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ADR in Employment Litigation

David R. Cordell

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David R. Cordell*

The wave of employment litigation appears to be far from cresting. A high percentage of all cases filed in federal courts are in the general category of employment cases. Alternative Dispute Resolution ("ADR")—including, mediation, arbitration and settlement conferences—is therefore a very important aspect of employment litigation resolution in the federal courts.

I. ADR IN GENERAL

ADR is not new in employment disputes. Long before ADR became a common term, many employers had internal employee complaint procedures and more formal, oftentimes statutory, grievance and arbitration procedures. For example, the railroad and airline industry has a statutorily mandated grievance and arbitration procedure for disputes between employers, employees and their respective unions.[1] Federal executive branch agencies are required by the Federal Service Labor-Management Relations Statute to have a negotiated grievance and arbitration procedure in their collective bargaining agreements. [2] Other parts of the public sector are also quite accustomed to ADR in employment dispute resolution. For example, many states, like Oklahoma, have administrative procedures acts which specifically deal with public employment.[3] The United States Postal Service and many other federal government employers have strictly

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* David R. Cordell, born Tulsa, Oklahoma, December 21, 1959; admitted to bar, 1985, Oklahoma; 1988. *Education*: Washington & Lee University (B.A., cum laude, 1982); University of Oklahoma (J.D., 1985). Member, 1983-1985 and Note Editor, 1985, Oklahoma Law Review. Partner with Conner & Winters, Tulsa, Oklahoma; *PRACTICE AREAS*: Employment; Litigation; Oil and Gas; Airline law. Adjunct Settlement Judge, United States District Court, Northern District of Oklahoma 1990; Member Tulsa County, Oklahoma and American Bar Associations; Tulsa County Fee Arbitration and Professional Responsibility Committees. American Inns of Court, Member Johnson-Sontag Inn. *Email*: dcordell@cwlaw.com

1. *See* 45 U.S.C. § 151, *et seq.*

2. *See* 5 U.S.C. § 7121 (1994). Oklahoma has adopted the Dispute Resolution Act, Okla. Stat. tit. 12 § 1801, *et seq.*, the District Court Mediation Act, Okla. Stat. tit. 12 § 1824, *et seq.*, the Uniform Arbitration Act, Okla. Stat. Tit. 15 § 184, *et seq.*, and a variety of other "state" sponsored programs such as the Agriculture Mediation Program sponsored by the Oklahoma Department of Agriculture; Corporation Commission Technical Evaluation & Consumer Service Department; Department of Education Special Education Section; Early Settlement (Tulsa County); Dispute Mediation Program for Northeast Oklahoma; Eastern Oklahoma Development District Agency on Aging; Oklahoma Merit Protection Commission Dispute Resolution Program; Oklahoma Victim Restitution Juvenile Offender Responsibility Program (Department of Human Services).

3. Okla. Stat. tit. 75 § 250, *et seq.* (1991).

regimented grievance and appeal procedures.[4] It is not uncommon for public universities and school systems at all levels to have grievance and arbitration procedures with respect to tenure and termination decisions. Police and fire departments utilize forms of ADR.[5]

There are aspects of the employment relationship which are governed by statutory procedures which can also be viewed as another form of ADR or, at least, an alternative to the federal or state district court system, such as workers' compensation and unemployment insurance commissions. The American Arbitration Association ("AAA"), which has been utilized in commercial litigation and construction disputes for years also has a set of rules specifically for employment disputes.

Finally, the mandatory requirements for certain types of federal employment claims to be first filed with the Equal Employment Opportunity Commission ("EEOC") or equivalent state deferral agencies, along with their built-in conciliation procedures, are yet another alternative or pre-litigation ADR mechanism.

If all else fails, and the employment dispute reaches the courthouse, the role ADR plays in the process not only serves to resolve disputes without trial, but is currently, and should increasingly, be used as an effective tool by plaintiffs and defense lawyers alike. A form of ADR known as a settlement conference is mandated by the Local Rules of the United States District Court for the Northern District of Oklahoma.[6]

II. ADR IN EMPLOYMENT CASES.

Employment cases often involve more principle than money. Setting aside cases that are filed for seemingly opportunistic motivations, the combinations of factors that cause a plaintiff to sue his or her employer in the first place often make the dispute, once it reaches the courthouse, very difficult to settle. Once a case is filed, employers who feel they were in the right to take the action that they did, believe it is incumbent on them to defend their decision regardless of the cost—to set an "example". Plaintiffs oftentimes feel so wronged that, in addition to being compensated for their loss of employment, they want to make a public spectacle of the company and "get justice". Spurred on by news reports of large verdicts, plaintiffs sometimes have an unrealistic perception of the value of their case and, more often than not, that valuation is usually disproportionate to the amount of "actual damages" the employee has suffered. This combination of factors can make it very difficult to settle employment cases.

4. *See*, 39 U.S.C. § 1004 and § 1207.
5. *See* Okla. Stat. tit. 11 §§ 51-101, *et seq.*
6. *See* N.D. OK LR 16.3.

A. CHARACTERISTICS OF EMPLOYMENT CASES:

The following are what appear to be common characteristics of many employment cases:

- •Unequal economic positions between the parties.
- •Plaintiffs' attorneys are usually on contingency; thus, Plaintiffs are litigating for free and can afford to roll the dice. They have everything to gain and nothing to lose, so to speak.
- •The case law constantly develops as do agency interpretation of laws.
- •In cases where the employer and his supervisor are sued in the same case, conflicts of interest can arise.
- •Jurors' predilections generally run in favor of employees.
- •The statutory tipping of scales in favor of plaintiffs for the recovery of costs and attorneys' fees increases the risk tolerance of plaintiffs.
- •Many cases are disposed of on summary judgment.
- •Certain types of employment cases are very difficult for plaintiffs to prove, e.g., race discrimination where there is no direct evidence.
- •The motivating factor or claim is sometimes different from the legal claim asserted.
- •There is oftentimes a high emotional toll exacted on plaintiffs, both as a result of going through the process, and as a result of the intensity of discovery into personal issues.
- •There appear to be regional differences on attitudes towards employment rights, statutory enactments, and case law.
- •Sometimes there is a difference in level of expertise between the plaintiffs and the defense attorneys.
- •Juries may either discount or disproportionately enhance the importance of the claims asserted.
- •Employers, defense attorneys and plaintiffs' attorneys are all sophisticated in the system. Because the Plaintiffs generally are new to the system, it is oftentimes harder to make Plaintiffs understand the realities.

- As the insurance industry coverage increases the availability of insurance to cover employment litigation, economic evaluation and dispute resolution factors can change.
- There are federal statutory limitations on damages.
- The law changes so quickly, that it is important to specialize in the area.
- Other forms of mediation or conciliation (e.g., EEOC conciliation) have often been attempted prior to the case being filed in the courthouse, with the result that settlement of the dispute can be more difficult.
- In proportion to the amount of money at stake, employment cases can be expensive to defend.
- After summary judgment, the chances of success at trial are more difficult to assess because there is generally less "splitting of the baby".
- Efforts to bring as many claims as possible for alternative theories of relief oftentimes muddy the waters.
- Employers are often reluctant to settle the case until the summary judgment motion has been decided.
- Judges are reluctant to take up issues on summary judgment until the case has been through mediation.

B. Mediation

From the plaintiffs' perspectives, one of the problems with mediation is that one either gets a lawyer/judge who really does not understand employment issues or one gets a mediator who is on one side or the other. Having a defense lawyer as a mediator often hurts settlement because of the conservative mind set and his lack of credibility with the plaintiff. It is, after all, the plaintiff as opposed to his or her lawyer, the defendant or the defendant's lawyer, who has limited experience with the legal system and often unrealistic visions of glory. It is usually the plaintiff who needs to be convinced most as to the terms of reasonable settlement. Having a defense lawyer as a mediator undermines the credibility necessary to bring about a change in the uninitiated plaintiff.

C. *Ethical Issues Influencing ADR*

There are ethical issues in the employment law area which may be unique to the subject matter. When the financial target is the corporate employer, but that employer has a supervisor responsible for the violation, there is a tendency for the employer to consider as one of its defenses that the acts of the supervisor were intentional or were outside the scope of the supervisor's employment. A very

good example of this occurs in sexual harassment cases where the employer has no notice of, and thus no opportunity to correct, the improper behavior of one of its employees. Defense counsel may be placed in an awkward situation about advising their corporate client that indeed what is alleged to have occurred did occur, but that the best defense may be to cross-claim against the supervisor. Ethical issues can become even more complicated when the company is controlled by one or a few people and the alleged perpetrator is within that group and where the company asks the lawyer to represent the supervisor defendant as well.

It may be difficult for plaintiffs' lawyers to screen cases or adequately investigate factual bases and legal theories due to the nature of the cases: e.g., being on a contingency, not getting the unabridged facts from the employee, lack of understanding of the law or the industry affected, and seemingly incessant involvement by their own clients in the case.

If the settlement conference or other form of ADR occurs before any substantial discovery is done, the plaintiff may be able to hide poor aspects of his or her case and settle the matter before they are discovered. Plaintiff's lawyers who are aware of 'difficult' aspects concerning their client may have an ethical dilemma whether to reveal those aspects to the mediator or settlement judge to fulfill their good faith duty to the Court.

Timing of the settlement conference can be very important. An employer oftentimes has the desire to try to settle the matter before it incurs substantial defense costs or to wait until after the summary judgment has been filed and/or decided. For plaintiffs, often reality has not set in until they have been through the litigation process and until their lawyers have invested enough time in the case to appreciate its strengths and weaknesses and have their own motivation to settle the matter.

C. *Arbitration*

As noted, the difference between an employer and an employee is usually one of unequal bargaining position. It is generally the employer who requires the arbitration process for its employees in order to control costs and eliminate the vagaries of jury trials. It is believed in some circles that the danger of this system is that plaintiff's lawyers feel that the employers can control where the arbitrators come from and thus skew the results. This could occur in one of two ways. First, the arbitration group chosen could be one that was not truly neutral and the employer only picked arbitrators that favored the employer. Second, the employer-minded arbitrators can "flood the system."

From the plaintiff's perspective, one could say that the problem of non-neutral arbitrators is far-fetched. However, in the securities industry it is common. Employees are required to enter into arbitration contracts where the employer and the industry chooses the arbitrator, therefore, the plaintiffs believe the arbitrators are biased.

Although arbitration of employment claims in the securities industry is

commonplace and judicially enforced,[7] it is becoming more prevalent in other employment settings. Enforcement of agreements to arbitrate is pursuant to the Federal Arbitration Act,[8] ("FAA") and all federal courts of appeal (except the Ninth Circuit) which have addressed the question of whether the FAA compels judicial enforcement of written arbitration agreements (save "contracts of employment with seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce") have answered in the affirmative.[9]

The U.S. Supreme Court recently reaffirmed the position of the various Courts of Appeal that the FAA does not bar mandatory arbitration of employment disputes.[10] In that case, the arbitration agreement enforced was contained in an employment application when the petitioner was hired as a sales counselor for a Circuit City store in California.

In its opinion, the Court noted:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.... Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts....[11]

Moreover, the Court reiterated that it has been "quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law...."[12]

The practicing bar in the Northern District of Oklahoma has become accustomed to the settlement conference process, but that should not rule out arbitration services offered by for-fee private services such as the AAA or any number of private mediators.

D. *Settlements*

Once a case has settled, whether through formal ADR or the efforts of the lawyers, that may not be the end of it. Sometimes a battle of the forms starts when the settlement is reduced to writing. One of the parties may decide to renege on the settlement. If the settlement appears to be breaking down, a whole new set of problems can arise. For example, under *Kokkonen v. Guardian Life Insurance Company*,[13] the court held that where a federal case is dismissed with prejudice, the district court loses its jurisdiction over any breach of the settlement contract. Thus, a "retention of jurisdiction" provision in the agreement is

7. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), and Rodriguez De Quijas, et al. v. Shearson/Am. Exp., 490 U.S. 477 (1989)
8. 9 U.S.C. § 1 (2001).
9. *See*, McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998).
10. *See* Circuit City Stores, Inc. v. Saint Clair Adams, 121 S.Ct. 1302; (2001).
11. *Id.* at 1313.
12. *Id.*
13. *See* Kokkonen v. Guardian Life Ins. Co., 114 S.Ct. 1673 (1994).

sometimes included so either side can bring an action to enforce it.

Aside from the frustrations, anger and extra cost, a breach of a settlement contract entered into without an order for settlement is a breach of contract, but not contempt.[14] Where a settlement agreement has been entered into, but not reduced to writing, the federal court can enforce the settlement, but may have to hold an evidentiary hearing to determine if there is a contract and, if so, what its terms are.[15] The mediator and parties' lawyers are usually material witnesses, further complicating matters.

The settlement itself may have other intended or unintended consequences. For example, in *TBG, Inc. v. Bendis*,[16] the trial court attempted to bar a non-settling defendant from its cross-claim for contribution against a settling defendant in order to enhance the latter's willingness to settle with the plaintiff. This was held inappropriate.

The settlement of a Title VII claim is governed in its terms and interpretation by federal, not state, law.[17] Where a Title VII case is dismissed with prejudice by reason of settlement, the court does not have authority to enforce the settlement contract.[18] However, if it had merely been an administrative closing order, it would not have been a final judgment and could have been reopened.[19]

An order approving settlement or even incorporating by reference the settlement agreement cannot be a basis for the enforcement of the settlement contract by contempt. Thus, an alleged breach of confidentiality of the agreement has been found to be merely a breach of contract claim.[20]

Finally, in *Heuser v. Kephart*,[21] the plaintiff and governmental defendants settled in a settlement conference, subject to approval of the governmental boards. The next day, Plaintiff reneged. It was held that the promise of the defendants was illusory and, therefore, there was no enforceable contract – hardly the intended result.

III. CONCLUSION

The observations in this article reflect that ADR is and will be a major part of any employment law practitioner's tasks and tools. Just as zealous advocacy, ADR is an important step to fulfill lawyers' responsibilities to "secure the just, speedy and inexpensive determination of every action."[22]

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14. *See* Smith v. Phillips, 881 F.2d 902 (10th Cir. 1991).
15. *See* U.S. v. Hardage, 982 F.2d 1491 (10th Cir. 1993).
16. *See* TBG, Inc. v. Bendis, 36 F.3d 916 (10th Cir. 1994).
17. *See* Snyder v. Circle K Corporation, 923 F.2d 1404 (10th Cir. 1991).
18. *See* Kokkonen, 114 S.Ct. at 1674.
19. *See* Morris v. City of Hobart, 39 F.3d 1105 (10th Cir. 1994).
20. *See* Consumers Gas & Oil, Inc. v. Farmland Industries, Inc., 84 F3d. 367 (10th Cir. 1996).
21. *See* Heuser v. Kephart, 215 F.3d 1186 (10th Cir. 2000)
22. Fed.R.Civ.P. 1.

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