They're Human, Too: The Care and Feeding of Defendants in Employment Mediations

By Vivian Berger

At a recent training for mediators handling employment cases, the materials contained an introduction setting forth the two sides' perspectives on mediation. The employer contribution led off as follows:

> Keep in mind that settlement can also be emotional for employers. The tendency is to focus on the employee's emotions given what they alleged happened, and to assume for the employer it is simply a financial decision. However, many in-house lawyers or managers accused of misconduct take it very personally and need to have that recognized to get them to the point of settling.

These comments resonated with me. While I believe I give equal attention to both parties in my mediations, in the sense that I try to remain alert to emotions (and concerns and interests) of every participant in the process, it is likely correct that the seemingly needier, and often more vocal, plaintiff can at times monopolize the neutral's energy. This can be so outside the mediation as well: to some extent, my own scholarship has emphasized employees' viewpoints.[1] In addition, in my experience discussions among mediators about dealing with employment clients center more on the employee. Yet for reasons both practical and principled, employers have equal claim on the mediator's consideration. Neglect of defendants may scuttle the opportunity for settlement and, as important, violates the tenets of respect, impartiality and fairness underlying mediation.

The truth of this assertion is most evident in cases involving what I call "real people" defendants. Of course, the employer sends human representatives to every mediation, and most charges target at least one individual as the perpetrator of discrimination, wage theft, or other illegal conduct. More often than not, however, the accused employee, a low or mid-level supervisor or a co-worker of the complainant, does not even attend the session although he may be personally liable.[2] Prime examples of employers whose feelings and mindset may resemble that of the plaintiffs, and who come to the mediation, are small business owners: plumbers, dentists, architects, and so forth. Like employees, they are usually "one shotters" in litigation rather than repeat players[3] and thus share the former's anxiety and fear of the unknown. Because of the risk to their own money and reputation, such defendants frequently regard themselves as the "true" victims in the scenario; they can muster as much rage and sense of injury as any plaintiff—compounded by the perceived insult of being "extorted."

Yet, as the quoted excerpt cautions, one should not assume that managers and in-house counsel, present as proxies for the employer, have no concern but the bottom line. They, too, are people, and whether on account of involvement in the triggering events or simple identification with their bosses, they may feel heavily invested in the dispute and its resolution. Human Resources (HR) officers, for instance, often desire, consciously or not, to see a decision to impose discipline or fire the complainant validated. (In one of my cases, that wish was plainly what caused the head of HR to veto more than a nuisance payment, to the detriment of our efforts to settle.[4])

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Hence, even in larger organizations, I have encountered sentiments similar to those described with reference to individual owners. High-ranking supervisory or legal personnel often resent what they consider Monday-morning quarterbacking. Sometimes, such feelings are painfully obvious, as when a white charter school principal ran into trouble after he fired almost all of the minority teachers on the ground of poor performance. (Racism charges always carry a special sting; that is even more so when the target possesses the self-image of a liberal "do-gooder" acting from the purest motives—here, advancing children's welfare.) The man regarded monetary concessions in bargaining as an implicit admission of fault and thus, for a long time, resisted making them, even though he understood the vulnerability of the defendant to second-guessing by diverse jurors. In other situations, the emotions are veiled and hard to unearth. Indeed, they may be lurking in the background, emanating from absent superiors or subordinates. In these circumstances, even a very seasoned neutral may not pick up on the need to address non-monetary issues.

What follows is my attempt to pinpoint types of employers tending to call for the mediator's special attention to emotional (or, more broadly, subjective or personal) motives, concerns or reactions.[5] The classes of defendant that have this characteristic in common are not

distinct but overlapping. That is natural since, to give one example, closely held or family ownership and relatively small size frequently correlate with each other. This linkage leads to their sharing one or more attributes such as intimacy with staff, lack of significant prior exposure to legal proceedings, or financial anxiety, which in turn conduce to susceptibility to influence by non-financial considerations in negotiation. Another major employer category, not-for-profit corporations, present in some ways a comparable profile, and comparable responses to litigation, while also exhibiting certain idiosyncratic features. Further, a few miscellaneous kinds of defendant bear mention because they require a disproportionate focus on psychological factors. Whenever possible, I suggest approaches the neutral might utilize to avoid derailment of settlement talks by defense sensitivities—whether expressed or below the surface.

When Special Attention to Employers Is Needed

I. "Real People" Defendants

I have already mentioned one archetypical instance of a kind of employer that "owns" the lawsuit in a way that the usual corporate proxies do not: small business people, including professionals. Unsurprisingly, those employers who *are* most involved *feel* most involved; they have invested not only their money but also their identity in their livelihood. They may therefore regard the case (quite often the first, at least of this sort, that they have encountered) as a grave existential threat.

At times, these defendants' financial anxiety is well-founded. Especially during the recent recession, I mediated with several such parties who were hanging on by a shoestring.[6]

But current pecuniary strain aside, this species of employer is much less likely than larger outfits to carry employment practices insurance. Moreover, "mom and pop" shops and many professional outfits lack the HR expertise and legal savvy that might have averted exposure initially. (They ordinarily do not maintain the detailed personnel records routinely kept by other businesses; they may have violated laws with which they were unfamiliar.[7]) Thus, they face a double whammy: a greater risk of being found liable and, regardless, the need to defray litigation expenses, which they can ill afford to pay.

Coupled with the fear of financial ruin, akin to that of discharged employees, such employers, who usually know their workers well, experience a sense of betrayal when sued; this sentiment again mirrors what plaintiffs feel toward the "heartless" company. They often volunteer stories embroidering the theme of "no good deed goes unpunished." For example, a company owner defending a wages and hours claim related how he had loaned one of the complainants money for an overdue home mortgage payment. A dentist said he had counseled his adversary's troubled son. A realtor whose wife, like the employee, had undergone fertility treatments—and who had bought the woman gifts when she finally conceived—voiced understandable anger that she had brought an action against him for pregnancy discrimination.

How do these circumstances affect the conduct of the mediation? Mainly, they tend to cloud the good business judgment the defendant uses in everyday life—making it hard to get the person to weigh realistically the costs and benefits of litigation versus settlement. "Millions for defense, not one cent for tribute!" is a maxim I have heard pronounced at least twice in this setting. Countless times, I have heard this sentiment uttered in slightly different words. One party asserted: "I love my lawyer, I'm happy to pay him; I don't want to pay that SOB anything!" Similarly, employers have insisted: "We did not do anything wrong—we don't settle when we are right" and, sweepingly: "We're not made of money." Such remarks are often accompanied by statements that a particular position, like refusal to pay more than nuisance value, is demanded by "principle"—a counterpart to plaintiffs' frequent avowals: "It's not about the money."[8] Sometimes, the context reveals that a feeling of victimization, being "extorted," most animates the speaker's comments. In other situations, the driving force appears to be primarily a sense of self-righteousness. Whatever their precise genesis, these emotions and their expression share (and reflect) a strong tendency to personalize the litigation.[9]

A. The Mediator's Task

As with any mediation participant, the neutral cannot "wish away" an employer's inconvenient emotions. Nor is there any "one-size-fits-all" approach to dealing with them. I find, predictably, that empathy goes a long way toward smoothing the path of communication. So do the usual mediation techniques like posing open-ended questions, following up with further inquiries designed to draw the person out, active listening, summarizing, reframing and spurring self-reflection.[10] One can acknowledge emotions such as anger and hurt without appearing to agree (or disagree) with the boss who tells you that the plaintiff is an ungrateful, dishonest shakedown artist.

For example, I may point out that counsel and client are not identical: in an opening statement, the employee's lawyer frequently adds his own spin to the basic account given by the plaintiff. I also remind the employer that the employee's charge may stem from ignorance or misunderstanding rather than conscious falsification; early in litigation, especially, he or she may not possess all relevant facts. Thus, when the only Latina in the office has been dismissed for excessive absences, she—viewing her job performance more favorably than the employer—may conclude that her national origin weighed against her. It is human nature, I add, to minimize one's flaws

and exaggerate one's virtues. Probably, too, she does not know that the white co-worker (and presumed comparator) who called in sick more often than she was taking intermittent Family and Medical Leave Act leave because of a serious medical condition, while she had claimed only minor upsets and not produced any doctor's notes. Once in a while, if I sense the party does not believe I can fully understand the employer's perspective, I may share some personal data. That would include my growing up in a family business or (as Vice Dean for Administration at Columbia Law School) overseeing personnel who sometimes repaid good will with bad.[11]

At times, as with plaintiffs, reality-testing requires "tough love." Because small businesses tend to lack sophisticated HR support, one may have to suggest that the owner bears some onus for the debacle. Failures to implement progressive discipline, to give timely and useful feedback, or to create and publicize avenues of complaint can sink a defense that the underlying facts, if the truth be known, would have sustained. When the employer has a sense of humor and we have established a good relationship, I may describe as a "virgin tax" the extra amount that must be paid to settle a case made problematic by the defendant's "newbie" mistakes. (That tax is especially high when the employer has countenanced substantively dubious conduct as opposed to merely poor procedures: I have seen mainly small employers, unschooled in current workplace standards, make errors like turning a blind eye to racist, sexist, vulgar or just plain stupid e-mails, videos and "jokes."[12]) That said, I attempt to stress the positive: with counsel's help, the company now has the chance to institute best practices that will help to insulate it against future exposure. Yet I acknowledge the force of the oft-expressed concern that such reforms will carry a price tag of their own—increased bureaucratization of the workplace. There is undeniably a trade-off between informality and self-protection.[13]

II. Family-Owned Businesses

Mediating with a family company presents all of the "real people" defendant problems that I have noted, often in an intensified form. For one thing, the owners may pride themselves on treating employees like kin. "We're all one big happy family" is a mantra that implodes, however, when a worker sues the business. The employer feels not just betrayed, but betrayed by someone thought to owe a quasi-familial duty of loyalty. In particular, a founding owner and self-perceived paterfamilias will tend to exaggerate his own victimhood. (Paraphrasing Lear: "How sharper than a serpent's tooth it is to have a thankless employee!"[14]) One also finds in suits involving this type of firm that intra-defendant emotions run high. For both these reasons, the neutral must be especially alert to the need to recognize and respond to non-financial considerations on the defense side of the table.

A. Dealing with Emotions Evoked by the Employee

It is worth repeating that the mediator can validate feelings without intimating a view on the soundness of their holder's underlying notions. But validation alone will not suffice to advance the negotiations: the neutral will at least need to counter any penchant to demonize the employee. Anger and other negative emotions are frequently more complex, however, than they appear; at times, they are shot through with ambivalence. Sensing this to be the case, the mediator might want to elicit anything positive the defendant can say about the plaintiff. While such an approach may not be required to resolve the matter (defusing the employer's active ire will likely suffice), it constitutes a stronger form of humanization than merely undercutting resentment and, as such, might promote the employer's healing process.[15]

When I perceive mixed feelings on both sides of the litigation, I sometimes go even further. Illustratively, in an unusual mediation in a family company setting, I arranged a one-on-one meeting between the employer and the fired employee. To my amazement, the women flew into each other's arms, then spoke alone for forty-five minutes. Whatever took place between them in private did not produce a Hollywood-style happy ending like withdrawal of the complaint or reinstatement of the complainant. It did, however, seem to have made each party calmer, more objective, and more focused. Later that day, they reached a settlement.[16]

B. Addressing Intra-Family Tensions

Given the usual sorts of loyalties, it can be difficult enough to throw an accused wrongdoer to the wolves, via discipline or dismissal, when that person is unrelated to the corporate decision maker. How much more complicated, then, the task when the named "perp" is Cousin David, Uncle Joe, or a parent, child or sibling! Even mounting an investigation into an employee's complaint may be contentious if the target belongs to one's family. This is true in spades when the employee has alleged egregious or highly salacious misconduct.[17]

When the defense representative attending the mediation is a family member, that individual, torn by conflicting fiduciary and personal obligations, may react over-protectively, warding off challenges to the defendant's position posed by reality-testing inquiries. The mediator must help the spokesperson for the company deal with the issue of warring attachments. Recognition and acknowledgment of the predicament constitute necessary first steps to moving beyond it. In the end, a relative might actually have less trouble conceding the potentially warping influence of family ties on business judgment than would an unrelated agent. The latter may fear that admitting less than sterling behavior by an "insider" or ceding ground in negotiation—moves encouraged in mediation—could lead to her loyalty being questioned.

(Outsiders often feel insecure notwithstanding fancy titles because, in a pinch, "blood" will trump everything else, or so they believe.) Yet such concerns might well be unconscious or, if perceived, awkward to confess.

Even the most experienced neutral will find it a challenge to navigate these perilous shoals. Perhaps the most effective strategy is to air the problem before the scheduled session. Especially if the defense lawyer has previously represented the client, he should be attuned to the role that family dynamics plays in the company. With this knowledge, he can advise the mediator how best to address the relevant issues when they arise. Moreover, he can probably furnish useful input on who should attend the mediation for the defendant. That is always an important question. In this setting it is crucial to identify someone who both commands the family's respect and dares to speak truth to power.

III. Not-For-Profits[18]

Not-for-profit corporations, such as charities, often personalize the dispute and act in "non-businesslike" ways even though neither their representatives' money nor family relationships are typically at stake. They do, however, resemble "real people" defendants in frequently having a close-knit staff and lacking litigation experience as well as, relatedly, state-of-the-art HR procedures. Moreover, since they frequently operate under severe financial constraints, they pay attention to the bottom line as closely as do small entrepreneurs. Like the latter, they fear the outlay entailed by a settlement more than mounting legal fees, which can be deferred, or a potentially ruinous verdict, which may never come to pass. Their livelihoods, too, depend directly on the financial health of the enterprise. Thus, the extent of their emotional investment in the lawsuit is unsurprising.

One common trait of such defendants is their proclivity for self-righteousness. Unlike ordinary business people, they believe that they are engaged in "the Lord's work." Every nickel lost to litigation detracts from their benevolent mission. Accordingly, whether or not they feel that the plaintiff has personally betrayed them, they tend to regard the employee as an apostate to their cause. Such a viewpoint can make it extremely hard to resolve the matter at hand, especially as it goes along with a penchant to frame every issue as a matter of principle—and hence, unsusceptible to compromise. Implications that people whose whole careers consist of doing good would never discriminate only compound the difficulty.

A heightened example of the problems posed in such a context was a case of mine involving a charity established by a well-known entertainer to fund research into the potentially fatal disease, an extremely rare form of cancer, suffered by his daughter. When the dismissed employee, a Muslim, threatened to sue on the grounds of religious discrimination and retaliation, the founder-employer perceived the action as a form of treason against his mission and his child—since the needs of both were, to him, inextricably intertwined. (It did not help that the plaintiff had been seen as something of a slacker, who lacked dedication to the search for a cure.) Because of his anger as well as his very busy schedule, the employer strongly resisted attending the mediation. Yet the plaintiff, desiring to deliver a statement to the "top gun," was insisting on his presence. I thought we would surely accomplish nothing in his absence, and even when he finally agreed to come, I doubted that the dispute would settle.

In the end it did, but only through follow-up after the session—and not, I believe, on account of my efforts. I never succeeded in getting the defendant to see the plaintiff as anything but a traitor to the cause, looking to obtain something for nothing. Fortunately, defense counsel had a longstanding and close relationship with the employer. The lawyer played a crucial role in persuading the client that the possibility of liability should trump the latter's righteous refusal to "reward" a subverter of his cause.[19]

A. Possible Mediator Moves

No magic bullet will breach a solid wall of "principle." As usual, the mediator should begin by displaying empathy with the party and understanding of the role that the organization and its aims play in the representative's life. (It ought not be tough to do this sincerely since most charities and similar entities have laudable goals and try to achieve them.) Yet gaining that person's confidence and trust, while necessary, is hardly sufficient. Usually, push comes to shove when the neutral must try to persuade him to raise an initial, de minimis offer; at this juncture, he digs in and invokes principle. How should the mediator respond?

This quandary immediately calls to mind a story attributed to George Bernard Shaw. As told by blogger Robert Lindsay:

> [The author] was talking to some famous woman at a party. He asked her, "Would you have sex with me for a million dollars?"
>
> "Of course I would!" she smiled.
>
> "Well then," he said. "Would you have sex with me for a dollar?"
>
> "Of course not!" she huffed. "What do you think I am?"
>
> "We have already established what you are, dear," he said. "Now we are just haggling over the price."[20]

Applied to the not-for-profit's position, this anecdote implies that once a bargainer has crossed the Rubicon of of-

fering any money, remuneration has ceased to be a matter of principle. Theoretically, the final amount placed on the table should mainly depend on pragmatic factors: basically, the risk-discounted value of the plaintiff's case, the defendant's own litigation costs, the potential for negative publicity, and so forth.

Although simply telling the tale would almost always make the point, many listeners might not be thrilled to hear themselves compared to prostitutes! Thus, the neutral must find a means to convey a similar insight with tact. While there is no single way to do so, I ordinarily turn to the tried and true technique of probing for underlying feelings and interests or, if possible, reverting to ones already expressed. For example, if the employer harbors considerable anger toward the employee and dislikes paying her for that reason, develop the theme of not cutting off one's nose in order to spite one's face. Attempt to refocus the conversation on what will be good for the organization, instead of what will hurt the plaintiff. Emphasize the obligations the not-for-profit owes its constituency—all who benefit from its work—who could lose needed support if the defendant insists on basing decisions regarding the litigation on emotion rather than reason.

Finally, as revealed by the entertainer's case, managing contacts between the parties and, more broadly, the presence or absence of particular employer agents can assume great importance when dealing with a mission-driven defendant, whose chief may identify very strongly with the institution's aims. That individual will usually want to attend the session and will be desirable to have if only because he controls the purse strings. Yet if he is too personally involved to make a business determination to resolve the dispute, he may scuttle the mediation. A viable compromise may be to have the principal there for part of the time and then available to his lawyer and the neutral by phone. He will have had the opportunity to air his concerns and vent his feelings; the mediator will have reality-tested him in at least an initial caucus. From that point on (and after the session, if need be), his attorney might better serve as the mediator's point of contact.

IV. Defendants from Different Worlds

Two remaining kinds of employer deserve brief mention as they, at times, need special attention: prominent individuals and foreigners. (The latter have either been charged individually or appear as representatives of companies based in other countries.)

A. The Famous

The case of the entertainer posed a difficulty I have not yet mentioned: the challenge of dealing with famous defendants.[21] These parties tend to behave in an entitled manner. When they say "jump," they are used to people responding: "How high?" A neutral's insistence that their appearance at the mediation matters a lot may cut little ice with executives who have very busy schedules and who habitually reject demands on their time by others. They may also feel little compunction at canceling dates so as to reschedule at their convenience. At the mediation, they often display extreme self-confidence and more resistance to reality-testing than less self-important defendants. In addition, to the extent their lawyers might fear annoying or upsetting the "big man," counsel may, consciously or not, undermine the mediator's efforts.

I do not have a surefire solution to these problems. But I attempt to anticipate them and plan ahead. Above all, I work hard to locate and get to the table someone to whom the decision maker listens. Ideally, that person would be his attorney. If not, however, or if an additional attendee can help the lawyer and neutral to "tag team" the person in charge, he or she should be enlisted to round out the defense contingent.[22]

B. The Foreign

It is widely accepted that people from diverse cultural backgrounds bring different world views and styles to conflict resolution. This broad subject has been much mooted in the mediation literature.[23] What I wish to highlight here is narrower: the tendency of some foreign nationals to make missteps in the minefield of laws barring employment discrimination—and then to resist "correction," through settlement, of the claims their conduct produced, on the ground they "did nothing wrong."

Sometimes, problems arise because a particular actor's ingrained attitudes, shaped by his upbringing, contradict statutory mandates. For example, a French chef who persisted in making unwanted comments and advances to the women who worked in his kitchen simply could not understand the concept of sexual harassment. He honestly felt that through his attentions he was paying his subordinates a compliment! (Happily, the American hotel for which he worked did "get it"; they forced him to hire his own attorney.) The situation is even worse when top management flouts legal prohibitions in the service of contrary values, as in the case of a Japanese client that reserved its high-level jobs, including in the United States, for its own nationals.

More often than blatant violation of our laws I have witnessed insensitive or unwise behavior, caused by a cultural tin ear. For instance, a top-level Swiss executive, visiting her outfit's New York office, remarked on the number of pregnant "girls," rhetorically inquired "what shall we do?," and fired one in her ninth month. A Belgian company terminated an employee just after she announced that she would need a three-month leave in order to obtain treatment for cancer. While both matters arguably presented legitimate reasons for the discharge, the firms' imprudence, even recklessness, virtually guaranteed litigation and serious exposure for the company. Yet notwithstanding the advice of seasoned outside coun-

sel, representatives at the mediations acted as though in a state of denial. In one instance, these were foreigners; in the other, although locals, they had imbibed the home office's imperviousness to matters of appearance—and perhaps substance—arising under American laws.[24] Further, likely because of the cognitive dissonance between external standards and internal (personal or company) mores, they displayed an emotional attachment to their positions and a fair degree of self-righteousness.

Such reactions complicate the neutral's task, especially since the officer really calling the shots may be far away, in Paris, Zurich, Rome or Taiwan.

The mediator will frequently say to people in conflict that they do not have to agree on the facts in order to agree to resolve their dispute. By the same token, she can remind foreign employers (or any party) that assent to settlement should not depend on agreement with the law or its likely application in court. Furthermore, she can display empathy with a defendant's feelings of having been skewered by "political correctness" without suggesting her own concurrence with the underlying viewpoint.

Doubtless reinforcing counsel's advice, I occasionally stress what the party can do so as to forestall further difficulties: for example, training managers in the differences between local law and culture and that of the company's home country and ensuring good communication between headquarters and American H.R. Giving defendants a sense of control over the future may make them more receptive now to taking measures they deem distasteful, like paying money to the plaintiff when they regard themselves as blameless. Finally, as always, grasping where a party is "coming from" (and making it evident that you do) will help you to take them where you want to go.

Coda

Virtually all the employment matters with which I have dealt involved money damages. But they were never just about money even if, as is often true, this was all that the employee seriously demanded. Anyone at all familiar with the field realizes the critical role of the employee's feelings: the plaintiff is suing for respect, vindication, vengeance, what have you—in other words, to satisfy deep-seated emotions. Even the ultimate payday, should it materialize by way of verdict or, likelier, settlement is generally regarded by the complainant in other than purely financial terms.[25] What many people, including lawyers and neutrals, may not fully appreciate is the non-rational factors' importance in the actions and reactions of some employers. The mediator must recognize and respond to the psychological needs of both parties in order for employment mediation to fulfill its humane and pragmatic goals.

Endnotes

1. *See, e.g.,* Vivian Berger, *Get a Bigger Bang For Fewer Bucks: Pick Meaningful Numbers*, *in* Definitive Creative Impasse-Breaking Techniques In Mediation 157 (NYSBA 2011); Vivian Berger, Respect in Mediation: A Counter to Disrespect in the Workplace, 63 Disp. Resol. J. 18 (Nov. 2008-Jan. 2009), republished in AAA Handbook on Mediation 719 (2d ed. 2010).
2. *Compare Feingold v. New York*, 366 F.3d 138, 157-59 (2d Cir. 2004) (individual liability under the New York State and City Human Rights Laws) *with Spiegel v. Schulmann*, 604 F.3d 72, 79-80 (2d Cir. 2010) (no individual liability under Title VII and the Americans With Disabilities Act).
3. *See* Marc Galanter, *Access To Justice In A World Of Expanding Social Capability*, 37 Fordham Urb. L.J. 115, 119 (2010).
4. When I make more than a bare-bones mention of real events, I alter details or meld facts from different cases in order to preserve confidentiality.
5. This is not to say that the needs of other employers can be ignored. The specific facts of the case at hand as well as the personalities involved must always determine the mediator's moves. My "typology" merely attempts to flag certain recurrent instances in which the mediator's antennae should be attuned to the probability that the defendant has special needs.
6. Employees' understandable skepticism when employers cry poverty and try to use their purported lack of financial resources to settle the claim on the cheap can sometimes put the mediator into an uncomfortable position. First, insistence on verification will generally delay resolution of the case: the plaintiff's side generally wants to examine more proof than the defendant has brought to the table. Second, where the applicable law permits individual liability—as do, e.g., the Fair Labor Standards Act and the New York Labor Law, *see Sethi v. Narod,* 974 F.Supp.2d 162, 185-86, 188-89 (E.D.N.Y. 2013)—defendants ordinarily resist revealing personal financial data to the employee. This reluctance may result in the parties' asking the mediator to review documents and "vouch" for the employer's lack of funds.
7. I once had a wage and hour case with two electricians operating a small business. They claimed that they had never heard of overtime laws! Even their own attorney refused to believe them at first. They then produced hourly records documenting in perfect detail all they had failed to do correctly. It turned out that, as former members of a union, they thought that workers' right to overtime derived solely from the collective bargaining agreement. (Their present shop was non-union.) Less uncommon was the more limited misunderstanding of a furniture business owner, who used trucks to deliver his wares. Not wishing to pay overtime, he told his drivers to "knock off work at 5:00 p.m." He failed to realize that the 60 to 90 minutes spent returning the trucks to the warehouse had to be paid at time and a half. Wages and hours verdicts and settlements can be daunting even to companies with deeper pockets. (Small companies, however, are less likely than larger ones to confront collective and class actions.)
8. It usually *is* about the money. But money has many meanings for plaintiffs—not only, or always primarily, relating to financial gain.
9. Some of these comments bear, directly or indirectly, on the merits of the complaint, which naturally have a lot to do with a rational litigant's settlement position. But in the circumstances under discussion, they plainly stem from genuine emotion—not from either rational analysis or strategic posturing.
10. *See generally* Rosabelle Illies, Naomi Ellemers & Fieke Harinck, *Mediating Value Conflicts*, 31 Conflict Resol. Q. 331, 338 (Spring 2014).
11. Mediators may disagree about when, if ever, it is appropriate to introduce our own experiences into the discussion. I do occasionally, but never at length. We have to remember: "It's not about you."

12. The worst I have seen, "A Charlie Brown Kwanzaa," is a racially offensive spoof of the popular Peanuts character, which went viral in one office setting. Perhaps the most surprising entry in the idiocy sweepstakes was a series of sexually explicit e-mails sent by a priest in a religious order to the plaintiff, the only female employee.

13. Fair and transparent processes have inherent virtue, which is why the law "rewards" the employer that adheres to them. *See, e.g., Faragher v. City of Boca Raton*, 425 U.S. 775 (1998) (affirmative defense to hostile environment claim available when employer instituted practices to prevent and eliminate workplace harassment and employee unreasonably failed to take advantage of them); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) (same). *Cf. Jiao v. Chen*, No. 03 Civ. 0165, 2007 WL 4944767, at *2-3 (S.D.N.Y. Mar. 30, 2007) (in action for unpaid minimum wages or overtime, employer's failure to maintain adequate records shifts burden of proof to defendant under both federal and New York law).

14. The word in the original is, of course, child—not employee. William Shakespeare, KING LEAR I, iv.

15. Mediators should not forget that some employers, like employees, need to heal. Nor should we, even in "money" cases, fail to explore whether we can enhance parties' well-being in ways transcending dollars and cents.

16. I have found that enabling litigants to moderate extreme views of the relationships and events that led up to the litigation seems to make them if not happier, at least less acutely upset.

17. *See, e.g., Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659 (S.D.N.Y. 2005) (owner's nephew made sexually explicit comments to plaintiff, who was fired in retaliation when she complained), *aff'd*, 225 Fed. Appx. 3 (2d Cir. 2006). These circumstances generally call for the use of an outside investigator.

18. I do not deal with government entities, which present special problems, under this heading. I also omit from consideration large entities like some private hospitals, which tend to react like regular businesses when they are sued by employees. (Hospitals, notably, have plentiful experience with litigation related to their medical services as well as with employment lawsuits.)

19. While the employee did get to address the employer, doing so failed to advance his interests. The entertainer took everything the young man said about his devotion to the foundation's aims with a grain of salt, describing it later as "total B.S." But on account of wretched timing—the organization fired the plaintiff, allegedly so as to save money, days following his complaint—the defendant definitely had exposure.

20. See https://robertlindsay.wordpress.com/2012/10/25/ (last visited, May 27, 2014).

21. Well-known actors, sports heroes, and chefs, for example, may be household names. By contrast, certain business or professional figures are celebrities within a certain community. For my purposes, the distinction makes little or no difference. The relevant point is that the person in question regards himself, and is viewed by relevant others, as a "VIP."

22. Recall that I counseled similar tactics in dealing with certain family-owned companies: "[I]t is crucial to identify someone who commands the family's respect and dares to speak truth to power."

23. *See, e.g.*, Alessandra Sgubini, *Mediation and Culture: How different cultural backgrounds can affect the way people negotiate and resolve disputes*, http://http://www.mediate.com/articles/sgubinia4.cfm (last visited, June 4, 2014); Donna M. Stringer & Lonnie Lusardo, *Bridging Cultural Gaps In Mediation*, 56 DISP. RESOL. J. 29 (2001).

24. The Swiss case settled in the wake of the mediation session, in response to a mediator's proposal; the Belgian case, only a long time later, after the court had denied the employer summary judgment.

25. *See supra* note 8.

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