Mediating Workplace Harassment Complaints

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Allegations of sexual harassment are on the rise, confusion about how best to respond to these charges is mounting, and supervisors, human resource personnel, CEO's, and union representatives are looking to social workers and other human service professionals for services in this area. Sexual harassment has been recognized as an offense in the United States under Title VII since 1977. During the five-year period from 1987-1992, the number of sexual harassment complaints filed with the Equal Employment Opportunity Commission (EEOC) nearly doubled. Fifty to eighty-five percent of working women will experience sexual harassment in their place of work, but research indicates that up to 90 percent will be afraid to report the incident. The typical Fortune 500 firm spends $6,700,000 per year (or $280 per employee) on legal fees related to disputes involving sexual harassment. In the United States, sixty-four percent of cases filed are decided in favor of the complainant; the average judgment in litigated cases is $460,000 (Stamato, 1994). In the United States, over two million people employed in both the private and public sector have experienced physical violence in their workplace during one year, and over four million employees reported that they have felt threatened in some way by a fellow employee. Hostility in the work-place is a growing problem according to social services agencies and other professionals who provide training and support services for state, provincial or federal agencies and a wide range of private businesses. The root causes of the increasing incidents of physical violence and other intimidating behaviors are varied. The pressures in the workplace due to downsizing may be influenced by the longer hours and increased work loads to the employees' jobs. Increased stress levels may cause escalating and unresolved conflicts while depleting the ability to cope with the work and remain loyal to the organization. "According to recent human rights legislation, an employer is responsible and can be held liable for harassment that is endured by its' employees. The employer is also liable for the discriminatory conduct of it’s' employees, including managers, supervisors, co-workers and even clients or customers. Employers have an obligation to provide a healthy work environment and cannot afford to wait until a complaint is made before taking action to address harassment. Preventative measures should be taken by establishing a clear policy before a complaint occurs. According to a 1992 publication of the B.C. Council of Human Rights based on recent B.C. decisions, having a formal policy to deal with harassment may prevent the employer from being held liable "to the same extent, if at all, as an employer who fails to adopt such steps". Specifically, it is the employer's responsibility to: make it clear that harassment will not be tolerated; establish a formal harassment policy; make sure employees understand the policy and how to use it; inform managers and supervisors of their responsibility to provide a harassment-free workplace; promptly investigate and resolve problems as they arise; and take appropriate corrective action when required."
(Burdine).

Theory, Debates and Trends

Workplace mediation involves a third party who assists employees in conflict to negotiate an acceptable settlement of contested issues. Mediation is frequently used to avoid or overcome an impasse when employees have been unable to negotiate an agreement on their own. This chapter will focus on harassment complaints including sexual harassment complaints and when it may be appropriate to use mediation to resolve these complaints.

"Workplace harassment includes a range of behaviors which undermine the dignity, morale, safety and respect of the individuals or groups involved. According to the B.C. Council of Human Rights, workplace harassment is defined as verbal, visual or physical conduct which has the effect of unreasonably interfering with an individual's or group's work performance, or which creates an intimidating, hostile or offensive work environment." (Burdine) Harassment complaints may involve charges of discrimination, sexual harassment, or claims of personal harassment or intimidation. Forms of workplace harassment include: humiliation, threats, intimidation, abuse of power, rumors, back-stabbing, blackmail, exploitation, ostracizing, isolating, physical assault, malicious teasing, offensive gesturing or abusive language, and defacement or destruction of property.
(Burdine)

According to the U.S. Department of Regulatory Agencies, sexual harassment behavior includes: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: submission to such conduct is made either explicitly or implicitly a requirement of employment; the individual's response to such conduct is used as the basis for decisions which deny that individual rights protected by law; work performance is affected; such conduct creates an intimidating, hostile or offensive work environment. Forms of sexual harassment include: obscene gestures, staring or leering, sexually suggestive comments about an employee's appearance, unwelcome touching, displaying sexually oriented pictures, requesting sexual favors in return for a job or other employment benefit.

In this chapter, the term "complainant" refers to the individual who believes that he/she has been or is being harassed. The term "respondent" refers to the individual(s) who the complainant is charging with the harassment or with the responsibility of stopping the harassment.

Who are the mediators of workplace harassment disputes? Harassment complaints are usually mediated by experienced conflict resolution professionals who have a background in employment law, civil rights, personnel management, or counseling. Workplace harassment mediators need to have a solid understanding of the laws prohibiting sexual harassment and discrimination. The mediator also needs to be familiar with the organization's policies prohibiting workplace harassment, including the remedies available to the complainant if the respondent is guilty of harassment behavior. Finally, workplace harassment mediators must be "neutral". "Neutral" doesn't mean that the mediator is void of opinions or values regarding discriminatory behavior, sexual harassment or other forms of unacceptable conduct in the workplace. The term "neutral" does require the mediator to carefully assess whether his/her experience and the opinions and values formulated from that experience, will allow him/her to treat both the complainant and respondent with respect and strongly advocate for the process

itself. Individuals who have been victims of discrimination, physical violence or sexual harassment should not automatically rule out the possibility of mediating these types of cases. However, an honest assessment of the ability to view these cases with an open mind is necessary.

Why is Mediation an Appropriate Procedure for Resolving Harassment Disputes?

The forces impelling private corporations and governmental organizations toward the use of mediation to resolve harassment situations include the escalating costs of litigation, the strain on human resources during a time of downsizing, the pressure to increase productivity in the face of increasing competition, and the need to provide a safe workplace for all employees by eliminating violence and other forms of harassment.

Mediation can build workplace morale and enhance communication. If disputants are able to resolve their own disagreements, disputes and conflicts, the need to appeal to outside sources and rely on cumbersome external procedures will be minimized. Litigation and arbitration of harassment disputes is on the rise, primarily because employees believe that these procedures will protect their interests. Mediation is only successful when both management and non-management employees believe that the mediator and the process are accessible, fair, impartial and highly respected throughout the organization.

Mediation is less adversarial than more formal processes. The voluntary, non-adversarial, non-coercive nature of the mediation process offers the opportunity to explore the most important and problematic concerns of each party.

Mediation is also less formal and more expedient than more formal processes and it prevents unnecessary time delays, paperwork, and the stress and frustration that may result. In mediation, decision-making authority is retained by the employees; employees have control over the outcome. This means that the process is more predictable the likelihood that any settlements reached will be honored, and it enhances mutual ownership of the settlement. Mediation places the decisions in the hands of the people who are usually in the best position to know which solution will work and which will not. They can usually evaluate the impact of each proposed solution on their future working relationships and careers.

Mediation programs, when administered correctly, protect confidentiality. When the parties involved are protected by confidentiality, they are better able to identify what most concerns them, prioritize and focus on that which is most important to resolve, discuss how they want these issues to be resolved, and reach agreements on how to deal with future problems. Mediation also offers greater flexibility in regard to the issues to be discussed and the possibilities for agreement. Often solutions which are imposed by a third-party are viewed as unjust, unhelpful, ambiguous, or simply unacceptable. When mutually agreed upon, mediation enables employees to avoid the trap of deciding who is "right" and who is "wrong", instead, employees can focus on clarifying what really occurred, how each felt, what could have been done differently, and how they can rectify the situation. They can "expand the pie" and develop solutions which address their underlying concerns; these often include "saving face", offering and accepting apologies, and outlining specific behaviors and expectations which are designed to ensure that problems will not re-occur.

The fact that mediation does not focus primarily on attributing fault does not mean that a harasser cannot and will not be disciplined. Rather, the employee will discover how his behavior affected the complainant, and how the complainant would like to see the situation rectified. Mediation offers the harasser the opportunity to apologize for his behavior, clarify his intentions, and accept, if not agree to, appropriate disciplinary action which is dictated by organizational policy or management prerogative.

Mediation is usually considerably less expensive than litigation. The costs involved in using internal or external mediators are usually less than that of lawyers. Furthermore, the cost of discovery is eliminated, as are the costs involved in the delays which accompany most formal and legal processes. Employers spend an average of $200,000 on each complaint that is investigated in-house and found to be valid, whether or not it ever gets to court (Fisher, 1993). Resolving harassment cases through mediation, which might otherwise lead to expensive and humiliating lawsuits, can also help save valuable public resources.

Mediation protects relationships and individual careers. Mediation which results in genuine agreements addressing each person's needs helps, where appropriate, to preserve and enhance a future working relationship. When one or both employees agree to discontinue their relationship, the mediator can help them negotiate the procedure which outlines how the relationship will end while protecting reputations, confidences and career opportunities.

When is Mediation an Appropriate Procedure for Resolving Harassment Disputes?

The question of whether mediation should be used to resolve workplace harassment, especially sexual harassment cases, continues to be widely debated. Mediation is not appropriate in every situation. When an employee feels physically threatened, coerced or otherwise unable to express her concerns and negotiate for solutions to resolve the conflict, engaging in mediation would not be wise or possibly even safe. On the other hand, when an employee wishes to resolve the issue quickly and confidentially, while limiting the number of personnel who might otherwise be involved in the case, mediation may meet her needs (Stamato). When the complainant and the respondent wish to "clear the air" and maintain a professional working relationship with one another, the mediation process offers the opportunity to share perspectives, clarify outstanding questions and rebuild strained or damaged relationships. One of the difficult dynamics in harassment cases involves doubt: doubt on the complainant's part about the harasser's motives at the time of the incident, and doubt on the respondent's part as to whether the victim understood his intent. The respondent may be having second thoughts, or even regrets, about the incident and his motives at that time. For mediation to proceed, however, it is imperative that the respondent is able to recognize the impact his behavior has had on the complainant. The impact is much more important to the mediation process than the intent.

When the complainant is able to negotiate with the employee who harassed her without fear of retaliation or loss of face, the mediation process can offer a powerful opportunity to describe what happened, how she felt at the time and after, and what is needed to begin to move beyond this situation. One of the most humiliating aspects of sexual and other forms of harassment is that employees do not have secure opportunities to express their humiliation, anger, embarrassment, disappointment or fear.

In order to determine whether a case is appropriate for mediation, the mediator will want to review existing workplace policies regarding harassment; be aware of the full range of existing dispute resolution processes and procedures, including the availability of employee support services; determine whether the respondent has been involved in a single incident or has a history of harassment; assess the complainant's ability to negotiate without fear; assess whether the respondent is willing and able to negotiate without fear; determine if there have been any counter-allegations on the part of the respondent; and clarify the reporting requirements to the organization.

Prior to accepting a case for mediation, the mediator should know the answers to the following questions: When and how is mediation presented as an option to the complainant and the respondent? How does the organization define the role of the mediator (as a neutral, an advisor, both)? With whom does the mediator liaise before, during and after the mediation? How is the respondent notified of the complaint? How much time is allowed for pre-mediation preparation and post-mediation follow-up? Does the policy require a written agreement from the mediation? If so, who may review it, and who has access to it? What documentation or other communication, if any, does the organization require if the conflict is resolved? Unresolved? What is the role and responsibility of the mediator if the immediate conflict is found to be symptomatic of a larger, more systemic problem?

Mediation is most effective when it is an integral part of a larger dispute resolution system which offers support services and is governed by policies stating that the organization will not tolerate any form of harassment, including sexual harassment. These policies should specify that a supervisor who harasses or solicits favors (including sexual favors) from an unwilling subordinate in return for promotions, increased wages, job security, or any similar promise will be disciplined or terminated. They should also indicate that unwelcome sexual propositions or hostile or threatening behavior between teammates constitutes harassment and will not be tolerated.

Verifying that a policy is in place which prohibits physical violence, sexual harassment and other forms of hostile or intimidating behavior is the first step in determining whether the organizational culture truly prohibits such behavior. The mediator also needs to know whether this policy is consistently enforced throughout all levels of the organization. If the policy is adamantly enforced in some departments and not in others, or if it is enforced at staff levels but not at the senior management level, it will be difficult, if not impossible, for the aggrieved party to reach an agreement which will be enforced and supported by responsible officials within the organization. In fact, if the organization is not committed to the consistent enforcement of its harassment policy, it is likely that mediation could serve not as a process for resolving painful and difficult issues, but as a method of "pushing the issues under the rug", where the aggrieved employee is placated to the point where she is no longer willing to pursue the matter internally through the organization's procedures, or externally through litigation.

The mediator needs to understand the history of the relationship between the employees in question. A history of violence between the parties or a record of repeated harassment charges is a sign that a case may be better suited to more formal procedures for resolution. A critical point is that violence, sexual harassment, and other forms of intimidating or hostile behavior are not,

themselves, mediable. The focus of workplace harassment mediation is the relationship problem which is caused by the harassment.

Mediation can only be successful if the complainant is willing and able to negotiate with the respondent without fear. The mediator's initial critical task in any harassment case is to determine the extent to which an employee is feeling physically safe and the degree to which she is emotionally vulnerable. The key question to be addressed is under what conditions, if any, is the complainant willing and able to negotiate with the respondent? During a private interview with the complainant, the mediator should pose open-ended questions to uncover the nature and degree of the harassment. A non-threatening, confidential environment for the victim to talk about the situation should be ensured. In cases involving sexual harassment, it is often necessary for the complainant to not only talk about what occurred, but to also express her feelings of shame, anger, and fear. She may have never talked about the harassment beyond indicating that there might be a problem. She may believe that harassment, including sexual harassment, is simply part of the "package" she must accept in order to keep her job or be successful in the future. In many cases there is considerable fear of retaliation.

In addition to reflecting feelings, the mediator needs to ask open-ended questions to explore the situation with the respondent in the initial contact phase. These include: "How would you describe what happened?" "How would you like to see the situation resolved?" "Have you attempted to discuss this situation with the respondent? If so, what happened?" "How has your relationship with the respondent changed since the incident or since the harassment began?" "How closely do the two of you have to work together?" "Do you feel afraid of the respondent?" "How has the organization responded to your situation thus far?"

The employee who demonstrates very low self-esteem, readily assumes blame for the harassment, or is reluctant to engage in a discussion of the situation is probably not a good candidate for mediation. In any case involving sexual harassment, verifying whether the complainant is in need of and has access to support services is important prior to initiating mediation.

A thorough assessment of the respondent's willingness and ability to engage in mediation is also necessary. It is possible that this employee also feels victimized, either because he was harassed by the respondent or by the very way the organization is responding to the situation. His willingness and ability to negotiate is largely dependent on his willingness to accept the fact that there is a problem, and that the situation may be viewed very differently by the complainant. The employee who is unwilling to make concessions or take responsibility for hostile behavior or unwelcome advances may not be a good candidate for mediation. Mediation is not appropriate when the harasser trivializes his actions or believes that there should be no consequences for his harassing behavior. Finally, mediation is not appropriate if there is any hint that the respondent may use the process to humiliate the other party in any way.

If mediation proceeds, who should be at the table? In addition to the complainant and respondent, it is often helpful to include their workplace supervisor if they are employed in the same department. The supervisor, who is familiar with the organization's policies pertaining to sexual harassment and other inappropriate conduct, will be able to monitor any agreement made in mediation. The supervisor ensures accountability to the agreement while offering support and,

where necessary, additional remedial action. It may also be helpful for the complainant and respondent to have support persons to enable them to negotiate effectively. For example, after hearing the details of the problem from both the complainant's and respondent's perspective, the supervisor might determine that the department or the entire organization would benefit from training in preventing harassment.

When should mediation occur? Resolving workplace conflicts early via mediation is usually more cost effective, more expedient and less stressful than relying on formal grievance procedures (DeLeon, 1994, Skratek, 1990). Often these disputes involve tensions which have been allowed to escalate over several months or even years causing relationships and communications to deteriorate, while hostility and frustration escalate.

Different types of workplace mediation programs which deal with harassment are characterized by several different variables:

- Mandatory versus voluntary mediation. The U.S. Army Corps of Engineers has an Early Resolution Program which offers mediation to employees who believe that they are victims of harassment, including sexual harassment. If an employee elects to use mediation, the supervisor or manager must participate. Thus, mediation is voluntary for the aggrieved, but mandatory for whoever is representing the Corps of Engineers.

- Ad hoc versus formal process. Some organizations, such as the U.S. Department of the Interior's Bureau of Reclamation, have established formal mediation services. Others, such as a number of colleges and universities, utilize the expertise of existing staff or hire external mediators on an as-needed basis.

Issues and Challenges

The use of mediation to resolve harassment issues is clearly on the rise and is likely to become an increasingly important option in dispute resolution systems throughout the private and public sector. In the future, social workers and allied human service professionals will be more likely to occupy positions in which they function as workplace mediators. There are many questions and concerns that need to be addressed if their interventions are to be optimally effective.

One of the key issues facing workplace mediators is how do we assess an organization's readiness to accept mediation as a viable procedure for resolving harassment disputes? Although mediation is no longer an unfamiliar practice in the corporate world, it continues to be confused with arbitration. One reason for this is that human resource personnel and union representatives are thoroughly accustomed to arbitration, as it is often a final step in most grievance processes.

There are a number of reasons why an organization might decide to incorporate mediation into its grievance procedure. It may have been confronted with a high conflict, high cost situation, and is looking to reducing its risk in the future. The organization may be in the throes of a protracted litigation which, according to its legal counsel, may potentially cost a substantial amount of money and time. It may be suffering from continued chronic conflict which is not being addressed by its current systems. Finally, many organizations adopt mediation as a result of the influence of an internal champion. This person usually has credibility, established rapport, and access to the decision makers in the organization, has had a positive personal experience with mediation, has previously practiced as a mediator, or has had training in mediation, and has a vision for how the union, management, and specific employees can benefit from an interest-based, non-adversarial process.

Another issue facing mediators in the workplace is: how do we balance the need for privacy versus the right to know? Mediating harassment cases requires confidentiality procedures which protect the employee's right to participate in a process which is private and confidential. This allows employees to express feelings, own responsibility, apologize, and explore possible options for agreement without exposure, or formal internal or external pressures. However, specific limits may need to be imposed which protect employees against harmful acts by another employee or an outsider. It is imperative that confidentiality requirements not allow repeat offenders (employees who continuously harass others) to use mediation as a way of sidestepping disciplinary action, including termination, for such behavior.

How do we deal with fears of retaliation? An employee who has been harassed by his or her supervisor or another upper level manager is usually fearful of retaliation. This can surface during his or her performance review and can affect the opportunity for promotion, transfer, and access to positive references. Perhaps the most subtle and damaging form of retaliation can occur in the day-to-day activities of the team or department. For example, the employee who files a grievance because he or she has been harassed may experience a "chilly climate" in the workplace; not being invited out for a beer after work with the rest of the group, passed over for all the "exciting" projects, or simply being ignored. The mediator's challenge is to enable employees to talk about their fear of retaliation, and then assist the parties to reach agreements on how fears of retaliation can be addressed and resolved productively.

How do we manage power imbalances? Although many harassment cases involve a supervisor who is accused of harassing a subordinate and it is clear that in most of these cases the supervisor has more power than the subordinate, this power differential does not have to prohibit the parties from engaging in mediation. Each party to a dispute has both actual and potential power which can be mobilized to settle the conflict. Power comes in many forms: credibility, technical expertise, control over resources (such as money, labor, and materials), charisma, leadership (formal or informal), access to the media, access to and support from advocacy or consumer groups, relationships with upper management outside work, access to a board of directors or to funding sources, and access to legal counsel. The mediator's challenge is to assess each employee's sources of power and enable each to utilize his or her power in creative and productive ways, as opposed to using it to inflict harm or humiliate the other party.

One method of addressing a real or perceived power imbalance is to legitimize each party's participation in the mediation process, by validating everyone's need to be heard and understood

and discussing the benefits of reaching agreements or some resolution of the issue. By understanding the history of their relationship, the mediation can structure a process which acknowledges differing points of view, incorporates different styles of communication, and sets forth the expectation that parties will continually be involved in refining the negotiation process.

How can we assure that employees who have experienced harassment, who are unwilling or unable to report the incident due to cultural, class, language, or other barriers have access to the mediation process? Part of the answer to this dilemma lies in the importance of preserving legal and institutional safeguards. Mediation is not meant to replace these safeguards. It is meant to augment the existing systems by offering a less formal and adversarial, interest-based process for resolving disputes.

How can social workers and other human service professionals be better trained to understand and manage the challenging dynamics and ethical dilemmas which may arise during mediation? Courses on mediation and conflict resolution in different fields of practice are gradually being incorporated into social work curricula. As the practice of mediation continues to expand into the corporate arena, social workers and other human service professionals will be called upon to not only act as mediators, but share their expertise in training conflict resolution practitioners in the area of workplace harassment.

These questions are indicative of the challenges facing conflict resolution practitioners, corporate executives, labor unions, and the entire work force as we strive to expand the implementation of mediation. But they are also signs of its growth, importance, and relevance. The concerns we face are more about how to implement this process effectively across cultures, manage power imbalances, maintain neutrality, and preserve and strengthen policies and legislation which prohibit harassment, than whether or not to utilize mediation to solve workplace harassment problems.

Alternatives to Mediation in Workplace Harassment Disputes.

One of the mediator's primary responsibilities is to determine when a case is not appropriate for mediation. Indicators which may cause the mediator to recommend an alternative process include: the complainant cannot or will not negotiate with the respondent do to fear for her own safety or of other forms of retaliation; the respondent denies that there is a problem and does not view the complainant as credible or worthy of respect; the respondent is abusive toward the complainant; the respondent has a history of similar behavior; or the respondent continues to harass the complainant after he/she has agreed to mediate. In these cases the mediator may recommend to all parties and to the appropriate organizational representatives that they explore other alternatives such as: commencing a formal investigation; pursuing the formal grievance process through the union contract, filing a formal complaint with a regulatory agency, or filing criminal charges.

There are some harassment complaints which may not warrant mediation or attention from management or formal authorities. For example, two employees may be smarting from a recent unpleasant disagreement about a particular approach to the marketing of a specific product. The incorporation of mediation and other alternative dispute resolution processes should not supersede "common sense". Employees who have exchanged harsh words and feel remorseful

ought to be able to negotiate directly with one another, without a third party present, whenever possible. These same two employees ought to have the option to simply "live with their remorse knowing that, with time, most disputes of this nature will heal on their own.

The Process of Mediation of Workplace Harassment Situations

Dynamics such as power imbalances, diverse cultural views toward conflict, the presence of intense conflict, fear of retaliation, and a former consensual relationship often necessitate the modification of the structured mediation model in workplace harassment situations. The "structured negotiation" approach to mediation involves a neutral third party who assists people in conflict to negotiate an acceptable settlement of contested issues. The mediator does not render a decision, offer legal advice, or provide psychological counseling. The mediator's role is to facilitate a process by which disputants can express their concerns, articulate the issues which need to be addressed, offer proposals for resolving the issues, evaluate the various proposals, and accept those which meet their common and exclusive interests. While it is often important for both the aggrieved employee and the alleged harasser to exchange information, share differing perspectives, and mend their relationship in cases of workplace harassment, where power imbalance is the norm, and the complainant has been threatened or intimidated by the other, a modified approach to mediation should be used.

Caucusing which involves holding private meetings with each employee before and during the mediation is useful for several reasons. Prior to determining whether the case is appropriate for mediation, the mediator can assess each employee's willingness and ability to negotiate. Late in the process, private meetings may be the appropriate forum for dealing with high levels of emotion, or integrating unexpected information. One employee may be having difficulty articulating a proposal; in a caucus, the mediator is in a better position to coach that employee on how to present the proposal.

Shuttle mediation is often used in workplace harassment mediation. Employees are placed in separate rooms and the mediator moves between them, building an agenda and soliciting proposals. The mediator develops a draft settlement agreement and urges each employee to refine the document. When the employees are satisfied with the agreement, each receives a copy and the mediation process is concluded. The disadvantage of shuttle mediation is that the employees do not communicate directly with each another. Although this model can protect vulnerable employees, it also sends a message that the complainant and respondent are unable or unwilling to deal with one another in a productive or reasonable manner. If there is little need for an ongoing working relationship, this model works well, as it serves to resolve the issues without requiring further contact.

In most cases the complainant and respondent will continue working together, and in such instances face-to-face negotiation is generally recommended. If the parties reach an impasse in their negotiations, advisory mediation may be offered, in which the mediators can issue an advisory opinion regarding how the dispute might be resolved in a fair and reasonable manner. The parties can use this recommendation as the basis for further negotiation, or reject it outright and proceed to another forum to resolve their differences. It should be noted that once a mediator has rendered an opinion, even though it is advisory and non-binding, he or she may be viewed as significantly less neutral and impartial by one or both parties. While the opinion may break the

deadlock, the mediator's role will have shifted from that of a process facilitator to that of an advocate. For this reason, advisory mediators should withhold their opinions until the end of the process. Many disputants opt to accept the mediator's recommendation as the basis for settlement of their particular conflict.

The workplace mediation process can vary tremendously. The workplace may elect to use an internal mediator, an external mediator, or a combination of the two. The reporting requirements placed on the mediator vary from one setting to another, depending in part on whether it is a private organization or a government agency. The ground rules which employees follow during the process will vary from case to case. How the disputants define successful outcomes will also vary.

Several factors will guide an organization in its selection of a mediator. Internal mediators are often less expensive, and the internal mediator's familiarity with the organization's purpose, policies, norms, and culture may serve to expedite the process. On the other hand, an external mediator may be viewed as more neutral and impartial. The external mediator is less apt to focus on how the organization has historically resolved similar problems. In the presence of an external mediator, disputants are less likely to debate the specifics of personnel policy applications, and may be more willing to engage in an open discussion with several creative solutions to the issues.

How much substantive knowledge should the mediator possess? The mediator who is familiar with relevant employment legislation and precedent-setting decisions will be better equipped to assist all parties in understanding their rights and responsibilities, while enabling them to strongly advocate for solutions which meet and protect their interests. The mediator who is familiar with both internal and external policies and regulations will be more effective in assisting the parties in developing settlement agreements which are compatible with existing organizational policy and legislative intent.

A Six-Stage Mediation Process

Initial Contact with the Parties. It is important to initiate the workplace mediation process as soon as possible after a harassment complaint is received and the suitability of the case for mediation has been initially determined. A complaint may be brought to the attention of the human resource specialist who then contacts the manager of the department, the shop steward, the ombudsperson's office, the equal employment opportunity or diversity specialist, or the organizational development specialist to notify them of the problem, and solicit their expertise in an effort to resolve it. Conflicts involving harassment, hostile behavior and threats of violence need immediate attention; delays may cause problems with confidentiality, and the conflict may escalate out of control. General guidelines for resolving most harassment disputes are: adopt and enforce organizational policy which prohibits harassment, including sexual harassment, physical violence, and other forms of hostility; commit to resolving the problem by involving only those closest to the conflict; and follow up to ensure that the situation is resolved.

In this stage, the mediator should clarify his role and issues of confidentiality, listen empathetically to understand each party's perspective, and establish rapport. The goal of the mediator at this initial stage is to understand the conflict, develop potential mediation strategies,

and educate the parties about the process. In order to understand the conflict and develop an effective strategy, the mediator may pose questions such as: What is the problem you are experiencing? What is this conflict really about? How long has it been going on? Any changes over time? What prompted you to bring this forward at this time? Are their power issues involved? What impact is this having on you? What impact is this having on others you work with? What risks are there in proceeding? In not proceeding? Who else knows about the conflict? About taking this forward? What, if anything, has been done to deal with the conflict? What would you need to resolve this conflict? (Burdine)

Information Gathering. The emphasis at this stage is on exploring and understanding the context within which the conflict is occurring and the options that are available to assist with resolution. In almost every case, the mediator will want to consult with organizational representatives such as human resource personnel, union stewards, or in-house council regarding the existence of relevant policies, confidentiality, and ability to assist in resolution.

Preparing the Parties for Mediation. In structuring an effective mediation process, attention should be given to establishing specific procedures and guidelines that will promote openness while protecting against personal attacks and other forms of retaliation. Therefore, guidelines are needed which protect alliances and clarify the scope of confidentiality in order to encourage the disclosure of information, which is germane to the resolution of the issues. It is critical to specify that threats, demands, and other forms of intimidation will not be allowed. Instead, employees will be expected to appeal to each other's conscience, values, ideals, loyalties, commitments and common sense.

The most useful ground rules for mediation are often developed by the employees themselves. This is especially true for parties who have dealt unsuccessfully with one another in the past. They are the experts on what needs to be limited, changed, or tolerated in order for assisted negotiations to have a chance of success.

During this stage, the mediator further clarifies each party's interests, helps each party assess his/her sources of power, helps each party create or fine tune options for resolution, designs a process which speaks to each party's specific needs, concerns, and styles of negotiation, provides information to each party about the process, and schedules the mediation if the parties are ready to mediate. These tasks are accomplished with each party individually.

Joint Meetings. During the joint meeting between the mediator, complainant, and respondent, the mediator reviews the parameters of confidentiality, explains his/her role, and suggests an agenda for the meeting. The mediator's role is to facilitate communication and understanding, help to clarify misunderstandings by posing useful questions, and draw out options for resolution to the conflict.

Reasonable Outcomes. Reasonable outcomes can be defined by the parties in several ways. Salvaging or strengthening the relationship between the employees may be a primary goal. Clarifying intentions and circumstances surrounding the incident(s) may be one of the most important outcomes. Employees may define the most desirable outcomes as those which alleviate feelings of hate or reduce acts of violence. It goes without saying that in almost every case, employees will want specific agreements which resolve specific issues. These agreements

might involve a written apology, a reallocation of duties which serves to separate the disputing parties, a change of supervisors, a transfer, specific disciplinary action, or recommended policy revisions.

In some circumstances, the very notion of trying to reach a specific, permanent solution may cause an employee to resist any forward movement due to a sense of loss of control or a feeling of being trapped. On the other hand, mediation that remains deliberately vague when employees are anxious to pin things down serves little purpose and may increase parties' sense of frustration. Depending on the complexity of the issues and the relationship history of the parties, solutions may need to be on a trial, a temporary or an incremental basis. Parties may need the opportunity to test their agreements, further examining their perceptions and stereotypes, or changing certain aspects of their behavior.

Follow-Up. Prior to ending the mediation, a follow-up plan will need to be developed and included as part of the agreement which addresses the following questions: Who will monitor both positive and negative changes in the workplace? What will the parties need to return to a "normal" work environment? What do others need to know, if anything, in order to put closure to this conflict? What is the time frame for implementing any agreements? What resources are available if the resolution breaks down? What ongoing contact, if any, should the mediator have with each party? What communication is needed with HR or the union? What reports and statistical information is needed to close the file? (Burdine)

REFERENCES

Burdine, Marje. *Mediating Workplace, Conflicts and Harassment Complaints*.

DeLeon, Linda. "Using Mediation to Resolve Personnel Disputes in a State Bureaucracy." *Negotiation Journal* (January 1994).

Fisher, Anne B. "Sexual Harassment: What To Do." *Fortune Magazine* (Vol. 28, No. 4): August 23, 1993.

Skratek, Sylvia. "Grievance Mediation: Does It Really Work?" *Negotiation Journal* (July 1990).

Stamato, Linda. Center for Negotiation and Conflict Resolution in Newark. *Law Journal*. New Jersey: August 15, 1994.

Stamato, Linda. "Sexual Harassment in the Workplace." *Mediation Quarterly*, 1992.