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THE APPROPRIATE ARENA FOR ADA DISPUTES: ARBITRATION OR MEDIATION?

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There are arguments in favor of either arbitration or mediation for employment disputes. The American Arbitration Association ("AAA") takes no position on whether arbitration should be binding or prospective for future disputes, or whether arbitration is preferable to mediation or any other form of Alternative Dispute Resolution ("ADR").¹

The AAA is an administrative agency that handles disputes under the parties' contractual agreements. We leave it up to the lawyers to go into court to determine whether a clause is unfair or not. However, I initially refused to handle two cases in twenty-five years because the clauses were either impossible to administer fairly or contained conditions which were unfair on their face. The parties in one case agreed to amend their clause, rather than go into court to enforce arbitration. In the other instance, an arbitrator was appointed for the sole purpose of interpreting the arbitration agreement. Mediation presents a different situation for the neutral.² You do not want to reach an unfair result, but it is not up to the mediator to renegotiate the parties underlying contract.

As an employee, I want an arbitration clause to be binding on the employer and optional for the employee. I want the company with the deep pockets and salaried lawyers to be forced to arbitrate with the employee rather than force the employee to retain counsel. I think that is best for the employee.

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¹ See DOUGLAS S. McDOWELL, ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES 7-8 (1993). "[Alternative Dispute Resolution is] a method of resolving personnel and workplace disputes without traditional litigation and with the help of a trained neutral or a panel of neutrals." *Id.*

² A "neutral" refers to an uninterested party who will serve as the arbitrator for the parties.

ADR is very suitable for the Americans With Disabilities Act ("ADA")³ because of the "undue hardship" clause.⁴ There are a number of factors that may impact the ADA. One example is biotechnology. Presently, we are on the threshold of some amazing breakthroughs, such as helping the blind by implanting an optic nerve and enabling them to see,⁵ light-weight prostheses that enable people who are almost crippled to participate in strenuous athletics,⁶ and cochlear implants that may make deafness a thing of the past.⁷ The same thing is happening in the workplace. Technological advancements such as voice-activated computers and employees connected to the Internet to interface with headquarters offices may enable more people to work at home. This is not just going to be a boon to the disabled, it will be a boon for people with small children or others in the work force who have special needs.

The delays in administrative remedies and litigation may cause a court decision to be obsolete by the time it is rendered. It is possible that in the five years it takes to litigate a reasonable accommodation claim⁸ or some other issue, technology will overtake it and make the final decision moot.

The Act applies to, but is not limited to, non-contractual relationships, pre-employment issues, interviewing, testing, and training. Mediation can be used where there are non-contractual relationships. There are not many disputes of this type, but a prudent employer might have cause to call in a mediator or try to negotiate a possible accommodation for a handicapped person being interviewed for a position so as to avoid a subsequent lawsuit.

³ 42 U.S.C. §§ 12101-213 (Supp. V 1993).

⁴ *Id.* at § 12111(9).

⁵ Richard Burnett, *Six Million Dollar Bionic People May Be a Reality*, ORLANDO SENTINEL, Sept. 13, 1995, at A-16 (noting that scientists expect to transfer images directly to visual center of brain by implanting small cameras or sensors on optic nerve); Tony Newton, *And the Blind Shall See . . .*, THE INDEPENDENT, Aug. 15, 1995, at 14 (explaining process where cells of optic nerve are stimulated by implanting chip on retina to allow blind people to perceive light).

⁶ Bob Radocy & William Beiswenger, *Pumping Iron with Upper Limb Amputations*, PALEASTRA, Mar. 22, 1994, at 41 (describing amputees ability to lift weights with prosthetic arm).

⁷ Keith Ervin, *Gift of a Lifetime: Seven-year Old Hears for First Time*, SEATTLE TIMES, Nov. 23, 1995, at A22 (explaining success of cochlear implants which electronically stimulate nerve fibers to allow users to hear sounds critical to understanding speech).

⁸ See 42 U.S.C. § 12111(9) (Supp. V 1993) (defining reasonable accommodation as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities").

We are also going to need very good arbitrators⁹ and mediators.¹⁰ For this, you need to have resources. I recently was looking for experts in government contracts to act as mediators and arbitrators. I asked that the applicants provide me with a minimum of two references for each process in which they were experienced. Few people can provide the proper references. There are many people claiming to be experts who may not be, so we have to be very careful.

The Washington office keeps comments on every neutral that is ever appointed. We solicit comments from the parties by asking such questions as:

How did you feel about us?

How did you feel about the process?

How did you feel about the neutral? We file this information and use it as a resource.

The Equal Employment Opportunity Commission ("EEOC")¹¹ feels mandated to enforce the law rather than just settle cases. We have to find, however, a quicker way for those protected to assert claims and get a remedy. If you are looking for employment, you cannot afford to wait in the wings for years. While awaiting litigation, the targets of discrimination continue to suffer, to lose promotional opportunities, and to experience escalating hostility in the workplace if the claim is found to be without merit. It is a very uncomfortable situation. Every time the litigant walks through the office, and I have seen it in my own office, people say, "there's the person asserting this silly claim." For all parties, it's better to resolve it quickly.

A labor arbitrator in Atlanta, Georgia, has described the various processes. He has stated that in negotiations, the *parties* control

⁹ See Thomas J. Stipanovich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 473 n.1 (1987). "Arbitration is a process in which parties voluntarily submit their disputes to one or more impartial third persons for resolution." *Id.*

¹⁰ See Gerald W. Cormick, *The Theory and Practice of Environmental Mediation*, 2 ENVTL. PROF. 24, 27 (1980) (quoting Office of Environmental Mediation's definition of mediation as "voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement"); ROBERTA S. MITCHELL & SCOT E. DEWHIRST, *THE MEDIATOR HANDBOOK: A TRAINING GUIDE TO MEDIATION TECHNIQUES AND SKILLS* 3 (1990) (describing mediation as organized negotiation, voluntary dispute resolving process in which third-party facilitates and coordinates negotiations of disputing parties).

¹¹ See generally R. Gaull Silberman et al., *The Civil Rights Act of 1991: A Symposium: Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1534 (1994) (discussing creation and development of EEOC).

the process and the outcome. In mediation, the *mediator* controls the process, the *parties* control the outcome. In arbitration, the *parties* control the design of the process and the *arbitrator* controls the outcome. In litigation, the *court* controls both the process and the outcome.

If you have a mediated agreement with an arbitration clause in it, and you negotiated the agreement with your employer, you have participated in the design of the process. The concern arises when the employer *unilaterally* designs an arbitration system and the employees have no input.

There are, however, ways to assert your interests. You can go to an organization, such as the International Employment Lawyers Association, or have employee groups meet with management to design the agreement. There are ways to incorporate your interests into the agreement and to ensure that fair clauses are included.

The major thing is that you have a fair and impartial system with fair and impartial neutrals.¹² Furthermore, the agreement must be voluntary in order to make it fair and impartial. I have some problems with mediation as a panacea. Complaining about it is a bit like complaining about Mom and apple pie. Let us say there is a forty percent success rate of mediation programs. That's about true in the courts as well as the EEOC, but that is because it is mandated. Where the parties have the option of mediating, we find the success rate is much higher.

Obviously if you're talking about success rate, arbitration is 100% successful, but it does not necessarily bring 100% satisfaction. We do not have the figures to assess how employees feel about arbitration, nor do we possess a volume of cases on the subject.

The surveys we have done on normal commercial cases say that there is an average of eighty to eighty-five percent satisfaction rate with arbitration.¹³ Because we solicit comments, you would

¹² See AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, Rule 19 (1984). The AAA Rules also require a person appointed as a neutral arbitrator to disclose to the Association "any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel." *Id.*

¹³ See Lynn A. Kerbeshian, *To Be Or . . . ?*, 70 N.D. L. REV. 381, 423 (1994). "Approximately 80% of the participants in Washington, D.C.'s local court arbitration program are satisfied with the process whether or not they accept the recommended settlement." *Id.*

assume that more negative comments would come back. The fact is, the figures have not changed in years. There is still about an eighty percent satisfaction rate.¹⁴

One of my problems with mediation is that, although a mediator can not personally insure that each party has made a fully informed choice to reach any agreement, I believe that there is an implied duty on the part of a neutral to insure that the party is capable of making an informed decision. I have a problem with mediation when there is a tremendous power imbalance. Mediators have a lot more power than people sometimes realize. I have been surprised more than once to discover, that the parties were willing to do whatever I suggested rather than explore their own options.

I think mediation is not fair to use in some cases of mental disability. I had a brother with Downs Syndrome. He was in a residential program, and he was able to work in repetitive jobs. He would bind the three bars of soap with a piece of paper around them, similar to those that you see in the store. This type of work is often done by the retarded. The problem with Downs Syndrome people is that they are highly susceptible to Alzheimer's Disease, a progressive disease which starts slowly. What may have been a reasonable accommodation at age forty-eight for my brother, may not be sufficient when he is fifty-two, and may be an undue burden when he is fifty-five. I do not believe that he could have fully participated in any mediation in a knowing and voluntary manner. Somebody suggested that he could have a representative there. I could have represented him, but then I would have been mediating for myself, and not necessarily for my brother.

So I have some problems with certain areas of disabilities. I think you are going to need some expertise.¹⁵ You are going to need experts in dyslexia; you are going to need experts in attention deficit disorder. We are going to ask mediators to have knowledge of the law, certainly knowledge of the employment law, but outside experts may need to be called in and that may be an

¹⁴ *Id.*

¹⁵ See, e.g., Karen L. Liepmann, Comment, *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?*, 14 B.C. ENVTL. AFF. L. REV. 93, 103 (1986). "As is the case during litigation, parties involved in mediation hire technical experts. In mediation though, the parties use mutually agreed upon experts and jointly devised and managed research efforts." *Id.*

undue financial burden on the employee. It may be better to have a supportive, perhaps subsidized arbitration system where some of the arbitrators are experts.

For instance, there are going to be some other disputes under the ADA, where it may be a simple construction dispute. You may have a dispute over what kind of construction is needed to accommodate certain types of disabilities. You could theoretically have an engineer, a contractor and a lawyer familiar with ADA, sitting as arbitrators on that particular dispute.

I think there is one caveat in all of this; I do think we should not ever prohibit nor mandate any ADR system. I think it should be left flexible because we need more experience with it. It has been my experience that parties who are leery of arbitration say they want arbitration and want arbitration only if upon mutual consent.

Some industries have found, after experimenting with mediation, they prefer arbitration. The insurance industry recently seems to prefer arbitration because they figure they have already done a lot of negotiation and now want a final decision.

The other thing that has been proven over and over again is that any good ADR system lowers the number of disputes. We are frequently contacted by industries or groups who say that they have hundreds of annual claims or disputes and they want an arbitration or mediation system designed for them. After we devise rules and set up a panel, few cases materialize. The mere fact that a final and binding decision or a complete discussion of the matter is an absolute right leads to more intense negotiations or faster settlement.

In conclusion, I think the use of ADR in disputes will grow, and there will be a great deal of experimentation. We should not be tempted to mandate or prohibit any particular system. ADR should continue to offer a broad array of choices, while maintaining standards of fairness, quality and mutuality.