CHAPTER ONE
INTRODUCTION TO EEO SETTLEMENTS

Sitting in a bunker, here behind my wall,
Waiting for the worms to come
In perfect isolation, here behind my wall
Waiting for the worms to come
Waiting…waiting…waiting

—Pink Floyd

Many critics call it the greatest rock album of all time: *The Wall* by Pink Floyd, in 1979, is the source of all the epigraphs (the quotations that start each chapter) in this book. *The Wall* is a beautifully crafted haunting mini-biography told by a series of songs, through which runs the recurring theme of walls. Every song in the album has something about walls. The walls of Pink Floyd all have nightmarish and stifling oppressive qualities. They are walls of oppression, walls of loathing, walls of horror, and walls of intolerance. Yet what they all have in common is that they are all walls that we build ourselves. Walls we build against one another, walls that people build against us, and walls that we build within ourselves.

This is exactly what happens during management/employee disputes—a lot of people building a lot of walls. They are rarely walls of discrimination or mistreatment. They are usually walls of anger, fear, misunderstanding, distrust, and vindictiveness. Something happens to people during this type of dispute that is worse than in other management/employee disagreements—it gets personal.

In many legal disputes, the opposing parties still get along famously. Workers' Compensation claims or overtime claims under the Fair Labor Standards Act may get disagreeable, but they rarely get personal. As Abe Vigoda said to Al Pacino in *The Godfather* before being executed by him, "it was only business, Mike, nothing personal." Inject a union grievance, an unfair labor practice charge, or, especially, an EEO complaint into the worksite, and there is no medical metaphor that adequately describes what it does to the organization and its people. The walls it creates are monstrous. These are the walls we must tear down.

For all managers, labor relations professionals, and EEO professionals, resolving disputes is one of your top priorities. It is your job to resolve the case, avoid protracted litigation, and get the two parties working together again. And you must do it quickly, because everybody is waiting…waiting…waiting. The longer that wait goes on, the less the chances are for a favorable resolution. Positions become solidified, and the parties become entrenched. The parties in these disputes are quietly and angrily sitting in their bunkers behind their walls and waiting. If you do not grab a hammer, then nobody else will.

You have to hammer down those walls and get the two parties together with a settlement. This is nothing more than an agreement between the parties to start working together again to rebuild the relationship they had before. The employee agrees to drop his or her case, and management gives in return. Parties can give as much or as little as they want in a settlement: it's whatever you work out with the other side.

You must start by remembering a crucial point: there is no such thing as a case that you cannot or should not help settle. To settle a case is not an admission of wrongdoing or weakness. It is always to everybody's advantage to reach a settlement. No matter what side you are on, or whether you are in the middle, no case is too weak or too strong to settle. If you do it right, both parties will gain some advantage. If you do it really right, both sides will gain a lot.

WHY SETTLEMENT IS IMPORTANT

Most management/employee disputes, especially discrimination complaints, are a long and tortuous procedure. Complaints that drag on for upwards of ten years are not uncommon. Yet, this ponderous system strongly pushes both sides towards settlement. All third parties, the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority (FLRA), have made settlement a top priority in dealing with complaints and appeals. Administrative Judges from all three agencies have become stridently aggressive in pushing both sides towards settlements. The obvious reason for this is money. These cases cost the government and the courts a tremendous amount of time and money. The reasons for the pushy behavior of third-parties involve far more than merely trying to save the government a few dollars or lessen the caseload of appellate and judicial tribunals. Settling cases is the right way to do business for many other reasons.

It Creates the Right Outcomes

First, and most important, settlements allow parties to craft outcomes that are far more just and equitable than would be the result should the case end up with a third-party decision. When a case finally goes before a third party, whether it is a judge from the EEOC, MSPB, or FLRA, a federal judge, or a labor arbitrator, he or

she must give total victory to one party. One side wins and the other side loses. Judges are not allowed to create a reasonable outcome that gives each side what it really deserves. Either the employee wins and gets what he or she wants, or management wins and the employee gets nothing. The outcome cannot be a clever adjustment that recognizes the merits and weaknesses of both sides.

You will find that in most government management/employee disputes, neither side is completely guilty or innocent. Rarely does an employee who files a grievance or complaint have no case. On the other hand, it is equally rare for management to have acted in a totally illegal or discriminatory fashion. It is always somewhere in between. For example, an employee filing a complaint of discrimination in a nonselection case might not have been as well qualified for the job as the selectee, but management asked horribly inappropriate questions during the interviews. Similarly, in a disciplinary case, the supervisor might have had no discriminatory motive and the employee deserved what he or she got, but for other reasons other employees have been allowed to get away with the same offense for which the complainant was punished.

Settlement allows you to craft an outcome that recognizes and balances these strengths and weaknesses. If the employee did not deserve to be selected, but management bruised some rules in the selection process, then we will design a settlement that does not give the employee the job or any preferential treatment, but, instead, cleans up the process, slap some hands if necessary, and makes some improvements to ensure that nobody is ever harmed in the future and everybody gets treated right. If an employee was disciplined more harshly than others, we will create some clever form of alternative discipline that gets wiped off the books if the employee does not repeat the offense. Then we will straighten out the mess with the supervisors who are not enforcing the rules the way they should be.

The Destructive Power of Disputes

The second important reason to seek settlement is the terrible divisiveness that lengthy dispute proceedings have on an office and agency. It has nothing to do with money or wasted time. It is what happens when you have any sort of drawn-out struggle going on between an employee and management in any organization. The longer it is drawn out, the worse it gets. Fear and distrust between a supervisor and her employees are diseases that are usually fatal to an organization. They can be cured, but like most fatal diseases, only if they are caught and treated early. If they are not, they will spread and destroy an organization.

Gradually, employees start taking sides. They never do it for the right reasons, because they never really know what is going on. It is perfectly natural for the supervisor and the employee to begin treating each other differently than they

normally would. Either the supervisor starts taking subtle reprisal actions or bends over so far backwards to avoid reprisal that he or she does all the wrong things. The employee becomes more than a little bit paranoid, and refuses to speak to the supervisor without his or her lawyer. What it does to an organization is not something you want to experience. Nobody wins, no matter what the outcome.

BARRIERS TO SETTLEMENTS

If it is that obvious, then why doesn't everybody do it? To better work with both parties, you must be sensitive to why they are reluctant to pursue settlements as vigorously as they should. Let us take look at the most common reasons agencies and employees do not do enough to settle cases.

Fear of Perceived Weakness

This fear is an obvious problem and is usually more prevalent with management than with employees. The problem is that most agency supervisors, personnelists, and employees still think that if you settle a case, it is because you have a weak one. If you fire an employee and then give him something after he files a complaint, it must be because he did not deserve to be rued and would have won his case on appeal, right? Not necessarily.

The agency might want to settle because it might craft the agreement in such a way that a lower penalty would have the same deterrent value. Or perhaps the agency received a waiver of future appeal rights, and other strong concessions, in exchange for another chance under strict conditions. The agency could have had a variety of excellent reasons, none of which were caused by a weak case, that would have given it a motive to want to settle. Similarly, just because an employee accepted anything less than retroactive promotion, with full back pay, and attorney fees does not mean that the person is admitting that the case was not as strong as he or she initially portrayed it.

All a settlement means is that while a party still feels it has a strong case, it wants to work things out and rebuild the relationship—even at the expense of giving up some things it probably would have gotten had the case gone through litigation. The way to make the parties see that a settlement is not a sign of weakness is to make them understand that when you bargain from interests, rather than positions, you do not have to compromise.

In traditional positional negotiating, each party takes stands that they progressively allow to weaken and erode through a series of sequential compromises. The settlement then becomes the sum of all compromises, and the erosions of all interests.

However, as we will see in the next chapter, in interest-based settlement negotiating, each side retains and protects its interests throughout the process. Neither side compromises its own basic interests. Rather, each side finds imaginative ways that the settlement can serve the interests of both parties.

Many excellent settlements never require either side to appear weak or to give something up. To overcome their fear of being seen as weak, what you must do is to help both parties define their own interests in the case. Illustrate to them the difference between positions and interests. Show them that by dealing from their underlying interests, they can make settling a case a deal from strength, not from weakness.

Another problem related to this fear of perceived weakness is fear of legal consequences. Many supervisors worry that if you settle a case, somebody might use it against them in some future proceeding to prove a pattern of guilt and discrimination. This is the easiest concern to deal with because it is totally unfounded. It is well established in law that settlements are no-fault. Nothing about settling a case can ever be used later to show a pattern of wrongdoing on the part of the individuals who settle.

When we go into detail later about the mechanics of a settlement, we will see the importance of including a sentence or two emphasizing that nothing about the settlement involves any admission of guilt, wrongdoing or any violations of any law or regulation. Be aware that this is not an empty statement, even though many supervisors and managers still fret over legal consequences from settling. You must educate and reassure them that not only will they not be perceived as weak as we discussed above, but that they are on rock-solid legal ground when settling a case.

Fear of Instigating More Complaints

This fear is the most common reason that supervisors and other management officials give for not settling cases. They worry that if they settle a case and concede a point, it will only encourage other employees to file a complaint. This is a legitimate, but overrated concern. Most employees recognize that filing a complaint is a no-win game, no matter what tangible benefits they might achieve in the short run. Let's face it, most employees know that being branded as a "complainer" is one of the worst labels. Forget about ever being picked for a higher-level position or getting a good recommendation when applying for that dream job. Sure, the law prohibits reprisal but just try to prove it five years from now when a promotion is denied.

However, management's concern here is valid, and you have to treat it with respect. We have to face up to the other fact that far too many agencies routinely settle complaints by giving employees, even those with totally unfounded

complaints, delicious tangible settlements that clearly invite abuse. In the interests of saving extensive complaint processing costs, one agency started giving EEO complainants $5,000 when they filed formal complaints, no matter how weak their cases. On paper it looks great and the accountants and lawyers love you for it. They figure that it is going to cost you a minimum of $50,000 in administrative costs to take a grievance, appeal, or EEO complaint from the initial stage all the way through the final decision and into court. So you spend $5,000 and save the government over $45,000 and they ought to give you an award for thinking of that, right? Sorry, but that arithmetic is wrong. Ten years ago, the same agency only had a handful of discrimination complaints, now it has hundreds of them. Even worse than the financial loss to the agency is the fact that the people who really are discriminated against do not want to file complaints. They are afraid of being perceived as the money-grubbing opportunists who have destroyed the whole process. What are the solutions? First, make settlements like you make great music. No two settlements—and no two songs—should be alike. As soon as you start passing out boilerplate settlements with no concern for the unique qualities of each case, you have started eroding the credibility of the process. Far too many agencies fall in love with convenient, quick fixes that they apply to every similar case. One of the keys to good settlements is imagination. You have to try with every settlement to break the mold and do something different. It is possible to create settlements that will not encourage other employees to file a complaint just to take advantage of the process. You just have to work at it.

Second, we who are involved in trying to help parties settle make sure to keep both sides' interests constantly in mind when we are working on settlements. To say that we must be objective seems too obvious a point to even mention. However, we do develop biases and prejudgments. We must force ourselves to recognize that both sides have legitimate interests, despite our prejudgments or biases. In some cases we may not be able to reconcile those interests, but we cannot simply refuse to consider one side's interests because we are biased against it.

Lack of Knowledge

Not knowing how to settle is another serious problem. Even people who are eager to settle simply don't realize what a settlement is all about and lack the skills to make it happen. For example, as we shall discuss in detail later, one of the biggest problems is that people do not realize how much latitude they have, and how imaginative they can be when they are trying to settle a case. Many think that you cannot do something unless there is a regulation that says you can. In fact, it is the other way around. You can do anything you want, as long as it is not prohibited. And you will be surprised to find that there's very little prohibited.