

WORKING WITH COGNITIVE ERRORS CAUSED BY HEIGHTENED EMOTION IN EMPLOYMENT MEDIATIONS

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1. INTRODUCTION

Employment mediations, like other relationship cases, are about more than money even if that will often be the proxy in the end. One or more parties are usually driven by strong emotions: anger, sadness, betrayal, distrust, and rejection are just a few common ones. It is possible the parties may even fear having the case litigated or the claim going public.

Mediation provides a unique forum to address strong emotions constructively by allowing a claimant to fully express his emotions and air his feelings. With the exception of high conflict divorces or will contests, perhaps no area of legal dispute triggers stronger emotional reactions than employment law. Former employees carry their entire employment history, which usually includes a long-standing relationship with the employer who both hired and fired them, into the mediation room. The strong emotions associated with that burden may cause attachment to a rigid set of ideals and inflexibility that can derail settlement talks before the parties have even begun.

Claimants usually arrive to mediation in a highly charged emotional state, stressed, and exhausted. They typically feel a strong sense of injustice and that they have been morally wronged by termination. The thought of facing a previous employer can reignite upsetting feelings and can spark new ones. The claimants in employment mediations are typically facing an entirely new and unwelcome life path: the search for a new job after rejection. They may feel panicked or depressed about the lack of leads or prospects ahead of them. They may feel they have been blacklisted from their desired area of employment if the previous employer has a lot of power or control in the industry.¹

¹ Amongst employment law mediation cases, perhaps the highest level of emotions are felt in whistleblower cases, where a former employee reports

A dismissed employee has suffered a tremendous loss. Amid the attempt to cope with and understand what has happened, some feel the termination was unfair, leading ex-employees into courtrooms or, often, to mediation tables. Mediators in employment law disputes must take special steps to help former employees work through the extreme emotions they feel and come to grips with their loss. Only by acknowledging and working through this emotional struggle can the mediator find a solution that will help both parties come to an agreement about how to handle the situation and move forward.

2. THE PROBLEM: STRONG EMOTIONS IMPAIR COGNITIVE PROCESSING.

The very nature of losing a job triggers intense emotional reactions in an attempt to deal with the shock and loss of termination. Employees who have shown loyalty to their organization over many years may have expectations of staying with the company or perhaps being rewarded for their loyalty. Termination can be a stunning alternative to a safe company benefit program. The strong emotions associated with the loss of employment do not often lead a terminated employee to think more rationally or clearly. Although making decisions while emotional can lead to irrational and unpredictable choices, entirely removing emotion from the decision making process can also have adverse effects. “Emotions are a crucial part of the decision making process... A brain that can’t feel can’t make up its mind.”² To ask

illegal actions occurring in the workplace to either a supervisor or a regulatory agency. A whistleblower claimant may feel not only the typical emotions dealt with in employment dispute cases, but additionally may be experiencing guilt or shame for reporting on his prior employer, despite acting in the best interests of the company as a whole. See Sara Adler, *You Want What? Emerging Issues in Employment Litigation*, PERSPECTIVES AT WORK, LABOR & EMPLOYMENT RELATIONS ASS’N (Winter 2007). “An employee bringing a whistleblower claim often feels righteous[.]” See also C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* (Cornell Univ. Press, 2002).² JONAH LEHRER, *HOW WE DECIDE* 15 (2009); Doctors treating a patient who’s capacity to experience emotion was destroyed due to a brain tumor found the patient encountered extreme difficulty in making exceedingly simple decisions (by focusing on minute details, such as whether to use a black or blue pen), even though his intelligence functioning, measured by IQ score, never changed.

a party not to attune to his emotions during a mediation would be doing him a disservice, and perhaps inhibit his ability to come to an agreement.³ Mediators must find a way to acknowledge the strong emotions being felt in employment mediations, and find a productive outlet for those emotions that can help both sides come to a settlement, rather than letting the extreme emotions control the mediation.

Mediators who specialize in employment disputes must know and recognize the tendency of parties to bring these overpowering emotions to the table in an attempt to cope with the shocking loss they have suffered. As one mediator observed, “Emotional turmoil is not conducive to settlement because emotional people cannot ‘hear’ or assimilate the mediator’s reality check given later in the private sessions.”⁴ These overwhelming emotions can impair the ability to come to an agreement or settlement for many reasons.⁵ Mediators must be able to recognize the most common cognitive errors brought on by emotion. Once properly recognized, mediators can apply previously prepared strategies to overcome the common tendencies caused by emotions, to help both parties come to a resolution.

Although often coined “rational” beings, humans actually tend to be “quasi-rational”, meaning that they engage in departures from “standard economic assumptions.”⁶ Those departures tend to

Doctors concluded that emotion was an essential element required for making decisions, and because the patient was unable to experience emotion, he had difficulty making decisions.

³ *Id.*

⁴ Stefan M. Mason, *Mediating Litigated Employment Claims*, 2 JOURNAL OF ALT. DISP. RESOLUTION IN EMPLOYMENT 60 (Fall 2000).

⁵ See Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 175, 181 (1997), when people are angry, they become even less likely to know what other parties want. This inability to assess the other party’s desires makes evaluating offers exceedingly more difficult, which in turn reduced the likelihood that the parties will come to an agreement.

⁶ Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1502-04 (1998) (Individuals do not always chose the option that makes the most economic sense, but deviations from assumptions based on economics can be predicted systematically.)

be systematic and predictable within the world of psychology and neuroscience, allowing for cognitive changes that can be predicted with such accuracy that the departures from rational thought can be manipulated.⁷ By influencing “quasi-rational” thought departures caused by the extreme emotions felt by parties involved in employment disputes, mediators can overcome some common cognitive errors, and can use other common cognitive errors to actually help the parties work towards a settlement.

3. COMMON COGNITIVE ERRORS PRESENTING ROADBLOCKS TO SETTLEMENT: EXTREME EMOTION MAY DISRUPT THE “RATIONAL” THOUGHT PROCESS.

Emotions can be felt so strongly that they impede the brain’s ability to process information in a systematic and rational way, causing people to report feeling “as if they have lost control of themselves and are simply being driven by prevailing emotional states even against their own self-interest.”⁸ Studies have shown specifically that negatively valenced emotions, such as fear and anger, have significant, albeit different, impacts on cognitive risk assessments: “Fear predicted higher risk assessments; anger predicted lower risk assessments.”⁹ Risk assessments affect a party’s willingness to accept a settlement offer in the face of an uncertain litigation. The higher risk assessments triggered by fear lead to more risk adverse choices, meaning a party may be more likely to take a deal. However, if the emotion triggered is anger, employees may become more risk seeking and blow the deal.

A. Common Assumptions About Emotion May Be Incorrect.

Mediators may feel inclined to allow claimants “the floor” to air out their grievances, thinking the act of venting can help a party work through an emotional roadblock and begin taking steps

⁷ Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 1 115 (1999).

⁸ Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473, 474 (2000) (citations omitted).

⁹ *Id.*

toward settlement of the claim.¹⁰ Typically, when a mediator asks a claimant to relive a difficult time, such as by asking him to express how he felt at the time the conduct or termination occurred or when he first expressed to a loved one what had occurred, this brings extreme feelings to the surface, causing the claimant to get emotional. The common school of thought is that this emotional break is a catharsis, which will help the claimant “to ‘hear’ [a] reality check later, following the joint session.”¹¹ However, psychologist Daniel Goleman has actually found that “[v]entilating anger is one of the worst ways to cool down: outbursts of rage typically *pump up* the emotional brain’s arousal, leaving people feeling more angry, not less.”¹² Venting can additionally lead to language or gestures, which may intimidate or upset the other party, further causing each side to “dig in” its heels and resist movement towards a common solution.

B. Too Much Emotion Can Prevent A Party’s Ability To Make Decisions.

“Flooding,” a term coined by Professor John Gottman, identifies an emotional response pattern in which a person is *so* overcome by negative emotions that it blocks the rational functioning in his brain.¹³ This inability to think rationally is accompanied by an increase in adrenaline, blood pressure, and an elevated heart rate, something akin to the “fight or flight” response, the reactions the body has during a life or death situation.¹⁴ The only way to halt this process may be to remove the flooded party from the situation to allow his physiological responses to calm and his emotions to cool, *i.e.* separate the group into individual caucus or take a substantial break from the joint session.¹⁵ Once the physical response has subsided, then the party will resume a

¹⁰ David Hoffman, *Mediation, Multiple Minds, and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297 (2011).

¹¹ See Mason, *supra* note 4.

¹² See DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 64-65 (1996) (emphasis added).

¹³ See JOHN M. GOTTMAN, THE SCIENCE OF TRUST: EMOTIONAL ATTUNEMENT FOR COUPLES 119-25 (2011).

¹⁴ *Id.* at 125-26.

¹⁵ See David A. Hoffman & Richard N. Wolman, *Emotional Intelligence*, 14 CARDOZO J. CONFLICT RESOL. 759 (2013).

“rational” thought process and can return to productive discussions.

C. Emotion Can Enhance The Brain’s Reliance On Common Schematic Biases To Ease The Cognitive Load.

Even under the best of circumstances, when people are not clouded by extreme emotions impacting their ability to process cognition, people are still subject to a number of biases that exist in everyday life.¹⁶ Biases almost always operate deep within the brain’s subconscious, requiring “effortful, deliberate, cognitive correction” to control them in a meaningful way.¹⁷ Biases are a necessary schematic organizational process, which allow the brain to filter and categorize information in order to decide what is important to notice and what is not important in a world that is otherwise constantly bombarding it with stimuli.¹⁸ Fatiguing the brain by subjecting it to extreme emotion will cause the brain to rely more heavily on cognitive shortcuts to process information. This increased reliance can reduce the brain’s ability to accurately attribute causation, invoking one process known as the Fundamental Attribution Error.¹⁹

¹⁶ Linda Hamilton Kreiger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835 (2004).

¹⁷ Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994).

¹⁸ Imagine for a moment paying attention to everything you are aware of: the light in the room, the temperature of the air around you, the sensation of sitting in a chair, the feeling of your socks against your feet and your shirt against your back, the smell of the air around you, the noises coming from an adjacent room or the noises coming from outside... There is an infinite amount of information your brain is subconsciously aware of at any given second of the day, but it must filter out everything but the most important information to recognize at a conscious level in order for you to be able to concentrate and read this paper. To successfully dismiss non-important stimuli, the brain develops categorical shortcuts to classify information, such as by disregarding the feeling of your socks on your feet, unless the feeling changes substantially, such as if you were to step in a puddle and get your socks wet, at which point your brain would bring that feeling up to the conscious level and inform you it was time to change your socks.

¹⁹ David A. Hoffman & Richard N. Wolman, *The Psychology of Mediation*, 14 CARDOZO J. CONFLICT RESOL. 759 (2013).

The Fundamental Attribution Error is best described by a classic example of where a person places blame for a common situation such as arriving late to work. When an employee arrives late to work, his brain offers him categorical explanations for his lateness, attributing the cause to circumstances beyond his control (the weather, traffic, or maybe his alarm didn't go off on time). However, when the same employee watches someone *else* arrive late to work, his brain offers up explanations attributing that lateness to the *person* who was late (he's lazy, inconsiderate, or perhaps doesn't care about his job). The same exact action (being late to work) is viewed in two completely different ways depending on the perspective of the person. Humans tend to attribute their *own* faults to circumstances beyond their control, and explain their accomplishments occurring as a result of their character as a person.²⁰ This thought schema is flipped when we view others: we attribute others' successes to chance or circumstance and their failures to some aspect of their character.²¹ To take this one step farther, when a person causes harm to someone else, his brain tells him it wasn't his fault, it attributes this action to something outside of his person; however, if someone *else* has harmed *him*, his brain will likely interpret this harm as the *intent* of the actor performing it.²² It is easy to foresee a situation where a mediator must explain that an employer was not intending to *harm* a prior employee with the act of his termination, but rather that it was the unfortunate reality of downsizing.

The Fundamental Attribution Error tends to arise so the brain can confirm constructs it has come up with to categorize prior experiences and future expectancies, by classifying information that conforms to those expectancies as a result of "stable, internal factors," compared to events which contradict expectancies which are determined to be a result of "transient or environmental causes."²³ Clearly, the Fundamental Attribution Error hinges on who is observing the behavior, the actor himself,

²⁰ *Id.* See also Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

²¹ *Id.*

²² Edward E. Jones & V.A. Harris, *The Attribution of Attitudes*, 3 J. OF EXPERIMENTAL SOC. PSYCHOL. 1 (1967).

²³ See Kreiger, *supra* note 20 and accompanying text.

or an outside party.²⁴ This is hugely important in employment law cases because former employees have very different constructs and reasoning for their behavior than the employers who observed them.²⁵ A mediator may be dealing with a situation wherein the employer sees a lazy, unmotivated worker, and the employee himself has external explanations for any negative traits associated with him. People often attribute “stereotype-consistent behaviors to dispositional factors and stereotype-inconsistent behaviors to transient or environmental factors,” as determined by contemporary evidence and research.²⁶ This means that once a party has applied a stereotype to the other party, his brain will automatically assume that any information confirming that stereotype is due to traits of that person’s character, whereas information that is inconsistent with the stereotype will be attributed to some external factor, making it less salient or weighty. A heavy emotional load on a person will cause his brain to automatically rely on classification biases to relieve some cognitive effort so he can focus on his emotional stress.

D. Strong Emotions Can Shift A Person’s Opinion As To What Is Labeled A “Win.”

Parties’ strong emotions can also shift their cognitive processing from seeking outcomes that will benefit themselves, versus outcomes that negatively impact the other party. This is known as competitive arousal, or more commonly, spite. The brain’s pleasure centers become activated by the neurotransmitter Dopamine, which is commonly associated with sensations of pleasure, when someone enjoys or takes satisfaction from inflicting pain or distress on a person who they perceive has caused them an

²⁴ The leading work on these actor/observer differences in susceptibility to the fundamental attribution error is Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, IN *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* at 79.

²⁵ Jennifer Crocker, Darlene B. Hannah & Renee Weber, *Person Memory and Causal Attributions*, 44 *J. PERSONALITY & SOC. PSYCHOL.* 55, 56 (1983).

²⁶ See Kay Deaux, *Sex: A Perspective on the Attribution Process*, 1 *NEW DIRECTIONS IN ATTRIBUTION RESEARCH* 335 (John H. Harvey, William John Ickes, & Robert F. Kidd eds., 1976); Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 267, 268, 279 (1985).

injustice.²⁷ The pleasure centers in the brain can light up for a variety of reasons, including scoring higher in a game than an opponent.²⁸ Mediation specifically can trigger competitive arousal when one or both parties attempt to “win” by inflicting the greatest pain on the other party. This can be expressed by gaining large concessions, giving up very few concessions, or arguing for terms that the other party does not want, perhaps such as confidentiality. Mediators can downplay the emotionally induced competitive arousal effects by helping parties examine their own specific interests and guiding them through the evaluation of each new offer in the light of their personal interests. Although both an employer and employee may be seeking to “win” the mediation, a mediator must find a way to help both parties arrive at a settlement that feels like a “win” or effectively satisfies the needs of both parties. Mediators can also remind each party that the other side might be feeling the same way and that both parties, despite their respective desires to win, might be better served by arriving at a settlement.

People are inclined to reflect kindness upon those who act kindly to them and, may feel spite for those who act unkindly towards them. To put it another way, people retaliate when they have been mistreated. This feeling is so strong that they will retaliate to punish a wrongdoer even to the detriment of their personal material self-interest. This perceived inequity between the parties creates an aversion, which will inspire some people to sacrifice monetary payoffs in order to produce a more equitable outcome.²⁹ People want to reinforce perceived fairness³⁰ and will

²⁷ For more information on dopamine’s reaction with decision making, see LEHRER, *supra* note 2.

²⁸ See Laura Blue, *Success Depends on Others Failing*, TIME (Nov. 26, 2007), <http://www.time.com/time/health/article/0,8599,1687725,00.html> (last visited Jan. 12, 2015) (“This may be culturally specific, as it is said that in some cultures, a tie score is considered best because no one loses faces.”)

²⁹ Matthew Rabin, *Incorporating Fairness Into Game Theory and Economics*, 8 AM. ECON. REV., 1281 (1993); developed a formal model showing how fairness interacts with individual judgments. Rabin found that people may sacrifice material self-interest to help those who showed them kindness, and inversely, may sacrifice their own material self-interest to punish people who have been unkind. These motivations appear to have a smaller effect where the consequences of sacrificing are larger.

³⁰ Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. BUS. S285 (1986). Where companies violated

sacrifice their personal economic stake in order to punish those who they perceive have acted inappropriately.

Spite can derail mediation quickly if the mediator does not get a handle on it and it can manifest as inappropriate behavior at the mediation table or an unwillingness to compromise to the detriment of the other party. Terminated employees may be seeking to get back at prior employees in any way possible, and as such, mediators must be looking for this extreme emotion so they can downplay it while still addressing the claimant's feelings in a productive way. Mediators must remember that strong emotions can push people to overvalue short-term gains (such as forcing an employer to engage in a public apology) over long term gains (such as reinstatement).³¹

It's easy to imagine situations such as a bad divorce where strong emotions can cause a claimant to re-categorize a gain to the other party as a loss to the individual. Employment mediations are no different. Employers who feel a claim is meritless could easily view any gain by the former employee as a loss to the employer. Research done by Dean Ward Farnsworth highlights another potential pitfall caused by spite: a refusal to bargain or negotiate.³²

E. Anchoring Causes Rigid Bias Towards Irrelevant Numbers.

“Anchoring” is the process by which random numbers produce biases towards similar numbers.³³ Settlement amounts

norms of perceived fairness, such as by increasing the price of snow shovels after a snowstorm, people wanted to punish them for violations of those fairness norms, even where the “unfair” action was reasonable.

³¹ Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991), Psychologists define this term as “myopia,” which “helps account for impulsive behavior and for people’s inability, some of the time, to stop smoking or drinking, to spend wisely, or to save money over time.”

³² Ward Farnsworth, *Do Parties to Nuisance Suits Bargain after Judgments?: A Glimpse Inside the Cathedral*, 6 U. CHI. L. REV. 373 (1999). It was found that parties who had “bested” their opponent felt “especially entitled” to the right they had earned and refused to concede any benefit to the other party, even if it might be beneficial to all parties.

³³ Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 10, 519 (1996); In a study, having participants write down their social

can be subject to anchoring effects, which lead to a somewhat arbitrary bottom line number for parties.³⁴ Anchors, combined with spite, can create an impasse and may actually cause parties to be more inclined to “shift their losses” as discussed previously, treating gains to the other party as personal losses.³⁵

F. Intense Emotions Lead Parties To Become Susceptible To Shifts In Preferences And Values.

“People who are originally given an entitlement, say, to be fired only for cause, or to be free from certain occupational hazards, are likely to value the right more than if it were originally given to someone else.”³⁶ This phenomenon is known as an endowment effect, a greater valuation attributed to an endowment, merely because of its existence, regardless of the actual desire of the person upon whom the right has been endowed.³⁷ Legal title to a right creates this valuation slant. This effect can especially be seen in default contract rules. Different default rules affect a party’s valuation of the right, and, perhaps more importantly, each party’s *understanding* of the default rule affected how much value was placed upon it.³⁸

These endowment effects have huge implications in the world of employment mediation because employees may be overvaluing something they thought they were entitled to, or may be reacting more strongly to an entitlement being taken away from them. Research indicates that the allocation of the right

security numbers created an anchoring effect when they were later asked to evaluate settlement offers.

³⁴ Parties may become attached to arbitrary constructs such as “I’m not even going to respond until they are talking about a six-figure number” or, “A ‘number with a name.’” (Such as a quarter million dollars or half a million dollars.)

³⁵ Sunstein, *supra* note 7.

³⁶ Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

³⁷ Kahneman, Knetsch, & Thaler, *supra* note 31. In a psychological study where half of the participants were given coffee mugs, those that received the coffee mug endowment valued the coffee mug significantly higher than those that did not, showing an increase in the perception of the value of the mug based entirely on participants’ ownership of it.

³⁸ See Korobkin, *supra* note 36.

significantly alters the strength of the value associated with it.³⁹ For example, employees who were granted a right to be terminated only for cause will value that right greater than they would if employers were allocated a right to terminate employees at will. The initial designation of the right onto either the employees or the employers makes a substantial difference in how employees will ultimately value that right.⁴⁰

G. Optimistic Overconfidence Can Inhibit A Party's Ability To Perceive Risk.

People, on the whole, overestimate their abilities.⁴¹ Even when faced with cold numbers and data, people estimate risks will be less likely to happen to them than to others. Illustratively, over 90% of drivers think they drive safer than the average driver and are less likely to be in a serious accident than then majority of other drivers.⁴² Similarly, people severely underestimate the likelihood that they will get a divorce.⁴³ This inability to perceive risks is heightened when people are under the severe stress of strong emotions, typical of the ones found in employment mediation. This will require a mediator to help a party see and

³⁹ Linda Babcock, George Loewenstein & Samuel Issacharoff, *Debiasing Litigation Impasse*, 22 J. L. SOC. INQUIRY 913 (1997), For further explanation of the endowment effect, consider that “breathers of air may well value their right to be free from air pollution far more than they would if polluters had been given a right to emit polluting substances into the air.”

⁴⁰ *Id.*

⁴¹ See Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCIENCE 1232 (1989): People engage in systematic overconfidence in the judgment of risk believing that they are less likely than the average person to befall risk. This has been shown in studies involving various health risks, including suffering from asthma, suffering from a heart attack, or being infected with AIDS. When asking couples to evaluate the percentage of the shared housework they complete individually, there is an extremely high likelihood that between the two, the total percentage will equal more than 100% because each is overvaluing his or her own contribution to the work. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*. 11 J. ECON. PERSP. 109 (1997). The only group of people who accurately judge risk based on their own capacities are the chronically depressed.

⁴² *Id.* at 10-11.

⁴³ Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439 (1993).

understand the risks ahead of them if they refuse to settle and head to trial. Mediators must be aware that parties can be suffering from this optimistic overconfidence and that it will severely impair their ability to value future risk against present offers, even when presented with the statistical data.

A complementary bias, aptly labeled the “self-serving bias,” indicates that people tend to believe they deserve more than other people think they do.⁴⁴ This helps explain why both parties in mediation tend to think they should get what is “fair,” but they both have entirely different opinions of what “fair” is. Settlement of a claim can be excruciatingly difficult when both parties think they deserve more than the other, and fairness judgments are controlled by the self-serving bias.⁴⁵

4. HOW MEDIATORS CAN USE COMMON COGNITIVE ERRORS TO ENCOURAGE SETTLEMENT

“Emotions are a very powerful mediating tool because the conflict is really about emotions.”⁴⁶

Mediators can use cognitive errors in a positive way to help parties reach settlement agreements. In determining when an employment case is ready for mediation, a mediator must consider many factors, chief among them at which point *the parties themselves* are ready to reach an agreement. As we have seen, strong emotions play a heavy role in mediating employment disputes, and the timing of mediation is very important. Mediators must be aware of giving the claimant enough time to prepare emotionally for the mediation and stress of confronting his former

⁴⁴ Jolls, Sunstein & Thaler *supra* note 6.

⁴⁵ For a discussion of the self-serving bias in contract negotiation, see Linda Babcock, Xianghong Wang, & George Loewenstein, *Choosing the Wrong Pond: Social Comparisons That Reflect a Self-Serving Bias*, 111 QUARTERLY J. OF ECON. 1 (1996).

⁴⁶ MARVIN JOHNSON, STEWART LEVINE & LAWRENCE RICHARD, EMOTIONALLY INTELLIGENT MEDIATION: FOUR KEY COMPETENCIES, IN BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 151 (Daniel Bowling & David Hoffman, eds. 2003).

employer, but some believe earlier mediation is likely to be more successful⁴⁷ because the parties have not yet solidified their positions and that the earlier on in the dispute the parties decide to mediate is associated with a higher rate of settlement.⁴⁸ This may be because parties' have not had the chance to dig their heels into their respective positions yet and may be more willing to view alternatives.⁴⁹ Data suggests that there is a point in the claim that is *too* early to mediate, before parties have conducted sufficient discovery to assess strengths and weaknesses of the case, parties will be less likely to settle.⁵⁰ Mediators must aim for that golden window where settlement talks will be most well received.

A. A Mediator's Framing Of Issues Or Offers Can Incline A Party Towards Settlement.

People may react to a piece of information, or to a choice, in completely different ways based entirely on how the information is described. This is an effect known as "framing," wherein two identical, but differently worded options can elicit different responses.⁵¹ That frame can take any change and refocus it as

⁴⁷ Others take the "Goldilocks Approach," believing that mediations bring in the best results when they are not too early and not too late, but just right. Bringing parties to mediation too soon in the process can lower a settlement rate. Mediation too late, however, allows the parties time to calcify their positions and become inflexible. An early mediation with a lower settlement rate can still help parties avert later costs, and therefore might be more beneficial than waiting too long.

⁴⁸ See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 57 (1986) (early intervention by mediator may prevent polarization and limit hostility).

⁴⁹ *Id.*

⁵⁰ Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007 (1996).

⁵¹ Consider for example a bakery selling cookies. Would you be more drawn towards a sign indicating "Cookie – Fifty Cents" or "Two Cookies for \$1"? Most people are more interested in what is perceived as "a deal" (two cookies for a dollar) even though they are getting exactly the same product at the same value. The cookies are always fifty cents apiece, but the bakery is likely to sell more if they can frame it as a bargain. Similarly, when a client is deciding whether to settle and he is told that out of 100 similar claims, 90 who go to trial win, that client will be far more likely to go to trial than if they are told that of 100 litigants, 10 who go to trial lose. See Donald A. Redelmeier, Paul Rozin & Daniel Kahneman, *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 J. OF THE ALLIED MED. ASSOC. 72 (1993).

either a loss or a gain, simply by emphasizing the good or bad outcomes associated with it.⁵² For this reason, framing an offer is an especially easy way the mediator can make it more attractive.

Determining whether something should be categorized as a loss or a gain depends on what it is being compared to, namely, a *reference point*. People tend to be averse to losses, so by manipulating the context of the loss by framing it, it can be recoded as a gain. In order to determine the reference point by which gains and losses will be judged, the mediator should start with the status quo, or other existing practices and distributions that will help the party make sense of the offer.⁵³

The heightened state of emotion associated with employment dispute mediations can create an environment ripe with emotional reactivity. For this reason, the framing of an offer (or even something like the rejection of an offer) must be done with the utmost care and precision to keep both parties interested and invested in settlement, and to not let the emotion take over entirely. If and when the emotions in the room do derail the mediation, the mediator can attempt to “reframe” the situation to get them back on track.⁵⁴ In order to reframe the situation in a positive and productive way, the mediator should attempt to make any remaining risk as familiar and manageable as possible to encourage parties back into discussions.⁵⁵

B. Recharacterization Of Loss Aversion Can Reframe A Party’s Opinion Of An Offer.

People don’t like losses.⁵⁶ In fact, people dislike losses almost twice as much as they like equivalent gains.⁵⁷ Defendants

⁵² Sunstein, *supra* note 7.

⁵³ Consider again what a difference is made in descriptive wording: “cash discount” is extremely more attractive than “credit card surcharge.” Similarly, parents are constantly reframing behaviors in the real world by either positively reinforcing the lack of behavior or negatively reinforcing the behavior itself.

⁵⁴ See BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* (2000).

⁵⁵ Dwight Golann, *Beyond Brainstorming: The Special Barriers to Interest-Based Mediation, and Techniques to Overcome Them*, 18 DISPUTE RESOL. MAG. 22 (2011).

typically will view paying a settlement as a loss, making them prefer the risk of going to trial over the certain loss of paying a settlement.⁵⁸ In fact, “[t]he psychological pain of paying \$500,000 is far greater, for most people, than the pain of taking a 50% risk of losing \$1,000,000.”⁵⁹ Because the function of valuation is steeper for gains than losses, people tend to seek out risks associated with losses and avoid risks associated with gains.⁶⁰

C. Mediators Can “Prime” Parties For Settlement.

Unconscious priming was studied relating to political beliefs and attitudes surrounding the 2008 presidential election. Participants were asked to rate their beliefs and attitudes using a standard political attitude-rating scale for measurement.⁶¹ Half of the group was given a scale with a small American flag printed in the top left corner. The other half was given a plain scale with no flag. The participants primed by viewing the American Flag shifted their political preferences toward Republican point of views.⁶² Because the human brain takes in such a huge quantity of information at every moment, stimulation from any number of unconscious sources can act as a primer, thereby affecting the way a person thinks and the choices he makes. Similar to the way biases help our brains sort information into predetermined categories, priming affects what subsequent information is taken in, how much attention is paid to it, and how it is interpreted.

⁵⁶ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

⁵⁷ *Id.* This means that a party feels approximately the same level of emotion for a loss of \$5 as he does for a gain of \$10. Because of this, the ability to reframe a loss as a gain is an essential tool for the mediator to manipulate the parties into settling the case.

⁵⁸ Hoffman & Wolman, *supra* note 19.

⁵⁹ *Id.*

⁶⁰ This means on average, people would rather choose an 80% chance to lose \$4,000 than choose a certain loss of \$3,000, and they would choose a certain gain of \$3,000 over an 80% chance to gain \$4,500. Economy theory would suggest that the first choices would be equal, but that a person should choose the 80% chance to gain \$4,500, though almost no one actually would.

⁶¹ Travis J. Carter, Melissa J. Ferguson & Ran R. Hassin, *A Single Exposure to the American Flag Shifts Support Toward Republicanism up to 8 Months Later*, *PSYCHOLOGICAL SCIENCE* (July 8, 2011), available at <http://labconscious.huji.ac.il/wp-content/uploads/2011/03/Carter-et-al-Long-term-effects-of-American-flag.pdf>.

⁶² *Id.* at 14. Research indicated that this result lasted up to eight months.

“Priming” occurs during mediations as well.⁶³ Mediators can directly prime the entirety of the mediation depending on how they describe the mediation in the very first session. Mediators should prepare opening statements that set forth appropriate ground rules, and the purpose of mediation. The principles of priming indicate that mediators should include language with an emphasis on flexibility, open-mindedness, fairness and reasonableness.

D. Contingent Valuation Problems Indicate That Presenting Options Together Can Alter People’s Judgments.

When cases are studied together rather than separately, people’s evaluation of those cases differs rather than if they were evaluated independently of one another.⁶⁴ Studies have shown that people’s willingness to volunteer money for a cause, such as to protect coral reefs, is high when the issue of saving the coral reefs is presented in isolation. This preference may change, however, when the option is presented alongside other options, such as presenting the problems of skin cancer among the elderly alongside saving coral reefs.⁶⁵ By presenting the problems together, people’s valuation of the problems sometimes will reverse, causing an increase in the willingness to protect against skin cancer as the willingness to protect coral reefs decreases.⁶⁶ This reactive valuation can be varied by presenting multiple offers together at the same time. This means if Party A knows Party B highly values a confidentiality agreement at the end of the mediation, by presenting other settlement offers as an alternative to confidentiality can actually lower Party B’s overall valuation of confidentiality as a term of the settlement agreement.

⁶³ Jane Juliano, *Primed for Resolution? What Mediators Can Learn from the New Research on Priming and the Unconscious Activation of Mental Processes*, ACRESOLUTION 21 (2011). One group of mediators attempted to prime their clients for settlement by naming their conference rooms after famous peacemakers (Mandela, Carter, Gandhi), in the hopes that it would foster more productive negotiations and settlements.

⁶⁴ Sunstein, *supra* note 7.

⁶⁵ Daniel Kahneman, Ilana Ritov & David Schkade, *Economic Preferences or Attitude Expressions? An Analysis of Dollar Responses to Public Issues*, 19 J. RISK & UNCERTAINTY, 220 (1999).

⁶⁶ *Id.*

E. Mediators Should Constantly Strive To Foster Positive Emotion In Mediation.

Positive emotion in the mediation environment has been proven to enhance flexibility and openness, which can lead parties to be more open to reaching agreement and settling the case.⁶⁷

Mediators should strive to maintain that positive environment in any way they can, even if it is so simple as a clever turn of phrase or a humorous (and anonymous) anecdote from another case to ease the tension in the room. If one party is allowed to poison the mediation with negativity, it can cause the parties to dig in and become more resolute in their respective positions, diminishing the likelihood of settlement and agreement. However, if the mediator can keep emotions positive on both sides, it is far more likely that the parties will come up with creative solutions that will satisfy everyone involved.

5. CONCLUSION

Employment disputes are usually fraught with heavy emotions. Former employees are struggling to cope with a

⁶⁷ Fredrike P. Bannink, *Building Positive Emotions In Mediation*, MEDIATE.COM (July 2009), <http://www.mediate.com/articles/banninkF4.cfm> (last visited Jan. 12, 2015) (citing Barbara L. Fredrickson, *Cultivating Positive Emotions to Optimize Health and Well-Being*, 3 PREVENTION & TREATMENT (March 7, 2000), <http://www.rickhanson.net/wp-content/files/papers/CultPosEmot.pdf>), “Participants were randomly assigned to watch films that induce positive emotions such as amusement and contentment, negative emotions such as fear and sadness, or no emotions. Compared to people in the other conditions, participants who experience positive emotions show heightened levels of creativity, inventiveness, and ‘big picture’ perceptual focus.” Furthermore, the simple act of putting a pencil into one’s mouth and “forcing” a smile can cause a person to feel happier.

substantial loss and are seeking any available avenue to compensate them for that suffering. Mediators must be aware that strong emotions in employment disputes lead parties on both sides of the mediation into common cognitive errors that can prevent settlement and resolution of the dispute. Awareness of these misperceptions allows the mediator to correct the problem, or at least sidestep it in a way that is productive and will lead both parties to a satisfying resolution of the dispute. Mediators can additionally anticipate common misperceptions and actively defuse them. “[T]he most successful mediators typically have a high degree of emotional intelligence ... These skills enable mediators to empathize with and understand the parties, while managing their own reactions to sometimes challenging personalities.”⁶⁸

By being able to successfully identify the most common cognitive errors that arise in employment mediations, mediators can use predictable thought processes to help the parties agree to settlement.

⁶⁸ Hoffman & Wolman, *supra* note 19.