

Pedaling Toward Prevention at the U.S. Postal Service

By Geoff A. Drucker



Bringing a mediator into a negotiation can feel a lot like removing training wheels from a bicycle: you know it can help you go faster and get farther, but it takes a while to regain your sense of control. Most employment lawyers have learned to pedal their way through mediation.

Now it is time to get uncomfortable again. And for this we have the U.S. Postal Service to thank. It has created a mediation program for discrimination claims that has reduced the number of employees filing new claims by 40 percent. This did not occur by happenstance. The goal from the outset was to use mediation as a tool for improving relationships between managers and employees and, thereby, to prevent further litigation between them.

The postal experiment shows that employment mediation is capable of reaching new heights. It not only can bring closure to disputes about what happened in the past, it also can improve relationships so future disputes become less likely. But in order to use mediation for prevention, many companies will have to leave their comfort zones in thinking about what, when, and how to mediate.

In the Postal Service program, mediators are instructed to focus first and foremost on improving communication and understanding. At the outset, employees and managers may discuss whatever issues are on their minds, regardless of legal relevance, for pretty much as long as they wish. Generally, the parties decide to settle the complaint at hand, but the mediator does not push them to do so. Exit surveys completed by participants in such free-flowing mediations report the following:

Represented employees are eligible to participate in mediation. Because the program was instituted pursuant to regulations issued by the Equal Employment Opportunity Commission (EEOC) (29 C.F.R. § 1614), the Postal Service was not legally required to consult with the postal unions beforehand, although

it did so informally. Under EEOC regulations, employees can bring the representative of their choice to mediation. Union stewards have no independent right to participate in the mediations, but employees often choose to be represented by a union official (and they generally are very helpful in finding a resolution).

Participants listen and learn:

- 69 percent of complainants and 70 percent of managers report listening to the other party.
 - 53 percent of complainants and 58 percent of managers report learning the other party's viewpoint. Are they fibbing to look good? The data suggest otherwise: 57 percent of complainants think their manager learned from them, and 58 percent of managers think the complainant learned their point of view.
- Learning generates respect and acknowledgment:
- Once they understand the other party's viewpoint, do they acknowledge its legitimacy? 60 percent of complainants and 70 percent of managers say they did. Did the other party hear this acknowledgment? 48 percent of complainants and 45 percent of supervisors say they did.

- When people in conflict acknowledge the other party's viewpoint as legitimate, they often show their newfound respect by apologizing. Managers report apologizing in mediation 30 percent of the time. Complainants report being apologized to 29 percent of the time, thereby confirming that the apologies are real. Complainants report apologizing 23 percent of the time. Curiously, significantly fewer (17 percent) supervisors report being apologized to. Even so, compared to litigation—

where apologies from the accuser to the accused are almost unheard of—17 percent is a remarkable figure.

Mediation builds conflict resolution skills:

- Immediately after mediating, 55 percent of complainants and 65 percent of managers predict the experience will have a favorable long-term effect on their relationship with the other party.
- When interviewed several months after mediating, 92 percent of a sample of managers and 28 percent of a sample of employees reported that mediation had influenced their approach to conflict resolution, particularly with regard to the importance of listening.

Managers are far more likely to report a change in behavior because they are far more likely to be repeat players in mediation. The communication skills fostered by mediation are reinforced through repetition.

Making the most effective use of mediation provides a competitive edge in reducing litigation costs and improving workplace productivity. The three key questions to ask are below:

1. Is our goal settlement, prevention, or a combination of the two?
2. Is mediation worthwhile only when the company faces a significant legal risk, or should management also agree to mediate when the current legal stakes are small but a significant relationship has been strained?
3. Should management agree to mediate only after litigation is in full swing, or should it also consider mediating nascent claims?

The first question gets at what style of mediation is appropriate. In high-stakes cases, the need to put the matter to rest generally overrides all other considerations, so choosing a mediator who will push hard for settlement makes sense. In more typical employment cases, the potential long-term benefits of a mediation style that fosters improved communication and understanding may outweigh the

possibility of achieving a somewhat lower settlement rate. Companies should experiment to determine what works best for them.

The second question follows from the first: if prevention is a goal, a company should take factors other than legal risk into account when deciding whether to mediate. Among these factors are what processes employees have to resolve their differences with managers other than mediation and whether these processes are widely used and cost-effective. Mediation is a relatively expensive and time-consuming way to foster improved communication and understanding. But it sometimes fills a void.

The third question also follows from the first. Free-flowing dialogue that surfaces and addresses underlying relationship problems is unlikely to occur on the courthouse steps. A dialogue is much more likely to happen when cases are mediated early on. Thus, a corporate alternative dispute resolution program should encourage counsel to *consider* mediating before the litigation process has further polarized the parties. Sometimes full-blown discovery is needed, but many cases can be successfully mediated without all the facts.

While the Postal Service was experimenting with improving internal relations through mediation, it gambled on enhancing its external image by sponsoring a pro cyclist who was trying to make a comeback from near fatal cancer. That cyclist pedaled on to win the world's most famous long-distance bike race a record seven consecutive times. You never know how far or fast you can go on a bike until you hop on, take your hands off the brakes, and start pedaling. The same goes for mediation. ■

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