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Tina Dean-Co-Editor
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Recent EEOC Decision: Threat of Discipline Found to be Reprisal

On December 16, 2011, the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations (OFO) issued its decision in *Malekpour v. Department of Transportation*, EEOC Appeal No. 0720100016. OFO upheld the administrative judge's finding that threatening Malekpour with discipline for refusing to mediate claims associated with his EEO complaint constituted EEO reprisal.

Malekpour was an aerospace engineer working for the Federal Aviation Administration. Malekpour had a workplace dispute with a coworker in October 2007, an issue which he amended into his preexisting EEO harassment complaint. On December 17, 2007, an agency manager approached Malekpour and

asked him to attend a mediation to attempt to resolve issues relating to the October 2007 incident.

Malekpour refused, stating that he did not want to resolve any issues relating to his EEO complaint at this mediation, that he did not want to jeopardize his EEO complaint by participating in the mediation, and that management was attempting to force him to attend mediation so that he might drop some of the matters related to his EEO complaint. In response, the manager yelled to Malekpour, and threatened to discipline him for refusing to attend the mediation. The mediation never occurred, and no discipline was imposed on Malekpour. Malekpour later amended this incident into his preexisting harassment complaint.

An EEOC administrative



judge rejected most of Malekpour's claims, but found that the December 2007 incident constituted retaliation against Malekpour for his protected EEO activity. As a remedy, the administrative judge ordered the agency to pay \$3,000 in compensatory damages to Malekpour for emotional pain and suffering. The agency rejected the administrative judge's decision and appealed to OFO.

On appeal, OFO affirmed the administrative judge's decision. OFO upheld the administrative judge's finding that Malekpour had engaged in protected EEO activity by filing a harassment complaint against the agency. OFO affirmed the finding below that management's public
(continued on page 2)

humiliation of Malekpour and threats to discipline him for refusing to attend the mediation could deter a reasonable employee from protected EEO activity. Thus Malekpour had suffered a harm which could give rise to an EEO reprisal claim.

Although the agency had articulated an alleged legitimate reason for its conduct (claiming that the mediation was to resolve workplace issues and not under EEO auspices and that Malekpour was being berated to get him to attend a team-building conference), OFO found that excuse to be pretext. OFO specifically noted the testimony showing that that the manager's threat to discipline Malekpour came after Malekpour had specifically cited concerns over not wanting to mediate his EEO claims. OFO further affirmed the amount of compensatory damages awarded by the administrative judge and affirmed the administrative judge's findings of no discrimination for the rest of Malekpour's claims.

* This information was provided by the attorneys at Passman & Kaplan, P.C. on FEDweek.com at: <http://www.fedweek.com/item-view.php?tbl=6&ID=7704>

DISTINGUISHING BETWEEN COMPROMISING AND COLLABORATING ~Ralph Kilmann

People often ask me to clarify the difference between compromising and collaborating, especially since these two modes involve both people getting their needs met. In particular, people often use the word *compromise* to indicate that they have completely resolved the

matter at hand: "We achieved a successful compromise!"

The key distinction, once again, concerns whose needs get met, and to what extent, as a result of using a particular conflict mode. Compromising means that each person gets partially satisfied but not completely satisfied. I think of compromising as a 50/50 split, in which each person gets a reasonable share of the available pie. But a compromise could also be a 75/25 split, where one person gets more than the other, but both people still get less than all their needs met. But notice that both a 50/50 and a 75/25 split still add up to 100—a zero-sum game along the distributive dimension. The more one gets, the less the other gets. As defined by the Thomas Kilmann Conflict Model, however, *collaborating* means that both persons get all their needs met along the integrative dimension. How is this possible? By using the collaborating mode under the right conditions—such as making the conflict more complex in order to expand the size of the pie available to both persons, maintaining trust among participants, speaking and listening with sensitivity and empathy, and so forth—it's possible to achieve total need satisfaction for both of them. With *synergy*, coming up with a creative solution that uniquely satisfies everyone's needs, we thus achieve a 100/100 resolution instead of a 50/50 split.

Here is a simple example to make a very important point. Let's say that two managers are discussing when to get together for a work meeting. Bob wants to meet at 8:00 a.m. because he's most alert at that time, while Eduardo wants to meet at 4:00 p.m., for the same reason. By compromising, they might split the difference and meet at noon. This solution, while workable, does not satisfy either person very well. Using

(Kilmann continued)

the same example, let's consider how the collaborating mode results in a very different outcome. Eduardo tells Bob that it's most important for them to clarify the strategic goals of their business unit—a topic that Bob has put aside, with one excuse or another, for quite some time. Eduardo also suggests that they meet at his home in the late afternoon, since he would love to arrange a festive Mexican dinner as part of their meeting. Since Bob loves Mexican food and is eager to meet away from the stresses of the workplace, he's happy to have the meeting at 4:00 p.m. at Eduardo's place. In addition, Bob knows the topic of the meeting is something that must be addressed sooner or later. By discussing it outside the work environment, they might be able to develop a creative solution to their long-standing strategic conflict.

As a result of each person sharing more about his needs and wants (which makes the initial conflict more complex), the size of the pie has been greatly expanded, which makes a creative solution possible. The meeting does in fact take place at 4:00 p.m. as Eduardo initially preferred, but the timing of the meeting is now the least important aspect! Indeed, the late afternoon meeting at Eduardo's allows both of them to relax and continue their discussion on a difficult subject over dinner, and also gives them the time and space to discuss their other differences. Collaborating is thus quite different from a quick attempt at giving both parties only something of what they really want.

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Class is in Session!

~Gregory Burke, ORM Ombudsman

Contact with ADR Office does not toll 45-day Deadline for Contacting EEO Counselor

In Pearson v. Napolitano, Civ. Act. No. 10-2875-SS (ED LA 3/8/12), A Federal district court held that an employee's contact with an ADR office did not meet the requirement for contacting an EEO Counselor within 45 days of an alleged discriminatory act and dismissed the civil suit over alleged discrimination.

The complainant alleged: He had been discriminated against in his agency on February 29, 2008. He contacted his agency's ADR office on March 10, 2008. ADR responded on March 12. In February 2009, the Complainant again contacted ADR. In March 2009, ADR provided instructions on filing an EEO complaint. In October 2009, the Complainant contacted his EEO office, which dismissed his complaint as untimely. He ultimately appealed to Federal district court.

The court found that the EEO regulatory requirement to contact a counselor within 45 days of alleged discrimination was not met by the contact to the ADR office. The court noted complainants are free to use ADR or other means of resolving disputes but are not excused from timely filing EEO complaints because they use ADR. Complainant had no equitable excuse for missing the filing deadline: he was trained in EEO and should have known the rules. Consequently, his case was dismissed.

Lesson: ADR staff should remind disputants in workplace disputes that ADR is not a substitute for timely contacting an EEO counselor.

Looking for conflict resolution resources?

ADRhub, a free website provided by the Werner Institute at Creighton University has many options for news and education.

www.adrhub.com

**In this photo:****Top Row R-L:**

Benjamin Balkum, AFGE President, Dale Huppert, AFGE Steward/Mediator/Conflict Coach;

Bottom R-L:

Dr. Barbara Belew/Mediator/Conflict Coach, Dr. Marianne Brady/Conflict Coach and Lisa Basanese, AFGE Chief Steward/Mediator/Conflict Coach

Conflict Coaching and Labor Relations

~ MaryAnne Gibler

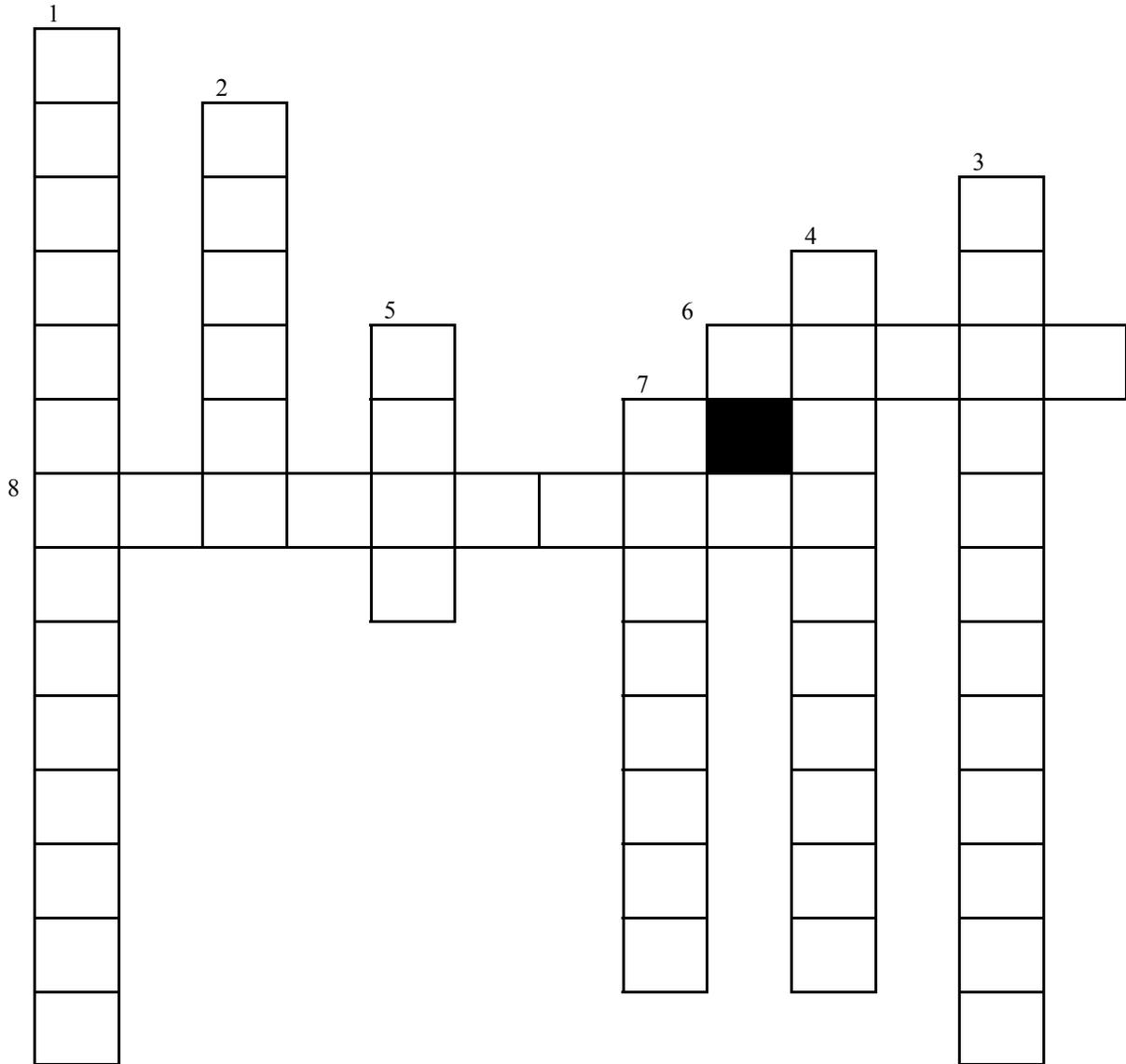
The Oscar G. Johnson VA Medical Center in Iron Mountain, Michigan is hard at work trying to resolve employee conflict at the front line level. In the summer of 2011 Benjamin Balkum, AFGE President was instrumental in working with the EEO/ADR Program Manager in an effort to start a program called “pre-mediation.” Early in the process, discussion took place with two of the facility’s Clinical Psychologists – Dr. Marianne Brady and Dr. Barbara Belew on how the agency can assist staff so that they are prepared for the mediation session. The goal was to have all parties feel confident when engaged in this program. After numerous meetings it was determined that the best training to help launch this new endeavor was Conflict Coaching training. On July 28, 2011 ORM assisted in providing this training to 11 staff members – AFGE, Mediators, EEO/ADR Program Manager and Service Line Managers.

Mr. Balkum, Mrs. Basanese and Mr. Huppert actively use Conflict Coaching methods in their daily interactions with Bargaining Unit Employees. Dr. Brady and Dr. Belew have implemented various parts of Conflict Coaching in their pre-mediation sessions. The Conflict Coaching process allows staff to deal with the various stages of conflict to include reviewing the story, emotions, testing the story, and looking at the individual’s communication skills. The EEO/ADR Program Manager promotes this program and believes that the decline in EEO complaints is attributed to the active involvement of all who are using Conflict Coaching.

DID YOU KNOW...

The activity of mediation appeared in very ancient times. The practice developed in Ancient Greece, then in Rome. The Romans called mediators by a variety of names, including *internuntius*, *medium*, *intercessor*, *philantropus*, *interpolator*, *conciliator*, *interlocutor*, *interpres*, and finally *mediator*.

Some cultures regarded the mediator as a sacred figure, worthy of particular respect; and the role partly overlapped with that of traditional wise men or tribal chief. Members of peaceful communities frequently brought disputes before local leaders or wise men to resolve local conflicts. This peaceful method of resolving conflicts remains prevalent in communities across the globe.



ACROSS

- 6. Independently and impartially issues final agency decisions and orders adjudicating employment discrimination complaints.
- 8. One party identified during a dispute.

DOWN

- 1. Point of contact for employees interested in ADR.
- 2. Method of meeting with the parties in separate sessions during the ADR process.
- 3. One of the many ways used to resolve disputes.
- 4. Not taking sides in a dispute.
- 5. Responsible for enforcing federal laws that make it illegal to discriminate.
- 7. The most common category of neutral used within VA.



Workplace ADR Program

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**Mediation: A Solution to
Workplace Disputes**

The Workplace ADR Program solicits articles for VA’s quarterly ADR newsletter. The purposes of the newsletter are to communicate information relating to the use of ADR in workplace disputes, and to serve as a resource for those interested in learning more about ADR and its application within VA. We invite you to submit ideas and articles for the newsletter through your respective administrations: VHA to Sherron McHellon (10A2E), VBA to Johnny Logan (20M42), NCA to Nicole Maldon (40A), VACO staff offices to your VACO ADR Liaison, and labor organizations to your ADR Council Representative. We are looking for ideas and articles on ADR-related topics, noteworthy activities, initiatives, accomplishments, best practices, or other items designed to educate and inform VA employees and managers on ADR and its benefits in addressing workplace disputes. We hope the VA community will find the newsletters a useful resource for obtaining interesting and helpful information representing ADR activity throughout VA. For more information, visit our website. <http://vaww.va.gov/adr/>



**Basic Mediation Training
VA Sierra Nevada HCS Reno, Nevada March 19 - 23**

Core Values "I CARE "

- I**ntegrity
- C**ommitment
- A**dvocacy
- R**espect
- E**xcellence



Training Calendar

APRIL:	3-5	Advanced Mediation Training, Southern Arizona HCS, Tucson, AZ
	10-12	Advanced Mediation Training, West Texas HCS, Big Spring, TX
	23-27	Conflict Coaching, VA Maryland HCS, Baltimore/Perry Point, MD
MAY:	15-17	Advanced Mediation Training, VACO, Washington, DC
	21-25	Basic Mediation Training, VAMC Topeka, Topeka, KS
JUNE:	11-15	Basic Mediation Training, VAMC Washington, Washington, DC