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PERSPECTIVE

What does it mean to apologize in employment mediations?

By Jonathan Andrews

Apology, forgiveness and reconciliation is a powerful concept in dispute resolution; however, it is rarely explored in employment mediations. The strength of an apology lies in the willingness to acknowledge in sufficient detail that an event has detrimentally affected another party. It requires self-awareness and contemplates a willingness to accept responsibility for the offending behavior, even if the apologizing party does not concede legal liability.

While apologies emphasizing the interests and space of the other party are important, apologies in mediation should not ignore the power of regret or true remorse. These latter sentiments go to the weight and sincerity of the apology. They also clear the path for forgiveness — which, in turn, leaves open the possibility for reconciliation. All of this points out the importance of framing the apology before providing one. But getting there takes time. An apology is not an event; it is a process.

Forgiveness is a deeply personal and often complex choice. It is one that may not (and need not) be shared by others. It requires acknowledging — often painfully — what has occurred. It means fully experiencing and registering the transgression. Similar to an apology, an important component of forgiveness is that it has to cycle through the appropriate stages before it can manifest itself fully. When people forgive too soon, it may be their attempt to distance themselves from the pain — to shut down. Alternatively, it may be due to a lack of self-esteem or self-worth. People need to under-

stand the impact an event has had upon them so that they can make the appropriate decision concerning the importance of an apology and the potential for forgiveness. Mediation can be an important part of that cycling process.

Apology in mediation is difficult for lawyers because it implies culpability. It may be perceived as an express admission of guilt. Of course, in the context of mediation — and the absolute confidentiality of the mediation process — this does not need to be the message. Apologies can be offered simply because they are the right thing to do.

What makes apology so difficult in the employment context is also what makes the apology, forgiveness and reconciliation process so intriguing: the fact that a relationship — feelings — once flowed between the parties. If parties are honest, they would admit that at one point in the employment relationship there was a positive connection. While we may not be able to get back to that point at mediation, tapping into the humanity of the parties allows people to look at each other as partners rather than as adversaries. In that context, the mediator can recast the negotiations as an opportunity to create a mutually beneficial agreement combining themes of closure and transition, rather than feelings of conciliation and capitulation.

Part of the general skepticism around apologies (particularly, for the first time) in mediation is the intent of the apologizing party. Is the apology offered to drive down the value of the case? Is it being offered to secure some moral high ground? As some advocates caution, if the apology is not a sincere effort to recognize the im-

port of the actions leading to the injury, then the use of apology can subvert the credibility of the offering party and deepen the mistrust between the parties.

Once we agree that apology may be useful, the next question is who should give it? Of course, the mediator or the attorney for the apologizing party could offer the apology, but the surrogate apology often lacks the sincerity or standing necessary to satisfy the receiving party. Therefore, effective apologies often come directly from the party representative.

For mediators, the mere discussion of apology can be tricky. If a mediator approaches apology, forgiveness and reconciliation at the outset of a case, she runs the risk of offending the parties and shutting one or both rooms down. Mediators do not want their discussion of apology to be perceived as pre-judging the merits. Mediators must also be mindful of their personal biases when it comes to apology, forgiveness and reconciliation. For example, a mediator who views fairness on par or above neutrality may be specifically concerned that the receiving party is cheapening their case by exploring an apology and, thus, not appreciate the positive impact it still could have. Similarly, an evaluative mediator who forms the early impression that one party has a weak case may believe an apology is unnecessary and never explore it. Mediators should be open with the advocates about their feelings/concerns about apology, forgiveness and reconciliation, so that parties can assess the viability of the practice in that setting.

Often in employment cases, the process and impact of separation is where some employers are will-

ing to acknowledge the process could have been handled better. Perhaps, the employer should not have escorted the person out of the office after termination; perhaps the employer should not have chosen to fight unemployment after terminating the employee; perhaps the employer could have addressed any performance issues sooner, so the employee could have taken measures to improve. From these concessions, an understanding may be developed that would allow an apology or acknowledgment of impact to surface in a meaningful way.

Apology, forgiveness and reconciliation is not appropriate for all mediations. Some people do wrong and will never acknowledge it. Others perceive slights in every corner and never forgive. Ultimately, however, apology, forgiveness and reconciliation could lead to a powerful, positive mediation outcome.

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