



## “GETTING TO YES” BY WAY OF “I’M SORRY”: SETTLING EMPLOYMENT DISCRIMINATION CLAIMS WITH APOLOGIES

By Maria C. Walsh

Apologies are difficult. By expressing regret and accepting responsibility for a harmful act, the person apologizing transfers “power” from him- or herself to the person receiving the apology. Parties negotiating settlement want all the “power” they can muster, and many fear they’ll convey weakness by apologizing. Experienced negotiators, however, use apologies to help settle cases.

Most people self-identify as decent, competent and moral. When accused of illegal employment discrimination, defendants recoil. They’re not “discriminators”! Why should they apologize for something they believe they never did? Moreover, won’t an apology be perceived as an admission of wrongdoing, further emboldening the plaintiff?

Social science research suggests the opposite. A well-crafted apology can reduce the ultimate price of settlement by communicating empathy and respect to the “victim.” Studies of adverse medical outcomes reveal that injured patients are less likely to sue, and more likely to settle quickly, when doctors apologize for unintended harm. Recognizing the value of apologies, more than 34 states have “apology laws” that exclude certain expressions of regret or sympathy from evidence, primarily in the context of medical malpractice cases.

When an employee is involuntarily terminated (other than for an indisputably neutral reason), rarely does he or she agree the termination is justified. Defense lawyers know, and advise their clients, that employers need not have just cause to terminate (in the absence of a contrary contract). Most terminated employees, however, facing the loss of professional identity, economic security and workplace community, challenge the validity of any termination decision.

Many employers avoid litigation through effective communication. They convey appreciation for the employee’s

past contributions, express regret for the necessity of the termination and volunteer assistance with the employee’s transition to a new opportunity. Their communications convey respect for the employee and acknowledge the employee’s value. The employee, trusting the employer’s action was an unfortunate, but not vindictive, decision, feels little or no animus and can accept the need to move on.

In contrast, employees who are figuratively (or literally) marched out the back door, offered little or no explanation for the reason or timing of termination and/or accused of bad acts tend to think the worst of their employer. Shame, confusion and disempowerment converge with anger and suspicion. Trust is destroyed. The employee disbelieves the employer’s stated reason, concluding that the employer must be hiding an illegal motive.

The act of filing a discrimination claim empowers the employee. By accusing the employer of illegal action, the employee asserts moral superiority. By insisting termination resulted not from any employee shortcoming, but from illegal employer motivation, the employee preserves occupational self-respect. The employer, offended by the employee’s accusations, responds by escalating its denunciation of the employee’s performance.

The resulting dynamic becomes not simply a legal struggle, but a psychological battle with moral overtones. Employee settlement demands incorporate many elements, including expensive demands for respect. Employer proposals convey dismissive disregard for the employee’s claims. Fortunately, money isn’t the only component of a settlement. Apologies provide an additional negotiation tool.

Mediation privilege statutes in many jurisdictions, like voluntary confidentiality agreements, can shield statements made in mediation from public disclosure. Rules of evidence in most states, and Federal Rule of Evidence 408, also protect

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settlement communications. Litigants can express empathy, acknowledge shared responsibility or express regret for harm to the other party without fear their statements will become evidence of liability at trial.

Formal face-to-face expressions of regret and responsibility, while potentially powerful, are rare. By the time the parties explore settlement, the animosity generated by their litigation makes it difficult to express anything directly other than hostility.

Communication through a neutral is easier. Messages can be passed to the other side, such as an employer's regret that an employee's skills were not better utilized, a manager's admission of ineffective coaching or a supervisor's acknowledged failure to appreciate the workplace hostility experienced by an employee. Acknowledgement of shared responsibility for the failure of the employment relationship, coupled with empathy for the hardship caused by the termination, can convey the employer's respect for the terminated employee. Once the employee feels respected and validated, his or her focus can shift from challenging the employer's decision to moving on.

Reference letters can substitute for apologies. Positive, factual statements about the employee (excerpted from past performance reviews or deposition testimony) communicate respect and confirm the value of the employee's contributions.

Plaintiff-employees also can secure negotiating leverage through apologies. Employer representatives, offended by allegations of discrimination, resist compromises they fear will validate claims or reward the plaintiff-employee. By acknowledging the embarrassment and disavowing their desire to inflict damage, plaintiffs can re-humanize the negotiations, removing a barrier to settlement.

Although not easy to express, apologies can be effective settlement tools, narrowing the gap of distrust through expressions of empathy and respect and expanding each party's willingness to compromise with the other. Parties need not agree on the merits of their dispute. With sufficient tools to promote compromise, they can still achieve settlement. ■

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<sup>i</sup> A reference to the ultimate negotiation primer, *Getting to Yes*, R. Fisher and W. Ury (1981).