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## HOSPITAL WORKS MEDIATION

**Fran Hamilton, Plaintiff's Attorney**

You are a partner in a prosperous mid-size law firm in Cincinnati. You have been fortunate to develop a practice that includes both plaintiffs and defense work in the employment area. (Indeed, yours is one of the few firms that litigates on both sides of the fence in personal injury, employment, and commercial cases.) Your four years of post-law school experience as an assistant prosecutor have made you comfortable in front of a jury. You like to try to negotiate settlements directly and early, and if you can't work out a deal, to litigate hard. Thus, you are not happy with the court's recent pressure to mediate. You generally resist and have had quite negative experiences in the few mediations you have done. The court-appointed mediators (in two-hour sessions) seemed to just pressure both sides to meet in the middle, no matter what the merits. To get there, they'd just tell each side about the weaknesses in their cases. It was a highly manipulative cookie-cutter formula that made neither you nor your clients happy.

In this case, you represent P.D. Terrell, the recently terminated director of development and community relations for the Good Neighbor Hospital, a reasonably large not-for-profit hospital that borders a low-income neighborhood on one side and a more upscale neighborhood on the other side.

P.D. was hired a year ago by the hospital's former CEO and board of directors, after an exhaustive and expensive search (using an executive search firm). At the time of his hire, P.D. was the development director for a smaller hospital in Memphis, Tennessee. However, he was born and raised in Cincinnati, where his mother still lives. P.D. is 50, unmarried, and an only child. His mother had reached her mid-seventies, and he wanted to relocate to Cincinnati to look after her.

As luck would have it, the CEO who hired P.D. was forced out by the Good Neighbor Hospital's board within 6 months after P.D. arrived. Acting upon this CEO's strong recommendation (which proved his undoing), the hospital established a luxury service wing for maternity, cosmetic, and other elective surgery. Less wealthy patients (who could not afford to pay over and above insurance reimbursements) were admitted only to the older, less well-decorated maternity ward and obviously could not take advantage of cosmetic or elective surgery there. This rankled the lower-income neighborhood adjacent to the hospital, which claimed that the luxury wing had increased traffic congestion and late-night ambulance noise. (The original ambulance path had been rerouted to accommodate the building addition.) Community relations suffered, as did the hospital's bottom line (at least in the short term), as many people opted to go to a different hospital for non-emergency procedures and wealthier patients hesitated to come to a facility in what was perceived as a rough neighborhood.



The new CEO came in a few months ago and took only a few weeks to fire your client. “We need new blood,” he was reported to have said at a hospital board meeting, “Community relations are a mess, and fundraising is down since P.D. got here.” He told P.D.: “You just aren’t working out; community relations are bad, and your fundraising development efforts have been insufficient and ineffective.” When P.D. protested, referring to the situation handed to him, the CEO interrupted and said: “I understand it may not be entirely your fault, but you don’t seem to be equipped with the energy or temperament it takes to build community relations.” Within a month after terminating P.D., the CEO hired a new VP for development and community relations. A woman in her mid-30s, the new VP is a Cincinnati local who had run a not-for-profit housing and community development organization in the Price Hill area of Cincinnati.

When you asked your client how he thought gender played into the picture, he explained that he’d heard the CEO had remarked that he wanted “to project a softer image, more like Mom; a young, tireless Mom who would stay up all night with you to finish a school project.”

According to P.D., the new CEO is a brash 37-year-old, who thinks anyone past 50 is ready for a rocking chair. You also suspect discrimination based on sexual orientation (though you haven’t raised this with opposing counsel). Your client is gay, though he doesn’t talk about it or appear to be in a current same-sex relationship. He maintains no religious affiliation. At one point, one of the neighborhood groups on the more prosperous side of the city (led by a local, conservative minister) had refused to meet with him. That minister is on record as referring to gays and lesbians as blasphemers. More than one member of the hospital’s board are members of his church; you suspect they share the same views. Not so coincidentally, the new director is a regular churchgoer. While she lives nearer to the University and attends church there, she is known to be of the same politically conservative and religious affiliation.

While you haven’t started on any discovery yet, your client told you there has been a great deal of turnover in the hospital since the new CEO’s arrival. According to your client, younger (straight) staff who were not performing to the liking of the new CEO were called into a private meeting and given six months to “transition” to new expectations. The CEO treated the hospital’s outside counsel and accountants the same way, calling them to task for past service he called unsatisfactory (based upon his review of the budget and the files). He fired the hospital’s outside counsel, who was at least 55 but gave a chance to “shape up” to the accountant who appeared to be under 40.

Discrimination aside, there may be a contractual claim. P.D. told you that he had an employment contract, handwritten in bullet points and initiated by the past CEO at the end of P.D.’s hiring meeting. While he hasn’t yet found the document in his moving boxes (still packed), he claims to have negotiated a minimum three-year contract with the former CEO, with termination only for good cause and a buyout of the contract for termination under any circumstances within the three years. If P.D.’s memory is right, this wouldn’t yield the payout



of discrimination claim, but it's a fall back. You aren't going to mention this until P.D. finds the contract.

You see this as a very strong case. Although your client may acknowledge his community relations and fundraising work were not going as well as planned, this was due to actions taken by the former CEO. P.D. was dealt a mess and had to start the difficult job of cleaning it up and turning things around. He is convinced the new CEO would have given him a chance had he been younger, female, straight, and a churchgoer (or some combination of these).

For that reason, when the hospital's counsel M.J. Lewis called and suggested a discussion settlement, you said P.D.'s demand was \$2 million. Your client's salary plus benefits package was valued at \$100,000 per year. You stated that, given a calculation of back pay (the past three months), front pay to age 65, and punitives, this demand was reasonable. There was a long silence on the other end of the phone. Lewis said, "I'll get back to you." Three days later, Lewis called again and said: "I don't think we're going to get very far negotiating. I'd like to try mediation. After all, if we don't do it now, some judge will tell us to do it later."

You told Lewis you were somewhat skeptical of mediation but would consider it. You both agreed a court would order mediation if it hadn't been attempted, and you would rather pick the mediator. You called a few plaintiffs' side employment attorneys and obtained three names. Lewis agreed to one who had successfully mediated a few cases with lawyers from Lewis' firm.

You recognize some of the factors in this case would make private settlement attractive. As a practical matter, your client can't afford a bad reputation in Cincinnati. His area of experience is in fundraising and community relations, where building good relationships and a good reputation is essential to success, no matter what institution you work for. P.D. does not want to return to Memphis (where he built a career and reputation) because he does not want to leave his mother.

P.D. is emotionally distraught and angry. Nothing like this has ever happened to him before. He is extremely angry at Watson, the CEO, and the hospital board. Right now, however, P.D. needs income. He lacks large savings due to the recent purchases of a condominium for his mother and one for himself. (He also helps his mother with monthly expenses.) P.D. had been shocked to find how much higher housing prices were in Cincinnati than in Memphis. While he has begun the tedious task of sending out resumes, it is difficult to find an organization that will hire someone 50 years of age. The other problem, of course, is that no one knows P.D. in Cincinnati, and any prospective employer will ask him what went wrong at the Good Neighbor Hospital.

The faster this case is settled, the better for your client. Otherwise, you'll see if you can help him get some other interim job and prepare "full steam ahead" for trial. You would push for an expedited discovery and trial schedule with the court.



You wouldn't feel comfortable if the plaintiff's difficult financial circumstances forced him to take a lowball offer. You wouldn't advise him to take less than \$500,000 right now, though he has only been out of work for 3 months. At trial, you would calculate front pay of \$100,000 for at least 15 years, adjusted for inflation, plus emotional distress, punitive damages, and attorney fees. The plaintiff will have to pay your 1/3 contingency fee out of any settlement.

If your client wants to settle for less than what you consider to be the fair settlement value, you will not stand in his way. You want your client to be well served by the legal process.