

Representation of Clients in Mediation Roleplay
King. v. Johnson and Jones

TEACHING NOTES

This exercise was written for use in my Negotiations class. During the latter half of that class, we talk about assisted negotiations, and how attorneys and their clients can participate most effectively in a mediation.

My goals for the exercise are to have students learn:

how to negotiate with the assistance of a mediator, with special attention to what value a neutral party adds to the negotiation process;

how to interview a client, prepare the client for a mediation and then represent the client in mediation; and

how different mediation styles and approaches affect the negotiation process.

The exercise has been successful in meeting these goals. To reinforce the first goal, I ask students to write in their journals about how the presence of the mediator affected their negotiation. The second goal is accomplished within the process, itself. Despite the time constraints, students find the exercise useful and some are able to reach agreement. Next year I plan to add opportunities for students to interview their mediators in advance of the mediation, and to file a pre-mediation brief. Students especially enjoy the feedback session with the mediators at the end of the mediation. To accomplish my third goal, I invite mediators with a range of styles and approaches to mediation, from evaluative to facilitative. In class, we discuss how stylistic differences affected their negotiations.

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To prepare students for this exercise, I describe what mediation is, where it fits in the ADR continuum, and why you might bring a mediator in to help with a case. I also discuss styles of mediation (using Leonard Riskin's grid—facilitative/evaluative, etc.). Then I show a videotape of a mediation in which the parties are represented by counsel, and we discuss how effectively (or ineffectively) the lawyers manage their participation. One possibility is the ABA video, "Representing Clients in Mediation." Another option would be to show a video of the final round of the "Representation in Mediation" competition that the ABA sponsors in conjunction with its Annual Dispute Resolution Conference.

Next, I divide the students into pairs, assigning them to be clients and attorneys. To add an interviewing exercise, I give the attorneys only limited information ("Confidential information for ___ Attorney") and give each client Confidential Information, which includes more factual background. The attorneys then interview the client prior to the mediation, learn the client's goals, and complete a negotiation plan.

For the actual mediation, I use volunteer mediators from the community. We have a two-hour class, so the mediation typically lasts about an hour and 15 minutes, followed by feedback from the mediator for the attorneys. The following class, we compare experiences among the various groups.

I have also used this roleplay in a mediation training, focusing more on the mediator's role.

The Law: I encourage all users to review and update the legal information at the end of the exercise.

Representation of Clients in Mediation Roleplay
King. v. Johnson and Jones

Information for the Mediators and Both Parties

Rena King, age 42, began working at Johnson and Jones, Seattle's largest and most prestigious law firm seven months ago. The firm has over 500 attorneys, with offices in Los Angeles, Anchorage, Portland, OR, and Hong Kong. King is an experienced legal secretary, who moved to Seattle from Florida, where she had worked as a legal secretary for 18 years. King was assigned to work for Martin Green, a high-powered litigator who specializes in trademark disputes. King quit the firm three months ago and filed a Title VII sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) against Green and Johnson and Jones, alleging sexual harassment by Green. Green denies that he harassed King.

The EEOC has offered free early mediation in this case, and both parties and their attorneys have agreed to participate. You are scheduled for a mediation on Wednesday, November 29th at 2:30 p.m. You will be given the name of your assigned mediator on Monday, November 27th. You may want to contact your mediator for a pre-mediation discussion prior to Wednesday's mediation.

Assume you and your client have signed an Agreement to Mediate and Confidentiality Agreement.

Confidential Information for Rena King's Attorney

Your client is an attractive 42-year old woman. She came to you for advice after filing a charge with the EEOC, claiming she was sexually harassed while working as a legal secretary at Johnson & Jones. You took her case without hesitation, even though you went to law school with several of the attorneys at Johnson and Jones and consider many of them to be your friends. You are personally disgusted with the kind of conduct that she describes, and were very involved in writing and implementing a sexual harassment policy at your small firm. If this case cannot be settled in mediation, you plan to obtain a right to sue letter from the EEOC, and file a complaint alleging sex discrimination under Title VII. You also intend to file additional state law claims including the tort of intentional infliction of emotional distress. You will ask for at least \$500,000 in compensatory and punitive damages.

You have a contingency fee arrangement with King, which provides that you will receive 25% of any settlement amount prior to filing suit, and a third after suit is filed.

You do not know the attorney representing Johnson and Jones (s/he is not a member of the firm), but you've heard him/her described as a "corporate smoothie." You have had very little contact with the other side, and are basically waiting for the mediation to discuss the case. You have a reputation as a tough litigator and wouldn't mind taking this case to trial.

Interview your client and prepare for the mediation.

In preparing your client be sure to cover the following:

The mediation process, the role of the mediator, confidentiality of the process, and its limitations.

Your client's goals for the mediation.

Your client's interests and the likely interests of the other side.

Possible options for settlement.

How you and your client will allocate participation during the mediation, including opening statement.

Confidential Information for Rena King

You are an attractive 42-year old single mother, who is a very competent secretary. You moved to Seattle from Florida about a year ago because your son was a freshman at the University of Washington. Unfortunately this fall your son transferred to UCLA, but you have come to enjoy Seattle, despite the rain. You were very pleased to get the job at Johnson and Jones, as it is known as the premier law firm in Seattle, and the pay was better than at other firms where you interviewed. You started work there seven months ago.

When you were assigned to work for Martin Green, you immediately felt uncomfortable. You've been in the workplace long enough to quickly recognize his type (although you thought there would be fewer of them in Seattle than in Florida!). He began "hitting on" you almost immediately. He told you off color jokes, and had a habit of leaning against your thigh while talking with you at your desk. One night when you were both working late, he suggested you join him for a "hot tub" afterwards. Of course you politely said "No thank you." Another time he threw a pencil at your breasts and laughed. Then, during your sixth week at the firm, the two of you went for lunch to talk about a case he was preparing for trial. To your surprise, he urged you to go away for the weekend with him. You angrily refused. No one witnessed any of these incidents but you found them all to be embarrassing and outrageous.

Shortly after that, he began to criticize your work and tried to embarrass you. On one occasion, when a group of other support staff was standing around, he put a package of M & M candies in the front pocket of your blouse, pulled your shoulders back, and said: "Let's see which breast is bigger!" You felt extremely humiliated and angry, and later that day you went to the office manager to report Green's conduct. That person, you feel, did not take your complaint seriously, and seemed to have the attitude, "Have a sense of humor, he was just kidding!" Disappointed and somewhat intimidated, you did not ask to file a written complaint at that time, even though the employee handbook (which you were provided when you started the job) provides for such a procedure. You felt that everyone was protecting Green!

Shortly after talking to the office manager, however, you were transferred to work for a paralegal and a different attorney. This was a great relief to you, until Green, who was not located in the same area, at least twice and maybe more often, began to suddenly appear by your desk, and just stare at you. This left you feeling scared, angry and confused. After a few weeks of this, you went to see a therapist, who was quite helpful, and suggested you seek legal advice. The next day, you called the office of the EEOC and decided to go down there and file a sex discrimination charge. In a fit of anger, you then called the office manager to tell him you quit. A few days later you contacted an attorney to represent you. You had worked at Johnson and Jones for a total of 12 weeks at the time you quit. You have been in therapy since you left the firm three months ago. You have not looked for another job. You have been living on your savings, which are just about depleted, unless you dip into your retirement fund.

You know of at least two other secretaries, Janet Brothers and Sara Smith, who said they experienced similar behavior from Green. You confided to your best friend about the above stated events, a few weeks after you left the firm, after filing your charge with the EEOC.

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Your therapy bills so far are over \$2500 (you were going twice a week for a while, and each session is \$100). You anticipate that you will need to go at least once a week for another 6 months. Your annual salary was \$45,000, with great benefits.

You would like to have \$100,000 after subtracting attorney fees and costs (the costs shouldn't be much -- your attorney has spent very little time on your case, as far as you know). You have a contingency fee arrangement with your attorney that provides that he/she will receive 25% of any settlement amount prior to filing suit, and a third after suit is filed. If the case can be settled today, you would consider going as low as \$75,000, after covering your expenses and attorney fees. You really don't want to go to trial if it can be avoided. [You are also free to consider any other creative options that would meet your interests.]

Confidential Information for Law Firm's Outside Attorney

You have been retained as outside counsel to represent Johnson and Jones in this matter. The firm's Managing Partner will be present at the mediation. The attorney representing King is known as a tough litigator, willing to go to trial if necessary. You have had very little contact with the other attorney, and are basically waiting for the mediation to discuss the case.

You are being paid at your usual rate of \$250 per hour.

Interview your client and prepare for the mediation.

In preparing your client be sure to cover the following:

The mediation process, the role of the mediator, confidentiality of the process, and its limitations.

Your client's goals for the mediation.

Your client's interests and the likely interests of the other side.

Possible options for settlement.

How you and your client will allocate participation during the mediation, including opening statement.

Confidential Information for Johnson and Jones' Managing Partner

As managing partner of the firm, you have done a fairly thorough investigation of Rena King's allegations. She started at the firm seven months ago. You are aware King alleges that immediately after she was assigned to work for Green, he began "hitting on" her. She claims he told off color jokes, leaned against her thigh while talking at her desk, and asked her to go away with him for the weekend. King alleges that when she refused, he began to criticize her work. On another occasion Green put a package of M & M candies in the front pocket of her blouse, pulled her shoulders back, and said "Let's see which breast is bigger!"

No one witnessed any of these incidents except the M & M episode. Green denies all but the M & M incident, which he claims was a "practical joke." Green describes King as a "drama queen" with "an overactive imagination" and defiantly insists that the firm take this to trial to "restore his good name."

King talked to your office manager about the incidents, and that person reports that he did not find King to be entirely credible. It is true that Green has a certain reputation at the firm, but most of the secretaries joke about him, and don't take his advances seriously. The office manager decided, though, to transfer King to another attorney, and assumed that the matter was resolved. The transfer took place after King had been working at the firm for about eight weeks. She had already been reassigned to another attorney when she filed her charge and quit. King never filed a written complaint with the firm's HR department, which is required under the employee handbook. You feel the firm took appropriate action in reassigning her, although someone should have talked to Green about his conduct. If that was ever done, there is no record of it. At the time King left the firm, she had been employed there for 12 weeks.

Your investigation shows that at least one other secretary, Sara Smith, reported having experienced similar behavior from Green. Smith has left the firm, and you are concerned that this case may give her "ideas." You have also heard that King's best friend claims that she had confided in her about some of the above stated events, a month or so after leaving the firm. It is not clear whether King complained to other secretaries or attorneys about Green's behavior, but there are no written records of such complaints.

Personally, you think Rena King overreacted to the situation. She is typical of plaintiffs in these cases, and you've settled quite a few! They cannot take a little kidding, and cry "discrimination" at the drop of a hat. With everything in the news about sexual harassment these days, women are coming out of the woodwork, thinking they can recover millions, all for a little out of line "office play." You think the fact that King did not actually file a written complaint with the office manager, or even tell her best friend until later, will help your case. Green is an excellent attorney, perhaps a bit juvenile at times, but a great trial lawyer. Green does have a reputation at the firm as a bit of a "womanizer," especially since his last divorce. This is not the first time that J & J has faced these kinds of allegations from female employees. Other matters were settled quietly. The firm has a written sexual harassment policy, but you believe it needs "tightening up" to prevent future liability.

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You realize the climate of the times, though, and have warned the firm they could be held up as an example. You are also concerned about what kind of witness Green will make. He is known at the firm as a "rainmaker" and brings in megabucks. How will this look to a jury -- was the firm protecting him for its own financial benefit, rather than looking out for its employees?

You have clear instructions from your partners to settle this matter if possible. Liability insurance will not cover the settlement, so the money will come out of the pockets of you and your partners.

Your partners have asked you to try to settle this for under \$50,000, and have authorized you to offer up to that amount, to be paid today, in cash. With a great deal of reluctance, the firm executive committee, however, has given you authority to pay King up to \$150,000 if the matter can be settled today and some sort of payment terms can be arranged. Further publicity will only hurt business and damage the reputation of the firm--its greatest asset. The firm is fed up with Green's behavior and may later seek to recover some of this money from Green individually. [You are also free to consider any other creative options that would meet the firm's interests.]

Summary of Sexual Harassment Law

Sexual harassment is a violation of Title VII (42 U.S.C. s2000 et seq.) under either of two legal theories: “quid pro quo” and “hostile environment.”

To establish a prima facie case of quid pro quo sexual harassment, a complainant must show that an individual "explicitly or implicitly conditioned a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir.1995).

To state a Title VII claim based on a hostile working environment, a plaintiff must prove that:

- 1) she was subjected to verbal or physical conduct of a sexual nature,
- 2) this conduct was unwelcome, and
- 3) this conduct was sufficiently severe or pervasive to alter the conditions of ... employment and create an abusive working environment.

Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir.1995).

Whether the offensive conduct was sufficiently severe or pervasive to support a Title VII claim is determined by "looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Kortan v. California Youth Authority, 2000 WL 897751, at 5 (9th Cir.2000). Moreover, the working environment must "both subjectively and objectively be perceived as abusive" because of the sexual harassment. Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir.1995).

Employer liability:

Two recent Supreme Court cases have set forth a new test for determining when an employer is vicariously liable for a hostile work environment created by a supervisor. In Burlington Industries v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998), and Faragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93, 141 L.Ed.2d 662 (1998), the Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee."

To prevent this rule from imposing automatic liability and to encourage employers to adopt anti-harassment policies, the Supreme Court provided employers with an affirmative defense they could assert to avoid vicarious liability for their supervisors' misconduct:

[an] employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or

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corrective opportunities provided by the employer or to avoid harm otherwise.... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Burlington Indus., 118 S.Ct. at 2270; Faragher, 118 S.Ct. at 2293.

Representative Case

Montero v. Agco Corporation, 192 F.3d 856 (9th Cir 1999)

In Montero, the plaintiff, a secretary, was the only female employee in a distribution center. She claimed that her supervisor Carpenter had used foul language around her, told her that he was going to spank her, rested his chin on her shoulder while she worked, grabbed her arms until she said "ouch," and frequently stood on one leg, grimaced, and threatened to pass gas. She also complained that Newmann, another supervisor, had frequently made remarks of a sexually suggestive nature, made sexually suggestive gestures, grabbed his crotch while speaking with her, placed his face on her bottom, told her that he had sexual dreams about her, put mice and bugs on her desk, asked if he could sit under her desk, spat water at her, put his hands in the air as if he were going to grab her breasts, posted "pin-ups" on his desk, put his hand on her chair as she sat down, attempted to bite her neck, and knelt in front of her and tried to put his head between her knees.

On March 20, 1995, plaintiff reported these incidents to the HR Manager Rudin, and explained that she had not confronted Carpenter or Newmann before contacting Rudin, because she was not a confrontational person and was afraid of losing her job. Rudin agreed to place Plaintiff on paid administrative leave during the investigation, which Rudin anticipated would be completed by Monday, March 27, 1995.

Also on March 20, 1995, after meeting with Plaintiff, Rudin met with Carpenter and Newmann. Carpenter admitted that most of what Plaintiff had said was true. Newmann admitted that he had used foul language and sexual innuendo and had engaged in some "joking around." Newmann, however, denied most of Plaintiff's other allegations against him. AGCO later fired Carpenter and disciplined Newmann. Several months later, after consulting a lawyer plaintiff resigned from her position.

Portions of the opinion follow:

[Under the Burlington Industries rule (stated above),] [W]e first must determine whether Plaintiff suffered a tangible adverse employment action, because "[n]o affirmative defense is available ... when [a] supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Burlington Indus., 118 S.Ct. at 2270.

Plaintiff claims that she suffered a tangible employment action, because she was constructively discharged. She argues that a reasonable person in her circumstances would have felt forced to leave AGCO. See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir.1994) (holding that, to survive a motion for summary judgment, a plaintiff "must show that there are triable issues of fact as to whether 'a reasonable person in [the plaintiff's] position would have felt that [the plaintiff] was forced to quit because of intolerable and discriminatory working conditions.'" (quoting Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir.1989))).

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We need not decide whether a constructive discharge can be a "tangible employment action" for the purpose of a Faragher analysis, because Plaintiff was not constructively discharged. By the time Plaintiff resigned she was not subject to intolerable working conditions. In her deposition, plaintiff testified that Newmann's sexually harassing behavior had ceased three to four months before she left AGCO. See Steiner, 25 F.3d at 1465 (affirming the district court's dismissal of an employee's constructive discharge claim, when the employee resigned two and one-half months after the harassment had ceased). Additionally, Plaintiff did not resign until after AGCO had fired and replaced Carpenter and had reprimanded Newmann Moreover, there was no reason to believe that the new (female) manager would not ensure that Newmann did not harass Plaintiff further. Finally, after her complaint to AGCO's upper management resulted in the firing of one supervisor and the disciplining of another, Plaintiff knew that the company would take any other complaint seriously. Given those considerations, Plaintiff was not constructively discharged, because no reasonable person in Plaintiff's position would have felt forced to quit when she did.

Because Plaintiff was not subjected to a tangible employment action, AGCO may avail itself of the Faragher affirmative defense to vicarious liability for Carpenter's and Newmann's sexually harassing behavior. The first prong of that defense requires AGCO to show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Faragher, 118 S.Ct. at 2293. AGCO met that requirement here.

First, AGCO had a policy prohibiting sexual harassment, during the period when Carpenter and Newmann were sexually harassing Plaintiff. Plaintiff acknowledged that, when she was hired, she received an employee handbook containing a copy of AGCO's policy against sexual harassment, as well as a separate memorandum describing that policy.

The first prong of the Faragher affirmative defense also requires AGCO to establish that it exercised reasonable care to correct promptly sexually harassing behavior. AGCO did so [by immediately investigating her complaint.]

From the time Plaintiff complained, it took AGCO only 11 days to complete its investigation and take action to address Plaintiff's complaint in a decisive and meaningful fashion. AGCO thereby exercised reasonable care to "correct promptly" sexually harassing behavior at the Stockton facility. AGCO successfully established the first prong of the Faragher affirmative defense.

The second prong of the Faragher affirmative defense requires that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S.Ct. at 2293. "[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.*

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As noted above, Plaintiff knew about AGCO's policy prohibiting sexual harassment and had received several copies of it. She also knew whom to contact if she was being subjected to sexual harassment. Plaintiff had met Rudin in person and had talked with her over the telephone several times before making her complaint.

Noting that the plaintiff waited almost two years to complain to Rudin, and unreasonably failed to take advantage of company procedures in place to protect her, the court affirmed the summary judgment in favor of Defendant.

Remedies

The following remedies are available to a prevailing plaintiff in a Title VII case:

Compensatory damages. Compensatory damages are to compensate the plaintiff for actual amounts lost. Compensatory damages include back pay, front pay, lost benefits and damages for humiliation and emotional distress. Damages for intangible harm such as emotional distress are awarded only when there is adequate proof such as physical manifestations of emotional harm or expert medical or psychological evidence of damage caused by the action.

Back pay. Back pay is the amount of money the plaintiff would have earned if there had been no discrimination. It reflects total earnings, including the value of fringe benefits, overtime bonuses, shift differentials, premium pay, etc. Back pay generally starts to accrue from the date of the discriminatory act until the date of rightful placement, or the date on which the plaintiff's interim earnings begin to exceed the back pay. Under Title VII, back pay may not be calculated more than two years before the filing date of the charge.

Mitigating damages are subtracted from the amount of back pay owed. Mitigating damages are wages that the plaintiff earned, or could have earned with reasonable diligence. Reasonable diligence means an effort to find comparable employment.

Front pay is prospective relief and is awarded if the position to which the plaintiff is entitled is not available. Essentially, the plaintiff is paid as if she had the job. Reinstatement is the preferred, presumptive remedy for a discrimination victim, but where reinstatement is not feasible, an award of front pay may be appropriate. The period of time will vary and is based on the plaintiff's skills, the job market, and the nature of the position at issue.

Punitive Damages. Punitive damages are designed to penalize a defendant for its actions or to act as a deterrent. Punitive damages are available only in cases where the employer engaged in discrimination "with malice or reckless indifference to the federally protected rights of the aggrieved individual." In reviewing employer's actions, courts have focused on:

- 1) evidence of the employer's attitude towards sexual harassment;
- 2) direct statements by the employer about plaintiff's rights or complaints; and
- 3) the egregiousness of the conduct at issue.

The maximum allowable award in Title VII cases when the employer employs more than 500 employees is \$300,000.

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Other non-monetary remedies include reinstatement, special training, letters of recommendation/references, expungement of records, seniority adjustments, correction of discriminatory policies and protection from retaliation.

Attorney's Fees

A prevailing plaintiff is entitled to reasonable attorney's fees under Title VII.