPORTUNITIES, PRE-LITIGATION, BEFORE THE IDAHO HUMAN RIGHTS COMMISSION AND/OR EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Most employment disputes pursued in the state of Idaho are required to proceed through a pre-litigation process and investigation. During these process(es), mediation and conciliation are offered by the Idaho Human Rights Commission ("IHRC") and the Equal Employment Opportunity Commission ("EEOC").

A. IDAHO HUMAN RIGHTS COMMISSION

Before the IHRC, mediation is an informal method to resolve complaints of discrimination based on age, race, sex, disability, national origin, religion or retaliation and issues related thereto. It is a process in which the IHRC's Senior Civil Rights Investigator assigned to an employee's case assists the employee and employer to resolve their disputes. Often, the mediation takes place prior to the actual investigation being initiated and/or completed. It is a voluntary process and requires the consent of both the employer and the employee.

There are a number of advantages to the parties participating in this early mediation opportunity, including: permitting the parties to gain perspective on the different views of the issues; clarification of the issues causing the disagreement; stimulation of mutual problem-solving efforts and encouragement to resolve conflicts in an informal, expeditious and cost-effective manner. These advantages, and more, are detailed on the IHRC website on its mediation process. Submitted with these materials are the IHRC Mediation summary materials, which can also be found at www.humanrights.idaho.gov/mediation.html. In addition, the IHRC Administrative Complaint Resolution Procedure is also submitted herewith demonstrating, by chart, the mediation and conciliation process and procedure.

On September 23, 2015, Linda Goodman, the current Administrator of the Idaho Human Rights Commission, appeared before the Idaho State Bar Employment and Labor Law Subcommittee. She shared with the Subcommittee that most of the current cases before IHRC are assigned (voluntarily) for mediation. She further suggested that, in her opinion, nearly all cases before the IHRC are appropriate for mediation – the process is impartial, brings the parties together to resolve their cases in advance of escalation and is successful; in her estimation

90-95% of the cases are resolved. It is imperative, however that both parties come in good faith, prepared with authority to settle the matter. If your client doesn't desire to mediate the case, it should not waste the parties' and mediator's time and allow the case to go forward toward investigation.

Finally, even in the event the case does not successfully mediate, an additional opportunity as resolution, pre-litigation, is possible. In the event the case is investigated and a probable cause determination is made, the case is sent out to the parties for an opportunity at conciliation. While the procedure (and timing) differ, the process appears much like mediation.

B. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In Idaho, most employment-related complaints/claims are dually filed, pre-litigation, with IHRC (state agency) and EEOC (federal agency). In those cases assigned over for investigation to the EEOC, like the IHRC, voluntary mediation and conciliation are tools available to the parties to facilitate early, voluntary and cost-effective resolution of claims prior to litigation.

Submitted with these materials are the United States EEOC Mediation materials, including an index to include a video, entitled "EEOC's Ten Reasons to Mediate", Facts About Mediation, Questions and Answers – Mediation, and additional helpful information and resource applicable to EEOC voluntary mediations. Links to the resources may be found at: www.eeoc.gov/eeoc/mediation/index.cfm. Further, submitted herewith is the EEOC publication: What You Should Know: The EEOC, Conciliation, and Litigation, which may also be found at: www.eoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm.

II.

PRIVATE MEDIATION/JUDICIAL MEDIATION

In the event mediation and/or conciliation before the IHRC and/or EEOC are not successful and/or if your case is not covered by the IHRC and/or EEOC administrative processes, mediation remains an available tool to settle and resolve your case pre-litigation, pre-trial or perhaps post-trial during the appellate process. Typically, these mediations proceed before an impartial third party or judge, mutually selected by the parties. Important considerations, in the employment litigation context include: whether to mediate, preparing for mediation, participation in mediation, and dealing with failure.

With respect to whether to mediate, the parties and counsel must consider why to mediate, if and when to do so. Preparation for mediation is vital to the likelihood of success, including selection of the appropriate mediator, evaluation of the case and strategies toward what a successful resolution may look like. Participation requires the parties and counsel be credible, creative and flexible. And, finally, if a mediation is unsuccessful, what next – trial, further settlement negotiations prior to trial, after trial or during appellate proceedings? In any event, consideration must be given to understanding, adapting and respecting the other parties, the mediator, the issues and the process.

Skip navigation

"Laws only declare rights. They do not deliver them." ~ MLK

Mediation

Home > Filing A Complaint > Mediation

About Us
Discrimination
Filing a Complaint
The Law & You
Posters
PSA Videos

Mediation is an informal way to resolve a complaint of discrimination based on age, race, sex, disability, national origin, religion, or retaliation. It is a process in which an impartial third party assists the parties to resolve their dispute.

What does a mediator typically do?

Invites the parties to the dispute to discuss the problem;

Empowers the parties by facilitating problem solving, brainstorming, and mutual understanding;

Facilitates the development of mutually acceptable agreements;

Works to reduce hostilities and improve communication;

Encourages cooperation and respect in an informal, creative atmosphere.

What are the advantages of Mediation?

Mediation provides advantages to other forms of alternative dispute resolution methods. Mediation:

Mediation At The Idaho Human Rights Commission

In accordance with its statutory obligation, the IHRC has a mediation program through which parties may resolve their disagreements. This method has been successfully used at the IHRC for over 20 years.

Allows the parties to get different views and perspectives of the dispute;

Clarifies the issues causing the disagreement;

Stimulates mutual problem-solving efforts;

Provides the parties an uninterrupted opportunity to present their point of view;

Helps individuals focus on what they have in common rather than on the issues dividing them;

Fosters the rebuilding of a damaged relationship;

Enables parties to retain decision making authority, keeping it out of the hands of third parties;

Helps resolve conflicts in an informal, expeditious and cost-effective manner;

Allows parties to tailor a creative solution to their dispute.

What is the role of the parties?

Mediation is voluntary; however, both parties must agree to mediate. Unless both parties agree to use the mediation process as a way to help resolve their disagreement, mediation cannot occur. Parties should:

Approach mediation in good faith and with an open mind;

Be willing to listen and to consider all aspects of the issues;

- Be active participants in mediation;
- Develop the terms of the settlement agreement with the assistance of the mediator.

You should have the authority to settle, be ready to settle, and be prepared to commit any resources agreed upon.

Who are the mediators?

The mediator assigned to your case is a senior civil rights investigator in the Commission's mediation unit. This individual has successfully completed specialized training in mediation. As a neutral third party, the mediator acts as a facilitator to communication and to conflict resolution. The mediator is NOT a decision-maker. Our mediator qualifications include:

- Extensive experience by having processed over 3,000 mediation cases
- Exceptional ability to maintain neutrality and objectivity
- Excellent communication skills
- Thorough knowledge of State and Federal civil rights laws and regulations

Do I need a lawyer?

You may retain a lawyer or representative, but one is not required. You are free to consult one at any time.

What if mediation fails?

If you are unable to reach a satisfactory solution, your complaint will be assigned to the Commission's investigative unit for further processing.

Transfer to the investigative unit does not preclude the possibility of mediation happening at a later time. An invitation or request for further mediation can be initiated by either party or the staff of the Commission at any time during the administrative process.

What is the difference between mediation and investigation?

Mediation resolves the dispute immediately without deciding the merits of the case. Its purpose is to settle the charge.

Investigation is a longer process and results in a decision on the merits of the charge. Its purpose is to determine if there is enough evidence to prove discrimination.

While mediation and investigation serve very different purposes, a case filed with the Commission may move from one process to the other as a result of a request from one or both parties or at the suggestion of a staff member.

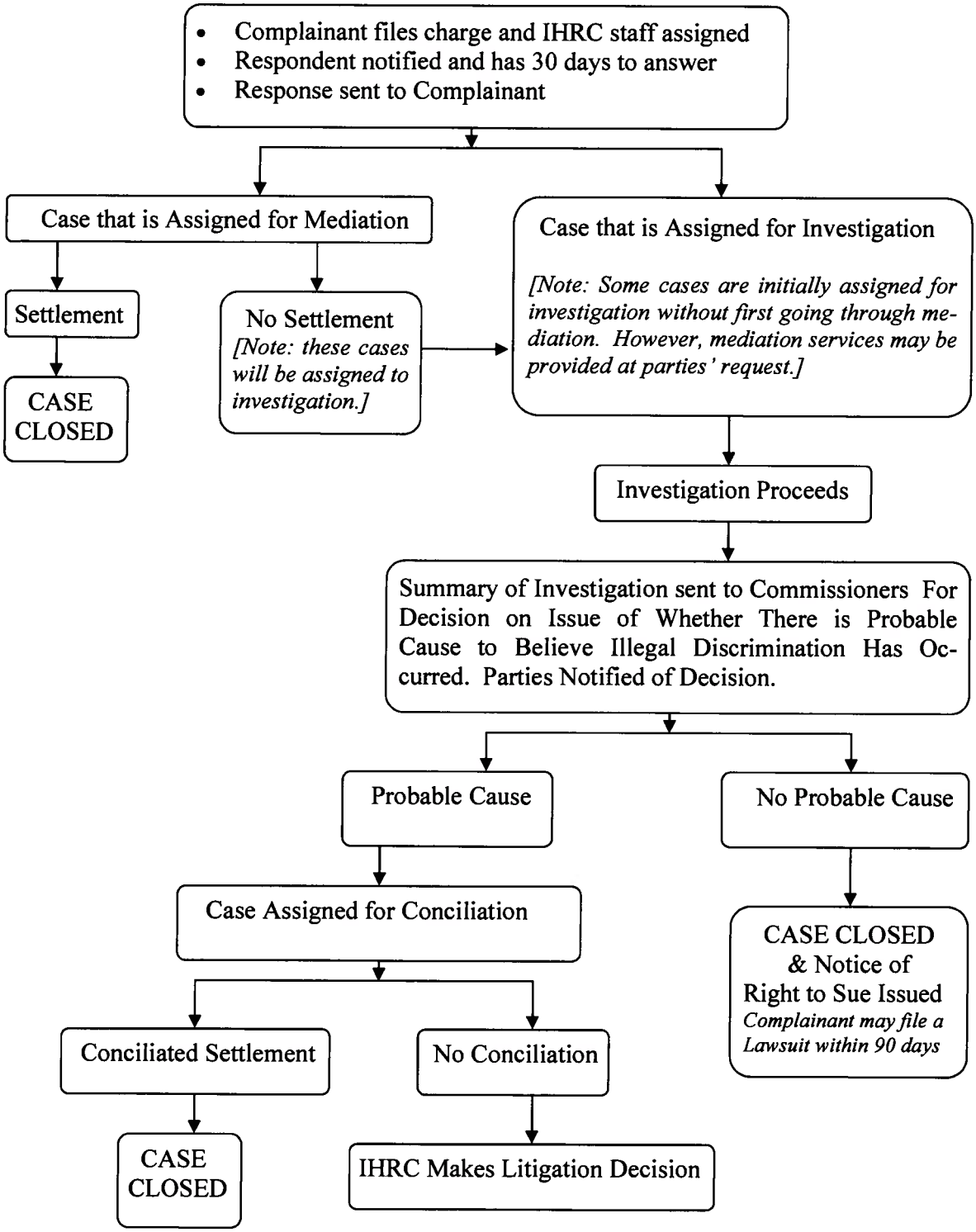
How can I learn more?

The senior civil rights investigator assigned to your case can answer your questions and provide more information.

A decision not to mediate does not impact the case as it goes through the investigative process.

Home | Contact Us | State of Idaho

IHRC ADMINISTRATIVE COMPLAINT RESOLUTION PROCEDURE



Mediation

Mediation is an informal and confidential way for people to resolve disputes with the help of a neutral mediator who is trained to help people discuss their differences. The mediator does not decide who is right or wrong or issue a decision. Instead, the mediator helps the parties work out their own solutions to problems.

Note: Federal agencies are required to have an alternative dispute resolution program. Most use mediation, but not necessarily the EEOC process.

Benefits of Mediation

One of the greatest benefits of mediation is that it allows people to resolve the charge in a friendly way and in ways that meet their own unique needs. Also, a charge can be resolved faster through mediation. While it takes less than 3 months on average to resolve a charge through mediation, it can take 6 months or longer for a charge to be investigated. Mediation is fair, efficient and can help the parties avoid a lengthy investigation and litigation.

EEOC's Mediation Process

Shortly after a charge is filed, we may contact both the employee and employer to ask if they are interested in participating in mediation. The decision to mediate is completely voluntary. If either party turns down mediation, the charge will be forwarded to an investigator. If both parties agree to mediate, we will schedule a mediation, which will be conducted by a trained and experienced mediator. If the parties do not reach an agreement at the mediation, the charge will be investigated like any other charge. A written signed agreement reached during mediation is enforceable in court just like any other contract.

Duration and Cost of Mediation

A mediation session usually lasts from 3 to 4 hours, although the time can vary depending on how complicated the case is. There is no charge to either party to attend the mediation.

Who Should Attend the Mediation

Sexual Harassment

Prohibited Practices

All parties to the charge should attend the mediation session. If you are representing the employer, you should be familiar with the facts of the charge and have the authority to settle the charge on behalf of the employer. Although you don't have to bring an attorney with you to the mediation, either party may choose to do so. The mediator will decide what role the attorney will play during the mediation.

Learn More About Mediation

If you would like to learn more about mediation, we have extensive information about EEOC's Mediation Program available.

About EEOC
Overview
The Commission
Meetings of the Commission
Open Government
Newsroom
Laws, Regulations, Guidance & MOUs
Budget & Performance
Enforcement & Litigation
Initiatives
Task Forces
Interagency Programs
Publications
Statistics
Outreach & Education
Legislative Affairs
FOIA & Privacy Act
Doing Business with EEOC
Jobs & Internships
EEOC History
Office of Inspector General

Home > About EEOC > Mediation

Mediation

Mediation is a *fair* and *efficient* process to help you resolve your employment disputes and reach an agreement. A neutral mediator assists you in reaching a voluntary, negotiated agreement. Choosing mediation to resolve employment discrimination disputes promotes a better work environment, reduces costs and works for the employer *and* the employee.

- EEOC's Ten Reasons to Mediate *(Watch the video!)*
- Facts About Mediation
- Questions and Answers - Mediation
- Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)
- Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act (ADA)
- EEOC's ADR Policy Statement
- History of EEOC Mediation Program
- Mediation Contact List
- Studies of the Mediation Program
- Universal Agreement to Mediate

A few satisfied customers ...

> *"Once the employer gets past the myth of "If we didn't do anything wrong, we shouldn't go to mediation" and decides to participate, the real issues in the dispute become clear. Through mediation, we have had the opportunity to proactively resolve issues and avoid potential charges in the future. We have seen the number of charges filed with EEOC against us actually decline. We believe that our participating in mediation and listening to employees' concerns has contributed to that decline."*

Donna M. Gwin
Director of Human Resources
Eastern Division
Safeway Inc.

"As an employer's attorney, I routinely recommend mediation to my clients. In mediation, you can build a sense of what the issues are, learn the problems, explore possible options for resolution, and make informed decisions whether or not resolving at that time or moving on is the best outcome for that matter. It makes both business and economic sense from the employer's perspective."
Charles C. Warner, Esq.
Porter Wright Morris & Arthur LLP

"Regardless of the issue or whether it has merit under Title VII, if it is draining resources, weighing on the mind of the employee, or having a negative impact on productivity, then getting the issue out on the table, mediating it and resolving it is often the smartest and most expeditious way to ensure workforce effectiveness."
Linda I. Workman
Vice President
Workforce Effectiveness
ConAgra Foods, Inc.

"Hopkins is striving to be an employer of choice. We think that participating in EEOC's mediation program moves us that much closer to meeting that goal. . . .We learned that settlement is not always about money. Sometimes there are non- economic ways to settle a case that may be important to the charging party and the respondent."
Laurice Royal, Esq.
Johns Hopkins Health System Corporation

For more information, see
EEOC Mediation Program and the Workplace Benefits of Mediation
EEOC Commission Meeting of December 2, 2003, Washington, D.C.

About EEOC
Overview
The Commission
Meetings of the Commission
Open Government
Newsroom
Laws, Regulations, Guidance & MOUs
Budget & Performance
Enforcement & Litigation
Initiatives
Task Forces
Interagency Programs
Publications
Statistics
Outreach & Education
Legislative Affairs
FOIA & Privacy Act
Doing Business with EEOC
Jobs & Internships
EEOC History
Office of Inspector General

Home > About EEOC > Newsroom > What You Should Know

+ Share

What You Should Know: The EEOC, Conciliation, and Litigation

There has been recent interest in EEOC's conciliation and litigation. The following information is intended to help explain the EEOC process.

At the end of an investigation, the EEOC makes a determination on the merits of the charge. If the EEOC concludes that the information obtained in the investigation does not establish a violation of the law, the person who filed the charge of discrimination will be issued a letter called a "Dismissal and Notice of Rights." This informs the person that he or she have the right to file a lawsuit in federal or state court within 90 days from the date of receipt of the letter. The employer also receives a copy of this document.

If the EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a "Letter of Determination" telling them that there is reason to believe that discrimination occurred. The Letter of Determination invites the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. Conciliation is a voluntary process, and the parties must agree to the resolution - neither the EEOC nor the employer can be forced to accept particular terms. The EEOC is required by Title VII to attempt to resolve findings of discrimination on charges through conciliation. The EEOC strongly encourages the parties to take advantage of this opportunity to resolve the charge informally and before the EEOC considers the matter for litigation. Conciliation is an efficient, effective, and inexpensive method of resolving employment discrimination charges.

The EEOC takes its conciliation obligations seriously. In fiscal year 2014, the EEOC successfully conciliated 1,031 cases. In fact, the EEOC improved its rate of successful conciliations from 27% in fiscal year 2010 to 38% in fiscal year 2014. The successful conciliation rate for systemic cases in fiscal year 2014 is even better -- with 47% of systemic investigations being resolved. This means that more and more often employers are coming to the table after an investigation and resolving more complaints with conciliation agreements, without the need for protracted litigation. It

is important to note that even before conciliation efforts take place, over 14,000 charges are settled with EEOC or through private settlements each year.

More information for employers about the EEOC's mediation program and conciliation process can be found at http://www.eeoc.gov/employers/resolving.cfm.

If conciliation fails, the EEOC must decide whether to sue the employer in court. In fiscal year 2014, conciliation failed in 1,714 charges. When deciding whether to file a lawsuit, the EEOC considers several factors, including the seriousness of the violation, the type of legal issues in the case, the wider impact the lawsuit could have on the agency's efforts to combat workplace discrimination, and the resources available to litigate the case effectively. Filing lawsuits is a last resort - the EEOC files suit in less than 8 percent of the cases where it believes discrimination occurred and conciliation was unsuccessful.

In fiscal year 2014, the agency filed 133 lawsuits against employers accusing them of unlawful employment discrimination, including 105 on behalf of particular individuals and 28 on behalf of groups or classes of employees. In that same time period, EEOC's legal staff resolved 136 of the lawsuits filed that year and previous years, for a total monetary recovery of $22.5 million. At the end of fiscal year 2014, the EEOC had 228 cases on its active docket, of which 57 (25 percent) involved challenges to class-wide or systemic discrimination. By any measure, the EEOC has compiled a remarkable record in court. It achieved a favorable resolution in approximately 90 percent of all district court resolutions.