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Comments

Paper Presented to the Commission on the Future of Worker-Management Relations

Suggested Citation

Tobias, P. H. (1994). *Alternate dispute resolution as an alternative to the litigation of non-union employee claims of illegal termination* (Paper presented to the Commission on the Future of Worker-Management Relations). Retrieved [insert date], from Cornell University, School of Industrial and Labor Relations site: http://digitalcommons.ilr.cornell.edu/key_workplace/428

Hot Topic
"Future Worker"

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COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS

April 6, 1994

MEETING, U.S. DEPARTMENT OF LABOR¹
WASHINGTON, DISTRICT OF COLUMBIA

ALTERNATE DISPUTE RESOLUTION
AS AN ALTERNATIVE TO THE
LITIGATION OF NON UNION EMPLOYEE CLAIMS
OF ILLEGAL TERMINATION

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¹ General Topic Of The Meeting: "Resolution Of Work
Place Problems By the Parties Themselves Or Through Alternate
Dispute Resolution (ADR) Methods, Rather Than Through Recourse To
Litigation And Regulatory Bodies"

BIOGRAPHY OF PAUL H. TOBIAS

I have specialized in employment and labor law since 1958. I have represented companies, unions and individuals. For the past 15 years I have represented individual employees exclusively. Our law firm in Cincinnati, Ohio, of which I am senior partner, has 5 lawyers who practice employment law on the side of Plaintiffs. In 1987, I authored Litigating Wrongful Discharge Claims, the first such book from the Plaintiff's perspective. I was the Founder, first chair and Executive Director of the National Employment Lawyers Association (NELA).

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA)

Founded in 1985, NELA now has over 1700 members in 49 states. There are 40 local chapters. NELA is the home for the nation's employment law specialists who represent individuals in the non-union work place.

FOCUS OF THIS PAPER

This paper concentrates on one particular "work place problem" - the non-union employee who has been terminated and claims wrongful and illegal discharge.

This paper will not address issues in the union work place concerning labor-management cooperation, collective bargaining, union grievance procedures etc. This paper will not address the problems of current employees in the non-union work place who protest on the job harassment, unsafe or illegal working

conditions, wage inequities, failure to promote, unfair discipline etc. Their dilemmas are very different from those of terminated employees. Current employees must be careful not to so antagonize management as to invite retaliatory dismissal. The filing of EEOC charges, retention of a lawyer, and filing of a lawsuit are steps that frequently lead to resignation or dismissal. The pressure and tension produced by hostile legal confrontations often affect the employee's emotional health and impede work performance. Without a union or other institutional or group support, many individual employees can not successfully cope with the problems.

This paper will not deal with preventative medicine which would alleviate the problems i.e.

- a) the avoidance of discriminatory and arbitrary treatment of employees;
- b) use of internal grievance procedures, ombudsmen, and outside objective advisors;
- c) humanistic, sensitive understanding of the plight of the terminated employee;
- d) generous severance pay, outplacement service, restraining, early retirement bridge packages, extended health insurance coverage.

"EXPLOSION" OF EMPLOYMENT LITIGATION

In the past 20 years there has been a law revolution governing non-union employees. The "employment-at-will" doctrine has been dramatically eroded. There are numerous new federal and state

anti-discrimination statutes. The common law of torts and contracts now applies to the work place. The public believes that unfair, unjust dismissals are illegal. The media draws attention to employment litigation. There are over 100,000 charges filed annually with the EEOC. Employment cases are 20% of the federal court docket. Employment litigation has risen 20 fold. The trend continues. The massive downsizing and restructuring in corporate America produces claims of injustice. There are many cases where prejudice, bias, arbitrary favoritism, corruption, gross mistake, broken promises, and outrageous treatment of employees prevail.

The job still is a prime source of identity and major social unit for millions of Americans. Career and work is the major focus of the lives of most of us. Discharge is indeed the 'capital punishment' of the work place. Its effects are devastating. Loss of income, loss of health insurance, and decrease in pension may be permanent. Discharged employees suffer intense emotional distress. There are labeled failures. Their self esteem, dependent on their jobs, may be crippled.

We have always been litigious society. Non-union employees have become more assertive and "rights" conscious. No longer are they willing to accept corporate injustice without a fight. Employees who feel "wronged" usually consult a lawyer and consider a lawsuit.

NATURE OF EMPLOYMENT LITIGATION

Employment law is developing, ever changing and always uncertain. There are deep conflicting economic, social and

political views on what is fair and unfair in the work place. The line between politics and judicial decision making is often thin. Employment law is complex and complicated - involving a blend of and conflict between traditional and newly created legal concepts. Six and seven figure punitive damages awards by juries reflect public outrage at corporate abuse and support for victims of corporate disloyalty.

The individual litigant (unlike a union) has no political, economic, or social agenda. His attorney has no allegiance except to the interests of the client. The Corporate litigant has no concern over future dealings with the individual and no incentive to cooperate with Plaintiff's counsel.

Employment litigation tends to be emotional. Unlike personal injury or product liability litigation, dismissal lawsuits are family feuds, similar to divorce cases. The employee/employer perceptions of the situation are widely divergent. Each party has myopia - tunnel vision. At the onset neither party understands the attitudes and viewpoints of the other. The employee has a deep sense of anger, bitterness, and outrage. The employee wants revenge and vindication. The employee has high expectations of financial reimbursement. The employer feels wounded by what is perceived as a disgruntled, ungrateful, and misguided former employee. The employer feels obligated to support and back up lower management decisions. The employer worries about principle and precedent. "Thousands for defense and not a cent for tribute" is the employer's war cry. The employer is willing to fight to

protect its prerogative to fire "at will".

Employment litigation is costly. For the employee the out of pocket expenses usually run \$5,000.00. The employer often may pay in excess of \$100,000.00 to defend a single discharge case. Employment litigation is stressful and aggravating for the employee. In depositions the employee must listen to management's repeated criticisms of his work performance. The employer often engages in harassing inquiries concerning the plaintiff's personal life.

Employment cases often drag on for years - with appeals and retrials commonplace. Some employees recover large verdicts. Judges dismiss at least 25% of the claims. About 85% of the rest are settled, usually after a year or so of litigation, often at a pretrial settlement conference with the judge or at the "court house steps".

Individual employees have difficulty in obtaining counsel. Many claims involve relatively small damages. Most cases involve hotly contested issues of fact and law. Most lawyers are unwilling to take contingency fee cases which do not involve the strong probability of success and large damages. Most employees cannot afford to pay a lawyer by the hour. The EEOC and state agencies lack the time, staff and muscle to help employees. Thus a large number of injustices are not remedied.

ALTERNATE DISPUTE RESOLUTION (ADR)

The phrase "ADR" covers a variety of methods of dispute resolution.

1. Negotiation between the parties;
2. Mediation;
3. Arbitration;
4. Fact-finding;
5. Neutral case evaluation;
6. Mini-hearing, including summary jury trial.

MEDIATION: THE PREFERRED PROCESS²

A. Benefits To All Parties:

1. Quick resolution;
2. Control by the parties;
3. Participation by the parties;
4. Small expense;
5. Reduced attorney fees;
6. Aids in discovering weaknesses and strengths of both cases.
7. Mediators, professional manipulators, effectuate face saving, compromises, and emphasize the "win" "win" approach.
8. Flexibility, creativity and rationality are utilized to obtain settlement.

² See Alternative Dispute Resolution of Employee cases by Maurice W. O'Brien, NELE Employee Advocate Supplement, Vol. 34 Winter, 1994.

B. Benefits To Employee And Counsel:

1. Some sense of a "day in court" with an advocate before an impartial authority figure.
2. Employee has opportunity to address employer's decision maker directly.
3. Provides feedback from neutral mediator to client who may have unrealistic settlement expectations.
4. Provides objective outside support for the Plaintiff counsel's more realistic assessment and recommendations.

C. Downside Risks Are Minimal:

A failed mediation may set framework for a subsequent bilateral settlement. If the face to face unstructured component of mediation is not handled diplomatically, there is a potential for exacerbated bad blood between the parties. If the mediator suggests a compromise figure and it is rejected by one side, it may make subsequent settlement at a different figure more difficult.

OBSTACLES TO SETTLEMENT BY NEGOTIATION AND MEDIATION

1. Corporate politics encourages employer counsel to be a gladiator.³ Counsel does not want to be perceived as a "patsy" who caves in to the opposition or as a "bad news" messenger telling Company officials they have acted improperly and must pay out large

³ John Wilkinson "ADR: Valuable Tool Is Often Misunderstood". National Law Journal 11/2/1987.

sums of money.

2. Employment law statutes of limitations are short - often six months or one year. Plaintiffs are required to file suit before their damages, measured primarily by the nature of new employment, are known.

3. Mediation may take place too early, before the basic facts are discovered and while the passions, anger and emotion of the dispute are still intense.

4. Corporations often declare cases as unseizable because of "principle", fear that settlement will set a precedent and encourage other lawsuits, and order a belligerent war like program to obtain total victory.

5. The employee's emotional state, lack of understanding of the legal process, sometimes unrealistic goals and expectations, desire to "hang on" to the employer, and inability to forget the past, all prevent realistic evaluation.

ARBITRATION

Arbitration is less costly, speedier and more informal than court proceedings. Other advantages for the employee are that summary judgment and other dismissal motions are rare. Arbitration will provide Plaintiff "a day in court" before an impartial person. The major disadvantage is that Plaintiffs are deprived of a constitutional trial by jury. Jurors have more experience with and tend to be more empathetic to the plight of employees than arbitrators. Jurors tend to be willing to award large economic and

emotional distress damages where warranted. Arbitrators are unlikely to award substantial punitive damages needed as a deterrent to prevent abusive and outrageous conduct.

In many cases Plaintiff needs the full panoply of discovery i.e. depositions, inspection of documents, and interrogatories. Most discrimination cases hinge on how other similarly situated employees were treated. Access to employer records is required. The employee's lawyer is in the dark in the non-union work place. Rules of ethics may restrict access to witnesses. Current employees may be afraid to help the Plaintiff. Counsel, unlike a union representative, is unfamiliar with past practice. There is usually no grievance procedure which educates the employee as to the employer's version of the facts. Ad hoc arbitrators do not generally have the authority or muscle to require, enforce and police extensive prehearing discovery. Without meaningful discovery, Plaintiff is unlikely to be successful at arbitration.

Plaintiff's counsel is unlikely to recommend arbitration in most substantial cases. Employers often rely on the delay and expense of litigation and the difficulty of obtaining a lawyer as a deterrent to a discharged employee's efforts to obtain relief. Therefore, some employers may not favor a quick inexpensive arbitration, which can expedite a non-appealable victory for the former employee.⁴

⁴ "There is a "hidden benefit" to litigation which is that most unemployed former employees can't afford it, says Alfred G. Feliu of Paul Hastings, Janowski & Walker in New York. Since arbitration is quicker and less expensive, more employees may be willing to try it, Feliu notes". Lawyers Weekly March 28, 1994 94

VOLUNTARY vs. MANDATORY ADR

Plaintiffs generally welcome settlement talks or mediation if required by statute or court order. Mediation is non-binding and the downside risks are minimal. Purely voluntary arbitration is favored by the Plaintiffs' bar. It presents a viable option and opportunity for a quick adjudication of small cases where a cheap speedy hearing is paramount.

On the other hand, the Plaintiffs' bar resists mandatory arbitration. Arbitrations are required in the securities industry by employment agreements. Some companies require newly hired and other employees to sign forms mandating arbitration of all disputes, including statutory violations. A few non-union companies have handbooks requiring arbitration as the final step in a grievance procedure similar to a collective bargaining agreement. These are contracts of adhesion signed under duress. The employee's "agreement" to arbitrate future disputes is truly not "knowing and voluntary". These employer mandated arbitrations deprive employees of the benefits of judge-administrated jury trial required by statute. Arbitrator selection methods often favor the employer. Lack of full discovery and other due process procedures often prejudice the employee. The arbitration may not provide the same remedies and damages as are permitted by statute. Frequently arbitrators, with no labor arbitration background, tend to be conservative and pro-employer. Further, arbitrators are not familiar with discrimination cases and the indirect method of

LW USA 268.

showing pretext permitted by federal law. St. Mary's Honor Center v. Hicks, 113 S.Ct 2742 (1993). Plaintiffs are fearful of giving up the right of appeal of issues of law, particularly when the employer is instrumental in selecting the arbitrator.

Some argue that Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct 1647 (1991) sanctions the compulsory arbitration of statutory claims arising in the future. The Gardner-Denver doctrine, 415 U.S. 45, (1974) which assured judicial enforcement of federal statutory rights, in spite of a prior arbitration, may be weakened. The Gilmer case runs counter to the message of Congress in the Civil Rights Act Amendments of 1991 and the new Americans With Disabilities Act, which permit juries to award substantial punitive and emotional damages.

Some academics favor the kind of mandatory arbitration set forth in the Model Employment Termination Act (META).⁵ The Act provides a "trade off" for discharged employees. It imposes a "just cause" standard upon employers.⁶

It claims to provide a speedy, inexpensive, therapeutic hearing before an impartial tribunal with the possibility of reinstatement, back pay, and payment of attorneys fees. For some victims of unfair discharge in some states who otherwise would have

⁵ The Model Employment Termination Act drafted by the National Conference of Commissioners on Uniform State laws and approved and recommended for enactment in all the states August 1991. See 9A LRR (BNA) IERM 540:21 (December, 1991).

⁶ The META preempts state common law actions for wrongful termination. However, the META does not cover discrimination claims arising from federal or state statutes.

no claim for relief, the statute is an improvement over the present system. However, the META is badly flawed. In order to get the backing of the business community, the draftsmen of the Act added provisions that destroy the reforms it appears to foster:

1. elimination of some common law torts and contract claims;
2. elimination of punitive damages even in egregious cases;
3. elimination of emotional distress damages;
4. drastic limits on prospective front pay damages;
5. ability of employer to "opt out" of the META by obtaining agreements with employees that provide liquidated damages, establish an internal ADR procedure, and establish performance standards;
6. exclusion of part-time, public and small firm employees;
7. unreasonably short statutes of limitations;
8. limited discovery;
9. liberal appeal provisions; and
10. good-cause standard subject to harsh interpretation.

The aforesaid provisions weaken and undermine the stated objective of a fair procedure.⁷ In sum, the META "holds the promise to the ear, and breaks it to the heart".⁸

⁷ NELA has advocated a federal, rather than state, "just cause" standard enforceable in Court or in administrative agency.

⁸ The quote appears in a different context in Summers, Individual "Rights in Collective Agreements and Arbitration", 37 NYU L Rev 352, 410 N 188 (1962).

CONCLUSION

The current emphasis on "ADR" is salutary. Generally, a fair private settlement is the best solution to an employment dispute. But settlements are not possible unless there is an in depth exchange of information concerning the other parties' version of the facts. Settlements are not possible unless the emotion, macho and politics are removed from the scene. Settlements are not possible if there is great uncertainty as to the merits, the damages and the probable outcome in court. The parties generally need the help of a neutral outsider - a judge or a mediator - in reaching a negotiated settlement.

One of the problems is that lawyers spend most of their time in 'combat' roles. Lawyers who are trial oriented, are often ill equipped to be sensitive negotiators. Lawyers get very little training in the art of negotiation. Another problem is that at the onset the parties often do not fully understand what lies ahead in court litigation. Continual education of the parties as to how the legal system works, the alternatives to litigation, the risks, the expenses, the options, the percentage possibilities of various outcomes, will go a long way towards producing early and fair settlements.

Mediation is the best form of ADR. Voluntary arbitration and other forms of ADR may also be helpful in reducing the excessive cost, delay, and aggravation of employment litigation.

Yet, compulsory arbitration is not an effective vehicle for relief in significant statutory discrimination cases. Trial by

jury is the traditional and trusted method for fact-finding in our society. Congress and the states have mandated that our discrimination and employment laws be enforced in court, like other important laws. Employers do not fear arbitration. Mandatory arbitration would weaken the fabric of our national laws designed to discourage employers from discriminatory dismissals.

We read much about the virtues and advantages of ADR. Many leading employer spokesmen talk at seminars about the desirability of ADR and early settlement of cases. Yet in practice, we see few employers who embrace ADR early on. Much education is still necessary.

Biography of Paul H. Tobias¹

Paul H. Tobias is senior partner in the firm of Tobias, Kraus & Torchia in Cincinnati, Ohio where he now specializes exclusively in the rights of individual employees, primarily in wrongful termination litigation.

Tobias is a graduate of Harvard College (AB 1951) and Harvard Law School (LLB 1958). He has specialized in labor and employment law for 36 years, having represented companies, unions, and individual employees. He is the author of ten published articles in the field of labor and employment law; has taught a labor law seminar at the University of Cincinnati (1975-1977); and has made over 100 presentations to Bar Association and other groups concerning employee rights.

Tobias is the founder of National Employment Lawyers Association (Advocates for Employee Rights) and served as its first Executive Director, Chairman and Editor of the newsletter "The Employee Advocate". He is the author of a two volume work: "Litigating Wrongful Discharge Claims" (Callaghan Company, 1987).

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