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The Whistle-Blower: Mediating an Employment Termination Dispute

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THE BOOT

Sam Hartnett was not entirely surprised when he was fired from his job as a mid-level manager in the national financial services company where he had worked for six years. A former army sergeant who had retired from military service after twenty years, he had been skirmishing with the upper management of the company for the last several years. Even so, he did not think that they would go so far as to actually give him the boot. He was furious and hired a lawyer to sue the company for wrongful termination.

A FIRM HANDSHAKE

By the time the case came to me for mediation, the preliminary rounds of litigation had been completed: depositions had been taken, various motions had been filed, and the case was scheduled for trial. Counsel on both sides were well known for their trial work and were looking forward to trying the case.

"I think you'll like Sam," his lawyer said to me privately as we waited for her client and the other parties and counsel to arrive. "I know the jury is going to like him."

Sam was the next to arrive, and it was immediately obvious why his lawyer thought he would play well to a jury. Tall, with piercing blue eyes and a lean physique, he looked like a Marlboro man, straight from Central Casting, except for a scar that ran from the side of his right eye to the top of a high cheekbone. When I shook his hand, I tried not to wince: he was, evidently one of those people who judges a person by the firmness of his handshake. Belying his crushing grip, however, was a shyness in his smile—a hint of discomfort with social situations.

"I'm Sam Hartnett," he said quietly. "I hope you can help us out today."

"I'll do my best," I said. What a likable guy, I thought to myself, while at the same time trying to hold back a little. I reflected fleetingly on the times that I had been totally taken with one party or another in a mediation only to feel disillusioned when I saw their less appealing sides. "We'll get started as soon as the others arrive."

I showed them to a conference room and returned to my own office to look at the file one more time.

WHISTLE-BLOWER CLAIM

The basis for Sam's claim against the company was his contention that he was a whistle-blower who had been fired unlawfully for complaining about unethical and illegal business practices. For example, in the company's overseas operations, company officials routinely took potential business partners on expensive junkets, which included nightclubs and risqué entertainment. Sam considered such expenditures bribes and was not shy about his accusations.

Sam had been sending blistering emails and memos to his superiors about these practices, and each time his superiors passed the complaints along to the officers of the company. On two occasions, the board of directors had convened an ethics committee to review the assertions of unethical behavior by the company, and each time the company concluded that its practices were sound, both legally and ethically.

Despite these conclusions by people at the highest levels within the company, Sam continued to complain. He was convinced that he was right, they were wrong, and the company could get in trouble if it continued to do business as it was then doing. Sam's seemingly unending stream of memos continued, and so the company put Sam on notice that if he did not stop, he would be fired. Sam strenuously objected; sent another round of emails, this time alleging that the company's efforts to keep him quiet amounted to an illegal scheme to cover up past misdeeds; and was terminated.

SETTLEMENT PROPOSALS

In the mediation, it became clear that Sam was not going to be rehired, nor was he interested in returning to the company. Therefore, the primary issue was what amount the company would pay to settle the claim. The gap between Sam's proposed settlement and the company's was substantial, and both sides appeared to be rather dug in.

I confess that I was feeling frustrated with both sides' intransigence—and, in particular, Sam's. Having mediated and served as counsel in a number of employment cases, it seemed to me that the company's proposals were in a reasonable range based on the facts and circumstances of the case and the magnitude of the alleged damages. Sam had been out of work for about six months but had been receiving unemployment insurance. He was not alleging emotional distress damages; the firing had not led him to see a psychotherapist. When I brought up the subject of therapy in a caucus session, he said that he had not needed to see a therapist because he wasn't depressed; he was merely angry.

Sam's settlement proposal, on the other hand, was—based on my experience—at the very far end of the bell curve of reasonableness. Sam did not seem to care that his proposals were on the high side,

and I noticed a judgment welling up inside me. My inner voice was saying: Sam's going to be trouble – he marches to the beat of his own drummer.

Meanwhile, the company was getting fed up with Sam's intransigence about settlement. Two of the company's representatives had flown in from out-of-town offices and felt like the mediation was becoming a gigantic waste of their time. "This is simply *not* a six-figure case," the company's lawyer proclaimed. "Even if a jury agrees with Sam, which I sincerely doubt, there are virtually no damages. Besides, it could be years before he ever sees a dime from a trial, even if he wins, because the appeals court has a huge backlog."

SETTLEMENT CHANCES: NEAR ZERO

In the initial joint session with all parties and counsel present, clenched jaws and fidgety body language told me from the outset that both sides were quite fed up with each other. After two rounds of caucus sessions with each side, in which the parties' proposals barely moved at all, I asked to meet with just counsel in my office.

"Is there any chance we're going to get this case settled?" I asked both lawyers.

Sam's lawyer was the first to respond. She noted that for Sam, the case was personal. She said that Sam was very committed to trying the case because he felt wronged and wanted his day in court. She added that Sam felt that even if he lost, his case would send a message to the company and maybe to people outside the company.

When I asked why they were willing to mediate, the lawyer said that it was because the judge told them to give mediation a try before impaneling a jury and that she had told Sam they had nothing to lose because the company agreed to pay the mediation fee. She looked over at the company's lawyer and nodded with a smile. "This is your nickel. Do you think the case can settle?"

The company's lawyer agreed that there was little likelihood that the case would settle. He noted that Sam gave the company no reason to think that he would be reasonable. And, he added, the company was

even angrier about his sky-high settlement proposals than they were about his flaming emails.

I wondered about other possibilities to improve the chances of settlement, such as an apology from either or both sides, a letter of recommendation, or anything else besides an exchange of money.

Both lawyers looked skeptical. Both agreed that no apology would be forthcoming from their client. And Sam's lawyer said that Sam wasn't interested in a letter of recommendation from *that* company.

"Okay," I said. "Let's focus on the money. I want to talk further with each side to see if there might be a bit more flexibility."

GETTING TO KNOW SAM

In a caucus session with Sam and his counsel, we talked about the usual issues. How long would it take to complete the trial? How long if there was an appeal? What would the out-of-pocket costs be for Sam? Would there be expert witnesses on the business ethics issues? Which arguments on each side seemed like the most compelling? Were there any legal precedents that might swing the outcome in one direction or another? Were there other options for settlement besides an exchange of money? None of these questions seemed to move us in a promising direction.

Then I looked over Sam's résumé, which was one of the exhibits in the case. I wondered about his twenty years of military service prior to his employment at the company.

I asked if he'd been in combat. Sam said that his unit saw a lot of combat. He described his service in the Army with intensity. He had served in Vietnam. He had made friends and lost friends there.

"I left Vietnam," he said, "with a lot of scars, both inside and out. But the thing I liked about the Army is that everybody turns square corners. You can count on your buddies to watch your back. You know what the rules are, and people obey them because your life depends on it."

Then he compared the army to his former employer, his only job since leaving the Army. He noted that when he retired from the Army, he immediately went into the private sector and felt like he was entering a foreign territory. "There was no code to follow. It seemed

to me like 'anything goes.' You know—whatever you can get away with. It's just wrong."

Sam got more animated as he spoke and then became calmer. I could see the proverbial light bulb switching on over his head. "I think I wound up in the wrong place," he said. "I should have stuck with the Army." I asked Sam if he was thinking about going back to the Army. He said that he probably wouldn't do that but that he needed a job more like the military—"working with people who care about rules and believe in following them."

AN UNEXPECTED OFFER

We turned to the subject of settlement offers. I stood at the whiteboard in the conference room and jotted down the offers and counteroffers that had been made that day.

Sam proposed moderating his demand by a considerable margin, and his lawyer agreed. I was astonished, while trying hard not to show it. I looked over at the lawyer. "This is Sam's call," his lawyer said. They authorized me to communicate their offer, which I was confident would be viewed as reasonable by the other side.

I walked down the hall to the conference room in which the company's representatives and counsel sat. "What took you so long in there?" the company's lawyer asked. "We thought you might have given up on this case."

"No settlement before it's time," I said, but there was not much appetite for humor in the room.

I gave them Sam's proposal and noticed the surprised looks on faces trying hard to be inscrutable. They glanced at each other, not sure how to respond. The company's lawyer wondered what I had done and why Sam was being so reasonable all of a sudden.

I reminded them that my conversations with each side are confidential, but I did say that Sam thought it over carefully and just wanted to move on.

The company's lawyer asked me to step out of the room for a few minutes so that he and his clients could digest this sudden progress in private. When they invited me back in, they explained their counteroffer.

"We're willing to pay him 90 percent of his proposed settlement, but it will come out the same after taxes because we will pay a third of the settlement directly to his lawyer for attorney fees. That way, Sam won't have to pay taxes on that portion. We've done this in other cases. The math works. He'll be getting the same amount either way, but this way the company can save a few bucks.

When I returned to meet separately with Sam and his lawyer, they quickly agreed with the company's approach.

READY TO MOVE ON

Ordinarily, I would reconvene all of the parties and their lawyers to discuss the settlement, congratulate the parties, and help them reach genuine closure. But Sam did not want to see the other side. "I'm ready to move on," he said. "This money will help me transition, but I really do *not* want to see those guys."

I asked the lawyers from both sides to meet with me again in my office. We hammered out a brief terms sheet on my laptop, and I printed it out. The company's lawyer agreed to write up the formal settlement agreement within a week. I waited in my office while the lawyers showed a copy of the terms sheet to their respective clients. We then exchanged signed copies, one for each side and one for me.

The company agreed that a final joint session was unnecessary. They were already packing up their briefcases when I walked in to meet with them separately. I thanked them for their hard work and patience and wished them a safe journey home.

"I'm not sure how you got Sam to see reason," the company's lawyer commented. "But whatever you did in there, we're grateful."

"Sometimes," I said to them, "the logic of a situation just unfolds in its own way. Both sides needed to be reasonable in order to get the job done."

I returned to meet with Sam and his lawyer. I told him that I was glad that he and the company were able to resolve the situation.

Sam was glad, too. He said that the whole situation had been eating him up and that it was all he'd thought about for many months. He added that it had been hard on his wife, too; she'd been worried about

the way that the case had consumed him. He told me how much he appreciated what I had done.

Then he reached out his hand. This time I was prepared. "You know, Sam," I said as we parted, "you've got a really firm handshake. I like that about a guy."

He looked at me sheepishly. "Thank you," he said.

SECOND THOUGHTS:

My impression is that Sam acquired insight about himself in the caucus session when his strongly held ideas were considered from different angles, especially the angle of comparing his private-sector employer to the Army. He left the mediation with a settlement agreement under which he received a payment of his legal fees and a portion of back wages. More importantly, he left with a greater understanding about what went wrong when his expectations about how the company should act collided with the norms that twenty years of military service had instilled in him. As we wrapped up the paperwork from the mediation, he said to me, "I am much clearer now about the kind of job I'm going to look for."

Mediations do not always result in such satisfying settlements. Sam's case has stuck with me over the years for four reasons.

First, I learned something about the value of caucusing. I don't think Sam and I could have done the personal exploration of his military service in a joint session setting. Caucuses create opportunities for personal engagement that are often absent in joint sessions. Sam and I, with his lawyer participating at times, got up close and personal in a way that the glare of joint sessions makes far more challenging. If commercial and employment mediations took place over the course of several days or if the parties were collectively comfortable with deeply personal discussions, perhaps caucuses would not be needed in order to have the conversation that led to Sam's settlement. But the legal marketplace typically allocates a day for cases like Sam's, and achieving comfort with personal disclosures in joint sessions, as opposed to caucus sessions, rarely happens in such a limited span of time.

Second, I rediscovered the value of simple curiosity. I am not sure what led me to inquire about Sam's military service. Perhaps I was feeling stuck and was simply fishing for something to talk about. I do recall feeling genuinely curious about Sam's life experiences and perspectives. And there is certainly a voyeuristic element in mediation: mediators get to see in a more intimate way what makes the world work and what makes people tick. Mediation often opens a door into personal material that is available to no one else but therapists, clergy, spouses, and the closest of friends—and sometimes not even *they* are invited in.

Third, I learned a lesson taught in Viktor Frankl's book *Man's Search for Meaning*—namely, that people sometimes act in ways that are contrary to their material interest because of a belief in some higher value or meaning. For Sam, adherence to ethical principles was more important than keeping his job. It was not my place to judge whether he or the company was right about those principles. Indeed, any judgment that I might make in that regard would have impaired my effectiveness as a mediator. It was my place, however, to listen respectfully to Sam's perspective and, in doing so, to honor his commitment to principle.

Finally, I was reminded of the power of mediation to change people. Even when a settlement does not result in a "kumbaya" moment involving tears, forgiveness, hugs, and heartfelt reconciliation, mediation can be personally transformative as each participant—including the mediator—engages in some valuable learning and personal growth. One of my mediation colleagues, psychologist and mediator Richard Wolman, often says that mediation is not therapy but that it can be therapeutic. Sam and I helped each other in this mediation. In my private conversation with Sam and his lawyer, Sam found his way to a new understanding of his values, how important they are to him, and how they can also get him into trouble at times. His tenacity and commitment to principle gave me a new appreciation of how complex and idealistic we human beings can be and what a rare privilege it is to be invited into a conversation with people each day about what matters most to them—and to us.