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WILL THE MODEL EMPLOYMENT TERMINATION ACT PROVIDE A REMEDY FOR THE EMPLOYMENT DISCRIMINATION CASE LOGJAM?

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ABSTRACT

A Model Employment Termination Act, approved by the National Conference of Commissioners on Uniform State Laws, may help break up the logjam of employment discrimination cases and help provide prompt service to employers and terminated employees alike. The act recommends alternative dispute resolution (ADR) procedures such as mediation and arbitration to help parties reach a settlement out of court.

Fifteen years ago, the *Labor Law Journal* published one of my articles that began as follows:

> The increasing backlog of unresolved employment discrimination charges, filed and still pending within the inevitable complexities of government enforcement procedures, has led many observers to conclude that the government is unable to provide convenient, inexpensive, and expeditious adjudication. At the same time, as courts further define employer obligations, companies and unions are working to renegotiate their collective bargain contracts and employment relationships [1].

The failure of government enforcement agencies and courts to provide prompt service seems more flagrant today than it was even in the 1970s. Backlogs continue to increase. Costs and delays have blossomed. Terminated employees are unable to adjudicate claims against an employer in timely fashion.

My 1976 article had described the views of labor arbitrators about the problems involved in deciding Title VII cases. Should an arbitrator allow the employee to be represented by independent counsel? Should the arbitrator make an independent

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investigation of possible civil rights violations? What should be the extent of an arbitrator's remedy powers?

Professor William B. Gould in a 1975 grievance arbitration award had called it "desirable that employment discrimination cases be heard by arbitrators, wherever possible, because of the complicated and time-consuming nature of Title VII litigation in the federal courts and the huge backlog with which the EEOC is now confronted. Delay and protracted litigation permit open wounds to fester" [2].

Gould recommended that parties authorize arbitrators in such cases to render awards that would provide full compliance with the law. Later, he advocated a California Employee Termination Act, that would have created a "just cause" standard, in exchange for limitations on recovery. More than a decade later, a Model Employment Termination Act (META) has been adopted by the Union Law Commission [3].

That act was an attempt to amend the common law of employment, providing a remedy for employees who have been unfairly terminated. Some of the initiative for the act came from academics who thought that at-will employment was unjust. But the growing thicket of employment civil rights laws, offering legal remedies to expanding classes of employees—race, gender, age, etc.—were what created a climate that made such a compromise possible.

Lawsuits by terminated employees have been increasing, filed by those terminated employees who were willing to endure the interminable delays that occur in such litigation.

As I pointed out in *The Termination Handbook* in the mid-eighties, anti-discrimination laws converted many terminations into negotiable issues [4]. Most termination claims are resolved that way. When faced with defending a lawsuit before a jury, management may be willing to compromise. Employees with valid monetary claims can retain qualified attorneys on a contingency basis.

Many employers have concluded that defending against former employees in court is stupid. The fear of high legal fees and bad publicity is obvious. Claims of discrimination are corrosive. Ninety percent are settled. The traditional court process, however, does not encourage prompt settlements.

The American Arbitration Association (AAA) has experienced an increase in its employment caseload, over 550 cases in 1991, involving over $15 million dollars in claims. Corporate attorneys and human relations executives constantly inquire how to utilize mediation and arbitration to privatize the process. Their interest is driven by a desire to avoid having to litigate discrimination claims.

Employers prefer to internalize or privatize the dispute-settlement process. Some adopt an "open door policy," under which a complaining employee can appeal to a top executive. Others designate an ombudsperson, charged with seeing that appropriate procedures have been followed. In those kinds of internal procedures, there may be no opportunity for an outsider to participate, but other employers have adopted procedures that offer access to impartial mediators or

arbitrators. Then, it is possible for the employee's attorney to come to the table. This article encourages the use of those kinds of systems.

In mediation, the neutral's role is to facilitate. Mediators with experience in employment relations, informed about federal and state discrimination statutes, should be in a good position to bring about settlements.

They do so by encouraging the parties and their attorneys to engage in good-faith negotiations, exchanging information and perceptions. Some of this is carried out across the table, but the mediator may also caucus with each side, to discuss the case in confidence, trying to shift each party's position by raising questions or suggesting how the claim might be resolved. Structured settlements may allow the employer to increase the benefits to employee without creating a precedent, and are often concocted in such discussions. A mediator facilitates a settlement, but has no authority to force it on the parties.

The mediator helps the attorneys obtain necessary disclosures and documents, to gain a realistic picture of how a jury might evaluate the claim. If the mediator thinks it is appropriate, a suggested formula may be transmitted to both sides.

Mediation can be scheduled at the convenience of the parties, long before litigation would take place. Four out of five mediations result in settlement, with the employer issuing a check to the employee's attorney, in return for a general release signed by the employee. After such a settlement, there is no appeal, and no ugly publicly for the employee or the company.

Some employers also offer to arbitrate such disputes. This can be advisory or binding, and can be established by a clause placed in a personnel manual or in an employment contract.

Arbitration arrangements should attempt to balance informality and expeditiousness against fairness and due process. Some of the following questions should be considered.

- Will arbitration be compulsory, a precondition to litigation, or purely voluntary?
- Can the employee be represented by an attorney?
- Will that attorney have access to corporate records?
- Will discovery be allowed prior to the hearing?
- How will arbitrators be selected?
- Will the arbitrator be an attorney, experienced in civil rights litigation?
- What issues will the arbitrator be authorized to decide?
- What remedial powers can the arbitrator exert?
- Will these include reinstatement? Punitive or statutory damages? Attorneys' fees?
- Will both parties agree to be bound by the award?
- Who will compensate the arbitrator and pay the fees and expenses of the AAA?

Arbitration clauses are subject to a strong national policy favoring arbitration, reflected in the Federal Arbitration Act. The U.S. Supreme Court endorsed the use of arbitration even for statutory civil rights claims in *Gilmer v. Interstate/Johnson Lane Corp.* [5]. Therefore, agreements to submit employee claims to binding arbitration may be enforceable.

The *Gilmer* doctrine has already been extended to other discrimination statutes. In *Dean Witter Reynolds, Inc. v. Alford* [6], the Court recognized arbitration in a Title VII case, remanding the case for further considerations in light of *Gilmer.* The Court also denied a petition for certiorari in a California case where a sex discrimination case had been ordered to arbitration [7]. These cases would indicate that courts are prepared to enforce such arbitration clauses, even where the employee's claims are couched in terms of federal civil rights statutes.

If those kinds of issues are decided by arbitrators with the authority to grant full statutory remedies, their awards may be issued more quickly than in court. Large recoveries from juries are few in number and may be reduced on appeal. An arbitrator's award, to the contrary, can be vacated on limited grounds.

Private Alternative Dispute Resolution (ADR) offers many options. Employers can offer mediation or arbitration on a case-by-case basis, or they can use an ADR procedure provided in advance. The staff of the AAA provides assistance to parties who want to use such mechanisms. American Arbitration Association professionals do not just talk about ADR, they help parties use it in thousands of cases.

A binding arbitration clause to resolve employment claims may require careful drafting. An arbitration clause can be included in a freestanding agreement, in a pension plan, or in some other benefit agreement.

In my books, *The Termination Handbook* [4] and *Empowered at Forty* [8], I have encouraged the use of mediation and arbitration for resolving claims by employees. Everybody wins! The employee may obtain a prompt decision, with compensation, and can get on with life. The employee's attorney may collect a fee, with less investment in time. The employer may save executive time and legal expenses, and will not risk the bad publicity and poor employee morale that comes in the wake of such litigation. The employer's lawyer can protect the interests of the corporation.

The potential benefits of arbitration were evident to the committee that drafted the Model Employment Termination Act, approved by the National Conference of Commissioners on Uniform State Laws in the summer of 1991, and mentioned earlier [3].

Unfortunately, the act seems unlikely to be adopted by states in the form contemplated. The act would create a "good cause" standard for terminating covered employees and would provide an "arbitration" system for resolving disputes as to whether the employer met that standard in discharging an employee. But the act provides for arbitration under the auspices of a state commission, department or service.

Under the act, an employer is obliged to give an employee the reasons for termination. Then the employee can file a complaint with the state. After an exchange of papers, the matter proceeds to a hearing before an arbitrator acting under the rules adopted by the state, and under the state arbitration laws. The qualifications and methods of selection and appointment or arbitrators are to be determined by the state, and "an arbitrator serving under this act exercises the authority of the state."

The right to counsel is provided, as are discovery procedures, including the employer's obligation to turn over the employee's personnel file. The burden of showing that the termination was without good cause is placed upon an employee who files a claim, but the employer presents its case first. The arbitrator is expected to file an award within thirty days after the close of hearings, and is authorized to reinstate the worker, award full or partial back pay and lost fringe benefits, with interest, reduced by any earnings from other employment. A lump-sum severance payment can also be awarded, for up to thirty-six months. Reasonable attorney's fees and costs against a losing party may also be made a part of the award.

The act also contains a list of categories of damages that an arbitrator may *not* award—pain and suffering, emotional distress, punitive damages, etc.

Section 5(h) of the act allows parties to opt out of the standard, state-administered arbitration system, by agreeing to "private arbitration or other alternative dispute resolution procedure"—or to simply settle their claim or agree to go to court. Such a private arbitration or court litigation would be subject to the "substantive provisions" of the law.

The act expands the normal grounds for vacating an award to include "a prejudicial error of law." The act also contains two alternative procedures for enforcement. Alternative A is an administrative procedure, relying on a state agency. Alternative B provides for enforcement by the civil courts.

The Model Act was an attempt to reach a compromise between employees who had virtually no rights under a prior state termination-at-will doctrine and employers who were fearful of unjust discharge claims being submitted to a jury. It would create a good cause standard for discharge, but restrict the authorized remedies. Whether it will be adopted by the various states seems, at this reading, somewhat doubtful. Neither plaintiff lawyers nor defense lawyers or employers have expressed substantial support for its passage.

The act's arbitration scheme would seem likely to result in arbitration administered, financed and staffed by a state agency. It is not likely that arbitrators would be selected by the parties from lists or paid by the parties, as is true in private arbitration. If such a law is adopted, arbitrators would probably be state employees or contractors, probably local attorneys, since they would have to know the state law of employment relations.

A more essential defect in the act may be that it does not cover violations of state or federal antidiscrimination statutes. These are the more common and highly

charged complaints as to terminations. They would, presumably, continue to be filed in court, subjecting employers to the jury trials that they might like to avoid. The common law grounds for contesting a discharge are of less concern to employers. The Model Act fails to address, and probably could not resolve, the employers' more chronic concern. That is why employers may not be willing to enter into the bargain reflected by the Model Act.

Private ADR offers employers and employees an opportunity to avoid statutory litigation. That is exactly why employers are privatizing their dispute resolution procedures, why they are designing systems of mediation, fact finding and arbitration. For more information on that subject, contact the American Arbitration Association at (212) 484-4060 (Robert Meade, Vice President, Program Development).

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Robert Coulson has been president of the American Arbitration Association since 1972. He has published extensively in the area of arbitration and labor relations. Mr. Coulson is a member of the Editorial Board of this Journal.

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