What Happens When an Early Referral Mediation Does Not Result in a Settlement

- If an Early Referral Mediation is not successful, the ALJ/Mediator refers the case back to the Equal Rights Officer to conduct an investigation of the complaint. At this point, the respondent will have to submit a position statement responding to the allegations in the complaint. The Equal Rights Officer will then investigate the case to determine whether or not there is probable cause to believe that the respondent has violated the law as alleged in the complaint. If there is a finding of probable cause, or if the complainant appeals an Initial Determination of No Probable Cause, the case will proceed to hearing.

- Even if the parties do not settle during the early mediation attempt, they are still free to try mediation again at a later point in the process. The parties' settlement positions may change or evolve as the case proceeds through the ERD investigation and hearing process.

- If mediation is unsuccessful, the ALJ/Mediator who handled the mediation will not be involved in the subsequent hearing of the case.

Some Tips to Facilitate the Mediation Process

- Parties are not required to have an attorney to engage in mediation. However, retaining an attorney can generally be helpful.

- Take into consideration the strengths and weaknesses of your case and the possible remedies if the case were to proceed to a hearing.

- Try to determine what settlement terms might be satisfactory to you and how flexible you might be if the other party is unwilling to agree to everything that you would like.

- Do your best to understand the views and interests of the other party.

- Be respectful to the ALJ/Mediator and toward the other parties involved in the mediation.

- Be patient. Mediation usually involves some give and take before a settlement can be achieved.

State of Wisconsin
Department of Workforce Development
Equal Rights Division
Civil Rights Bureau

The Department of Workforce Development is an equal opportunity service provider. If you need assistance to access services or if you need material in an alternate format, please contact us. Deaf, hard of hearing, or speech-impaired callers may reach us in Madison at (608) 264-8752 or in Milwaukee at (414) 227-4081.

Questions about the state employment discrimination laws may be directed to:

Equal Rights Division

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STATE OF WISCONSIN
DWD
Department of Workforce Development

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Early Referral Mediation Program

The Early Referral Mediation program offers an expedited process to resolve complaints between employees and employers.

STATE OF WISCONSIN
DWD
Department of Workforce Development

The pamphlet is intended to provide only general information. It should not be considered a legal document or legal advice.

Early Referral Mediation Program

The Equal Rights Division (ERD) Early Referral Mediation program was reinstituted in 2011. This means that mediation is now offered at all stages of the civil rights complaint process in the ERD. The Early Referral Mediation program offers the parties the opportunity for earlier, quicker and less costly resolution of a case.

Advantages of Early Referral Mediation

- The mediators in the ERD are all experienced Administrative Law Judges (ALJs) with several years of experience conducting mediations.

- An ALJ/Mediator will meet with the parties to try to assist them to resolve the dispute before there has been any investigation or hearing. At this point, neither party has incurred any of the costs that are associated with the investigation and hearing process.

- If the parties have an ongoing relationship, an ALJ/Mediator can often help them find an acceptable solution that will preserve their working relationship. During the mediation, the parties generally meet face to face in a non-adversarial setting where both parties can be free to discuss their dispute openly.

- An ALJ/Mediator can explain the law to an unrepresented party and can explain the difficulties involved in the litigation process. An ALJ/Mediator can also explain the scope of possible remedies. This can often be beneficial if a complainant has unreasonable expectations about what he or she can reasonably expect as a remedy if there is ultimately a finding of discrimination, or if the respondent is not familiar with the full scope of remedies which might be available.

- Mediations allow the parties to determine for themselves how they want to resolve their dispute. The parties may even agree to some different types of remedies than what the complainant might receive if the complainant were to prevail at a hearing.

- The ERD ALJ/Mediators have a very good success rate. They are able to assist the parties to settle approximately two-thirds of the cases where a mediation session is held.

- If mediation is successful, the settlement agreement can often be written to preserve confidentiality and protect the privacy of each party. Other than the complaint itself, there will be no public record of the case. On the other hand, if the case goes to hearing the case file and the hearing itself are usually open to the public and the news media.

- Even if an early referral mediation is not successful, the mediation may lay the groundwork for the parties to begin thinking about a settlement to which they might agree later in the process.

When to Request Early Referral Mediation

When a complaint is served, the ERD sends a letter to the respondent requesting a written response to the complaint in writing by a certain date. The ERD has recently modified its service letters to provide that the respondent does not need to file a written response to the complaint if the respondent is interested in participating in mediation. If the respondent indicates a willingness to engage in mediation, the ERD will check with the other party. If both parties are interested in mediation, the case is assigned to an ALJ/Mediator, rather than being assigned for investigation.

The role of the ALJ/Mediator is to facilitate communication between the parties to help them reach a voluntary and mutually agreeable settlement before there has been any investigation or hearing. The ALJ/Mediator schedules the mediation. Each party generally receives written notification indicating the time, date and location of the mediation for in-person mediations. Mediations may also be conducted by telephone if the parties agree.

How Early Referral Mediations are Conducted

Early Referral Mediations are conducted the same way that mediations are conducted at other stages of the ERD process. Some mediation sessions last a short time. Others last a day or more. A typical mediation lasts three to four hours.

A complainant's offer or a respondent's counteroffer involves, among other things, an assessment of what the potential remedy will be if discrimination is proven. Remedies may include (but are not necessarily limited to) reinstatement to a job, back pay, interest, attorney's fees and costs, and other potential remedies. In some cases, compensatory damages (for example, damages for emotional harm) and punitive damages may be available if the litigation were to go forward. A respondent will generally want a non-admission of liability provision and a release of claims to be part of any settlement. The parties may also agree on a confidentiality or non-disclosure provision.

- Mediations allow the parties to determine for themselves how they want to resolve their dispute. The parties may even agree to some different types of remedies than what the complainant might receive if the complainant were to have prevailed at a hearing.

- While the primary objective of mediation is to facilitate communication between the parties in order to aid the parties in reaching a settlement, it is ultimately the parties' decision whether or not to settle.

- If an agreement is reached, the parties may draft a settlement agreement themselves, or they may request that the ALJ/Mediator provide them with a draft agreement. (Drafts prepared by an ALJ/Mediator do not constitute legal advice.)

- Once the parties have agreed to resolve the case, the ALJ/Mediator asks the complainant to sign a form withdrawing the complaint. The ALJ/Mediator may keep the withdrawal form until the settlement agreement has been drafted and signed and the terms of the agreement have been complied with. The ALJ/Mediator then sends the signed withdrawal form back to the Equal Rights Officer (ERO) who was originally assigned to investigate the case. The ERO then issues an order dismissing the complaint.