Should a Statement Made at Mediation Ever be Used in Court?

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We have been watching with some concern recent developments in a much-publicized gender discrimination action filed in DC federal court by a female partner and practice group head in the Washington, D.C. office of Proskauer Rose LLP. The plaintiff filed her $500 million gender bias suit under a Jane Doe pseudonym on May 12, 2017, alleging that the firm engaged in salary discrimination and retaliation. Proskauer vehemently denied Jane Doe's allegations, and maintains that she was compensated fairly in accordance with her contribution to the firm, and its pay structure.

Last week, the legal press reported that the plaintiff was making the explosive allegation that she had been "threatened" with termination by the firm, after making an internal complaint of discrimination. It turns out that the alleged "threats" were made during a failed mediation held at JAMS, just before the suit was filed. Plaintiff "Jane Doe" claimed that a Proskauer attorney stated during mediation that she was " going to be terminated," because her "complaint upset a lot of people."

This alleged "threat" was then made a matter of public record when Jane Doe's counsel filed an emergency motion in the federal action, asking the court to order the mediator's notes preserved, to settle a "potential he-said-she-said impasse," on whether these alleged threats had been made. The same day Jane Doe filed her emergency motion, the court issued a minute order granting it, explaining "pursuant to the court's inherent authority to oversee discovery and the need to preserve the status quo pending a fuller evaluation of the issues, JAMS must preserve the mediator's notes from the parties' March 23, 2017 mediation session and all other documents related to the mediation pending further order of the court.

It is important to note that the court did not rule the mediator's note would be produced or would be admissible. The minute order specifically states "this order should not be interpreted as an indication that the court has made any finding or determination as to whether the material will ultimately be found to be relevant or admissible; The court is requiring the document to be preserved so that such issue can be ruled upon based upon a full record at the time."

The next day, it was reported that JAMS and Mediator Carol Wittenberg submitted their own filing to the court, stating that JAMS had told the plaintiff **in writing** that it was preserving the notes, raising a serious question as to why plaintiff had filed this "emergency motion" in the first place. On Friday, May 26, the DC federal judge issued an order vacating her prior order, stating that the "preservation order" was not necessary, and that there was "no longer any emergency warranting relief".

I am sure there will be more to follow on this, but it is very doubtful that these notes or any

statements made in mediation would be admissible evidence in the action.

As a management attorney who uses and values mediation, I find this plaintiff's tactic to be very disturbing. Parties choose mediation and other alternative dispute resolution mechanisms primarily for their confidentiality and secrecy. JAMS and most mediators require all parties to sign an agreement of absolute confidently, before a mediation session even commences. This mutual promise of confidentiality is essential for the mediation process to succeed, as if both parties cannot be honest and candid during mediation, there is little hope that they can reach a settlement. In order to be honest, each side must be assured that any statements they make will not wind up in court, or on the front page of a newspaper.

Thus, for a plaintiff and/or a plaintiff's attorney to attempt to use some alleged statement made at mediation as a piece of evidence in litigation is disturbing on many levels. In this case, the plaintiff's move is doubly disturbing because it seems as if it was not necessary, given that JAMS and the mediator had apparently informed the plaintiff that the notes were being preserved. On a more fundamental level, any attempt by a plaintiff to go into court and publicize statements made during what should have been a confidential mediation session may well discourage parties from trying mediation prior to litigation. It certainly may cause parties to be more "cautious" and "guarded" as to what is said during mediation, if there is a fear that the other side will use those statements against them in court. This is clearly bad for the mediation process as a whole.

We will be watching this case as it moves forward for further developments, and hope that this plaintiff's tactic does not gain traction with other litigants or in other cases.