



Position Statements and Mediated Settlements

DO'S AND DON'T'S

BY RAY GEIS, ESQ.

Title VII: Exhausting Administrative Remedies prior to commencement of litigation

Charge

- ▶ Receive Notice of Charge
- ▶ Prepare Respondent's position statement
- ▶ Probable cause determination or dismissal
- ▶ Right to sue letter

ADR

- ▶ Voluntary Mediation after charge filed but before complaint is investigated
- ▶ Mediated Settlement
- ▶ Withdrawal of Charge if settled
- ▶ Back to investigation if not settled
- ▶ IF Probable cause issued
- ▶ Voluntary Mediation OR
- ▶ OCRC Conciliation

Respondent's position statement



Who we are?

We are the good guys. Our agency does this and that which are good things.

**Just the facts, mam.
Just the facts.**



Our story...

Here are the facts. This is the background. This is what happened.



What we did...

We tried to fix the situation. This is what we did to do that. What we did was right, or if it wasn't we fixed it.

Writing for Understanding

Section Header

Introductory Statement

Content

Introduction

Thank you for the opportunity to respond. We are a cabinet level agency of the state of Ohio that provides...

Briefly tell the investigator your agency's mission, it's importance, the good that it does, the section

Background

This charge arises from....

Discuss "facts" and circumstances leading up to the charge. Include actions i.e. investigation, remediation, etc.

Discussion/Conclusion

CP did NOT meet her burden to show discrimination/harassment OR Respondent had a legitimate non-discriminatory business reason for...

Analyze the facts. Show that We met our obligation to charging party because (a) it's not a violation; (b) we promptly remedied the situation completely; (c) we unfortunately had to act within our rights as a last resort to protect the agency.

Annotated Attachments

Attachment 1 – Statement (states CP...

Attachments should support your story in an organized sequential progression of facts

Use “Action” Sub-headers in Conclusion

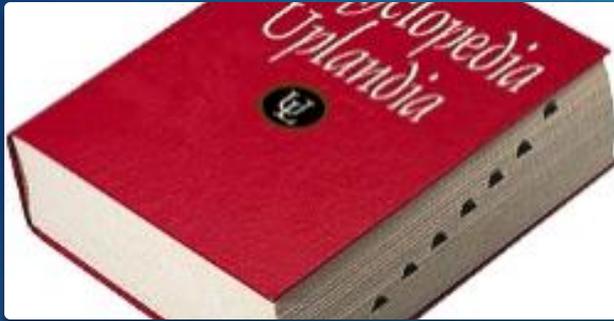
CP was disciplined for a legitimate non-discriminatory business reason when she called her boss a ?#@!!#?* and refused to write the report which was part of her assigned work.

Respondent promptly corrected the situation by disciplining the employee that CP claimed was harassing him and there has been no incident since Respondent intervened.

Other employees received discipline that was just as strong as the CP's for similar offenses.

CP cannot make out an inference of discrimination because he didn't suffer any adverse action.

What to avoid:



Too many cites

Investigators don't directly apply case law...they look for facts to support probable cause



CP bashing

Conclusory statements about "character" isn't evidence



Disorganized Thought

Doesn't tell a story. Rambling about dates and events without a theme

MEDIATION



Opening

CP will lay out what they want and why they feel entitled.

Respondent can also make an opening statement BUT...

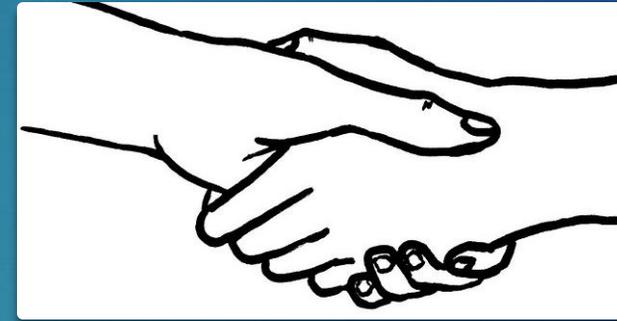


Caucus

Many mediators will break up the parties into different rooms

“Shuttle” Diplomacy

Offers and Counters



Drafting/Signing

If oral terms are reached the mediator will reduce to writing,

Rules of Mediation

Mediator is a third party neutral who must remain impartial by not taking sides in the mediation.

What is said in mediation as part of settlement discussions is privileged and may not be introduced in the investigation or in subsequent litigation unless the parties agree to it.

Mediation is voluntary and you can withdraw from mediation at any time including during the mediation itself.

Parties do NOT have to settle. The EEOC/OCRC or mediator CANNOT force settlement on any party in mediation.

EEOC National Mediation Program 3 Minute Informational Video



Advantages of Mediation

Interpersonal

- Is this a current employee?
- Will there be a relationship to maintain after the charge?

- Demonstrates engagement and caring
- Shows commitment to problem solving

Strategic

- Are there intangible costs to a longer more drawn out process?
- Is it likely that there will be litigation after administrative remedies are exhausted?

- Brings closure
- Things get back to "normal" sooner

Economic

- Have I added up the costs of time, energy in terms of case preparations, obtaining affidavits?

- May be cheaper to settle for low cost/no cost than go through full investigation process/litigation



Guard against these pitfalls encountered in Mediation

- No support or settlement authority from superiors – won't allow mediation or refuse to make concessions out of "principle"
- Pushy mediator (inflates the case of each party to the other in caucus in order to achieve settlement)
- Can't get hold of decision maker at a pivotal point in negotiations



Counters to Pitfalls encountered in mediation

- Focus on how a particular “deal” meets the Respondent’s needs (interests)
- Know the “value” of your case up front – immunize yourself from mediators that engage in too much “evaluation” of the case
- Pre-position yourself to be able to reach a decision maker for settlement authority when movement occurs in a negotiation OR get broad settlement authority ahead of time if possible

Common Verbal Techniques employed by mediators

Active Listening

REFLECTIONS – demonstrate understanding of what was heard to validate speaker and emphasize to other party

SUMMARIES – briefly cover to the parties what ground they have covered in the mediation



Inquiry

-Have you considered?

-What will happen if?

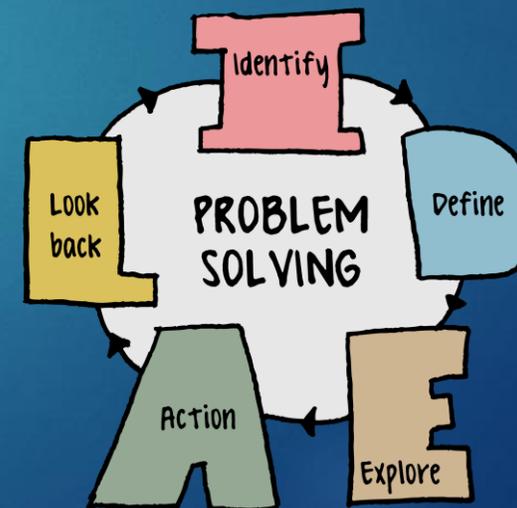
(helping parties get clear on what they really want and educating parties about their best alternative if mediation fails. BATNA)



Issue Framing

If you could XYZ, would that satisfy your concerns today?

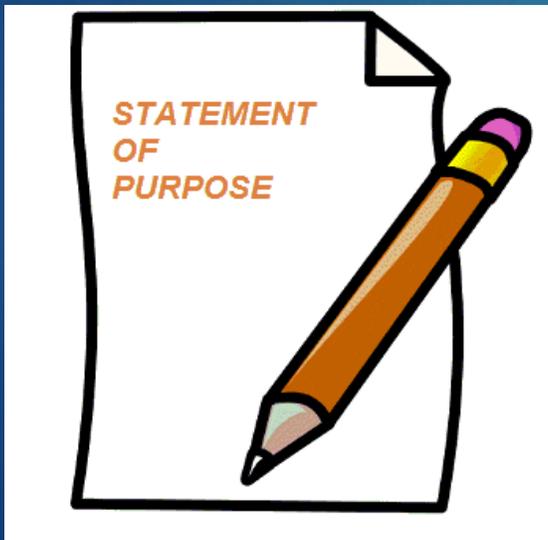
States dispute in terms of a problem that can be solved focusing on the interest of the parties instead of the position



Structural Techniques employed by mediators

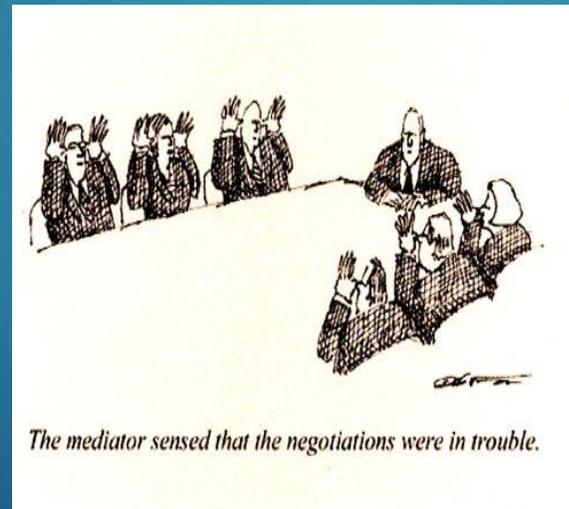
Openings

- Each Party has opportunity
- Story telling



Caucus

- Separation of the parties
- May use evaluative technique or inquiry in caucus



Scrivening

Helping parties reduce agreement to writing



Standard Settlement Terms



Non-Admissions Clause - Settlement cannot be construed as admission of fault.

Release of all Claims- a.k.a. covenant not to sue now or in the future over same events giving rise to the charge being mediated.

Withdrawal of Charge- Statement that settlement either constitutes a withdrawal of the charge or a promise to withdraw the charge within x days.

EEOC Sample Settlement Agreement Template



U.S. Equal Employment Opportunity Commission

This is a sample Settlement Agreement from the U.S. Equal Employment Opportunity Commission

Settlement Agreement

APPELLANT:

AGENCY:

EEOC APPEAL NUMBER:

AGENCY CASE NO.:

Preliminary Statement

In the interest of closure and in the mutual resolution of their differences, the _____ [Name of agency] and _____ [Name of appellant] entered into this Settlement Agreement on this _____ day of _____. The parties sign this Agreement in exchange for the good and valuable consideration set forth herein, which, absent this Agreement, neither party is obligated to provide to the other and the adequacy of which is hereby acknowledged.

Terms and Conditions

1. In exchange for the promises made by the agency in this Agreement, the appellant agrees not to institute a law suit under [Title VII of the Civil Rights Act of 1964, as amended, (Title VII), the Age Discrimination in Employment Act of 1967 as amended, (ADEA), the Rehabilitation Act of 1974, as amended, (Rehab Act)] based on EEOC Appeal Number _____.
2. Further, the appellant agrees that submission of this Agreement to the Equal Employment Opportunity Commission (Commission) will constitute a request for closure of EEOC Appeal Number _____.
3. It is understood that this agreement does not constitute and shall not be construed as an admission of liability or wrongdoing by the agency under [Title VII of the Civil Rights Act of 1964, as amended, (Title VII), the Age Discrimination in Employment Act of 1967 as amended, (ADEA), the Rehabilitation Act of 1974, as amended, (Rehab Act)], with respect to the appellant's claims set forth in EEOC Appeal Number _____.
4. The agency agrees:
 1. [Insert appropriate provisions]
5. The parties understand the terms of this Agreement and enter into it voluntarily.
6. This document constitutes a final and complete statement of the Agreement between the parties. There shall be no modifications or amendments to this Agreement unless they are in writing, signed by the parties.
7. The parties agree that in the event that the appellant believes that the agency has failed to comply with the terms of this agreement, the procedures set forth at 29 C.F.R. Section 1614.504 shall govern. Appellant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the appellant knew or should have known of a breach of this agreement. The appellant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased. The agency shall resolve the matter and respond to the appellant in writing. If the agency has not responded to the appellant, in writing, or if the appellant is not satisfied with the agency's attempt to resolve the matter, the appellant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The appellant may file such an appeal 35 days after [he/she] has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of [his/her] receipt of an agency's determination.
8. The appellant knowingly and voluntarily waives all rights under the Age Discrimination in Employment Act of 1967 (ADEA) which pertain to allegations of age discrimination as specified in the appellant's complaint. Federal law provides that the appellant may have 21 days from receipt of the agreement to review and consider this agreement before signing it. The appellant further

Special Issues with mediated settlements in the public sector

Public Records Law

Limits on:

*Neutral References

*Gag Clauses
(confidential)

*Rescissions/Expungements of Discipline

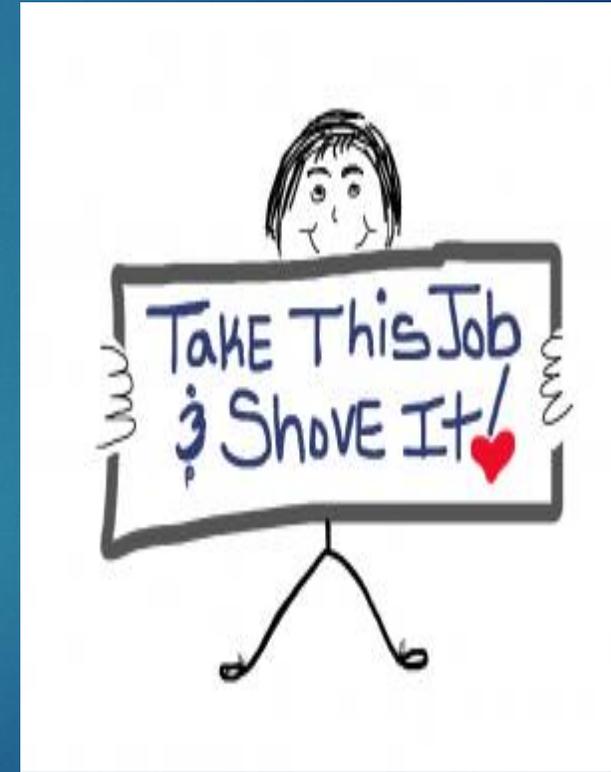
Resignation codes

HR-D-12

*Regular

*Not in good Standing

*Not Recommended for
Rehire





Public Records: Settlement provisions cannot override R.C. 149.43

Model Neutral Reference language: Employee agrees to refer all prospective employers to the XYZ Human Resources Administrator for the purposes of securing employment verification regarding her employment with XYZ. XYZ will respond to employment verifications regarding Employee with the following neutral information, to wit: dates of employment, last salary earned, positions held. **Nothing in this Agreement will prohibit or prevent XYZ from providing any responsive record to any future public records requests pursuant to Ohio Revised Code Section 149.43.**

Gag clauses can't cloak public records

- You can segregate records including the settlement agreement but you may not destroy them except according to retention schedule
- You must comply with R.C. 149.43



**PUBLIC
RECORD**



“ Resigned -- not
recommended for rehire

”

SITUATION: THE RESIGNATION-SETTLEMENT ALSO INVOLVES ACTIONS OF
A CRIMINAL OR QUASI-CRIMINAL NATURE

“This language shall appear in any settlement agreement, so that the employee has notice of the descriptive language, and it shall be designated as such in the agency and state personnel files. The employee shall also be informed that this designation will appear to outside employers checking referenced and employment history.” HR-D-12



“ Resigned- not in good standing

”

SITUATION: WHEN DISCIPLINE FOR CAUSE IS ALSO PART OF THE DISPUTE AND THERE AND SISTER AGENCIES HAVE A STRONG NEED TO KNOW EMPLOYMENT HISTORY

- This code appears to other state agencies
- This code does not appear to outside employers
- Alternative: Employee agrees NOT to apply with the State of Ohio



Questions?