EEOC Mediation: Five Things to Consider Before Participating

A former employee files a charge with the Equal Employment Opportunity Commission (EEOC) against their prior employer alleging that they were unlawfully terminated as a result of discrimination. The parties may be advised that they have the ability to participate in the EEOC's mediation program. When your client asks if they should participate, what should you say?

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A former employee files a charge with the Equal Employment Opportunity Commission (EEOC) against their prior employer alleging that they were unlawfully terminated as a result of discrimination. The parties may be advised that they have the ability to participate in the EEOC's mediation program. When your client asks if they should participate, what should you say? Here are five things to discuss with your client so that they can make an informed decision about whether or not to participate.

- **They should be advised that the process is completely voluntary. If they elect mediation, the mediation process pauses any investigation, production of documents and avoids costly expenses.**

If either side should decline mediation, then the charge would be sent to the enforcement unit for investigation. What does that typically mean? It means that the employer would be asked to submit a position statement in response to the charge and, thereafter, may be asked for documentation. The investigator then sends the position statement and documents to the employee to review and respond. The investigator typically does not conduct interviews, but instead relies on the documents submitted by each side. If the employee does not request a right to sue letter after the EEOC has had at least 180 days to investigate, the investigation process typically lasts for 10 months to a year. However, your client should be warned that the process usually takes longer than a year.

- **They should be notified that the mediation process is free.**

The EEOC assigns the mediation to either a mediator on staff or a pro bono mediator. This means that it will not cost your client any money to participate in the mediation. Compare this to what it may cost your client should the action continue to federal court where the parties will be mandated to participate in some form of alternative dispute resolution (ADR) and private mediators tend to charge between $3,500 to $6,000 for their services.

- **They should be made aware that the mediation is conducted via an electronic platform.**

A link is sent to the parties, so your client can conveniently participate from the comfort of their own home or office. This is helpful, as mediations can take hours and it can give them the flexibility of tending to other needs during breaks. It also might make them more comfortable during the process, as they are not required to travel and are in a familiar place. Your client should be told that while the mediation process can be lengthy, it is not nearly as time consuming as the time it would take to prosecute or defend a lawsuit.

- **They should be counseled that the mediation process is confidential.**

The mediator is tasked with acting as a neutral to determine whether the parties can amicably resolve the charge. The parties are required to sign a confidentiality agreement. Regardless of what occurs at the mediation, the mediator is not permitted to advise the investigator of what was discussed—only that the charge resolved or did not resolve. As such, the parties are able to speak freely and nothing said during the mediation can be used against them if the charge is not resolved. Further, the mediation process can shed light on your client's strengths and weaknesses and allow it to determine how best to proceed.

- **If your client chooses to participate in the mediation process, you should recommend that your client attend.**

After all, this is their case and they should want to hear what the other side has to say in order to determine how to proceed.

While the EEOC suggests that all parties attend the mediation session, sometimes employers will send counsel in their stead. Whereas if the matter proceeds to federal court, the parties are required to attend an ADR session. Again, it is more important for the parties to be present to learn what the other side is going to say if this matter were to continue.

Explaining the EEOC Mediation Settlement Agreement

If an agreement is reached, the EEOC will draft a mediation settlement agreement (MSA) that must be signed by both parties. This is a pre-determined, basic form that the mediator must complete. There is not much leeway, as the mediator is unable to make any real change to said form.

The MSA covers the basic provisions: the employee agrees not to institute a lawsuit; the submission of the agreement constitutes a request for closure of the charge and any dual-filed charge; no admission of liability by the employer; the employer agrees not to retaliate (should the employee still remain employed); final and complete statement of agreement; the EEOC is authorized to investigate compliance with agreement and may be used as evidence in a subsequent proceeding in which a breach of this agreement is alleged, and; the employee acknowledges that they have been advised to consult an attorney. The MSA then covers the basics including the money that will be paid to the employee and other nonmonetary details (employment verification, letter of reference, confidentiality).

Notably, also contained in the MSA is a provision where the parties agree that the employer will send the employee a separate

release, which will be more comprehensive in nature. Your client should be warned that the MSA also provides that if the employee does not sign the separate release within 21 days of receipt, it renders the EEOC MSA null and void:

> The charging party will review the release and if the charging party agrees with its terms, shall execute it accordingly within 21 days of its receipt. Failure of the charging party to execute the release will make this EEOC mediation settlement agreement null and void. It is understood that the EEOC is not a party to the release, its provisions are not incorporated herein by reference and the EEOC will not enforce any provision of the release.

The Impact of State Law

Arguably, the above MSA language impacts the long-standing principles associated with reaching a binding resolution. The Pennsylvania Supreme Court has held that where parties have agreed orally to all of the terms and a part of the mutual understanding is that a written contract is to embody those terms, such oral contract may be enforced, even though one of the parties thereafter refuses to execute the written contract. See *Shovel Transfer and Storage v. Pennsylvania Liquor Control Board*, 739 A.2d 133, 136 (Pa. 1999). Our courts have long explained that if the parties agree to the essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date. See *Johnston v. Johnston*, 499 A.2d 1074, 1076 (Pa. Super. Ct. 1985).

As such, the MSA provision is at odds with case law precedent finding that if a settlement has the elements of a valid contract, it is enforceable as a matter of law. See *Mastroni-Mucker v. Allstate Insurance*, 976 A.2d 510, 518 (Pa. Super. 2009). Essentially the provision allows the parties to reach a deal at the EEOC stage, and then render that deal invalid if the employee changes their mind and decides not to execute the separate release—regardless of the employee's signature on the MSA. While this provision may not impact the majority of settlements reached at the EEOC because the employee will typically sign the separate release, for those that it does, this is certainly a troublesome result.

Mechanisms Available in State and Federal Court to Enforce a Settlement

The Commonwealth of Pennsylvania has a strong judicial policy in favor of settlement agreements. See *Mastroni-Mucker v. Allstate Insurance*, 976 A.2d 510, 518 (Pa. Super. 2009). If the parties had reached the same type of deal while in state or federal court, they would have a mechanism to enforce the settlement through motions practice. See *Pennsbury Village Associates v. McIntyre*, 11 A.3d 906 (Pa. 2011).

In Pennsylvania, a contract will be valid and enforceable if the nature and extent of the obligation are certain and the parties agree upon the material details of the bargain. See *American Eagle Outfitters v. Lyle & Scott*, 584 F.3d 575, 585 (3d Cir. 2009). The presence or absence of a signed writing is relevant to the determination, but it is not dispositive. If the parties have agreed to the essential terms of a contract, "the fact that they intended to formalize their agreement in writing but have not yet done so does not prevent enforcement of such agree-

ment." See *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999).

The parties should be aware that at the EEOC stage, there is no mechanism under their procedural regulations to accept or rule on a motion from a party. If such a motion is filed, the EEOC will decline to intervene. Thus, in the event the employee decides not to sign the separate release, this leaves the employer with the untenable result of being back at square one.

There are both benefits and pitfalls to EEOC mediation. By educating and counseling your clients about the process, they can make an informed decision about whether participation will best serve their interests.

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