CHAPTER SEVEN:

Empirical Observations and Conclusions

Empirical Observations

Results: Not all programs maintain statistical reports of their programs. However, based on the statistics available, one trend is clear: nearly all disputes submitted to systemic employment dispute resolution programs are resolved by agreement, prior to the arbitration stage.

- Halliburton and Johnson & Johnson each report that fewer than 2% of the disputes that entered its program proceed to the arbitration stage.
- General Electric notes that in 1998/99 few disputes went to formal mediation and only one went to arbitration.
- The Air Force reports that during fiscal year 2000, 6200 disputes were identified, 44% of them were subject to ADR, and 79% of those were resolved without arbitration.
- The Postal Service's mediation-only program reports that, since 1997, formal complaints to the EEO have decreased by 26%, 76% of the claims addressed resolved or were not pursued; and participant satisfaction on a variety of parameters measured, on average, substantially over 90%.
- The Equal Employment Opportunity Commission reports that, of 7490 charges mediated during FY99, 5254 (70%) were successfully concluded.

Identifying Good Neutrals: Many managers of dispute resolution programs share common concerns. A particularly frequent one is identifying qualified neutrals. Good mediators might sometimes lack a background in employment law, and few lawyers who are trained in the field of employment disputes are also experienced and trained mediators.

Employee Skepticism: Another common concern is the difficulty in overcoming employee skepticism. Some employees are unwilling to assume that a system that is created, maintained and paid for by the company will in fact be impartial and responsive to their needs, particularly when compared to the promise of competent legal counsel and advocacy.

Even employees who may accept the company's utter good faith in promising that there will be no retaliation for using the program believe that it is highly unlikely that the company would be able to detect, respond to, and prevent the recurrence of incidents of retaliation on the shop floor. Moreover, many retaliatory incidents are extremely difficult to identify. Halliburton is one of the many companies that has a written policy forbidding retaliation against employees using its Dispute Resolution Program. Over the eight years the policy has been in effect, several managers have been terminated for overt retaliation. Halliburton also reports that, while fear of retaliation is often mentioned by employees as a concern, only about 10 of Halliburton's approximately 1,000 cases per year actually raise such issues. Nevertheless, this obstacle to effective utilization seems to be endemic to employment dispute programs, and is very difficult to overcome completely.

Management Participation: Lower management sign-on often is mentioned as another challenge. Most managers are trained to advance the processes and operations of

the company; few are formally trained to counsel employees. Many employment disputes challenge the conduct of immediate supervisors, and dispute resolution systems are easily misperceived by those supervisors as attempts to undermine their managerial authority. As a result, it is often difficult for system managers to rely on an untrained immediate supervisor's ability to respond creatively and intelligently to subordinates' problems in the first instance. The issue of lower-level management involvement is particularly acute because, of course, it is to that level that most disputes are first brought.

HR or Legal?: Many managers also report a difficulty in coordinating the professional skills of the nonlegal human resources department with the expertise of the legal department. Overlapping authority and vague allocation of administrative responsibility can increase the likelihood of miscommunication both in the design and the execution of the program. It may be unclear at what point a conflict within Human Resources' purview becomes a dispute within the aegis of the Legal Department. This phenomenon counsels care during the design process to include the people who will have primary responsibility for executing the program, and to take care to clearly delineate which departments have authority over how a dispute is handled, at what stage in its management.

Why No Unions?: Except for the US Air Force and the Postal Service, all programs in this study exempt represented employees. Particularly in light of the extraordinary success that the both these agencies have documented, it is reasonable to ask why this should be so. By far the majority of disputes that enter an ADR system are resolved at a management level, and those few that survive are nearly all resolved in consensual non-binding mediation. The effectiveness of negotiated and non-adjudicated

processes argues strongly that the most productive attributes of an employment dispute resolution program are: (a) that it is voluntary, and thus does not alter an employee's terms or conditions of employment; (b) that it either addresses extra-contractual problems and not "grievances" within the meaning of the collective bargaining agreement, or else is explicitly provided for in the collective bargaining agreement; and (c) that it culminates in a resolution acceptable to the employee (because unacceptable resolutions are rejected). Both the Air Force and the Postal Service have also gained the support and participation of their union leadership and bargained many ADR steps into their collective bargaining contracts. It would therefore seem prudent for managers to challenge the broadly adopted practice of excluding, wholesale, employees within bargaining units, and that managers consider including grievances under the collective bargaining agreement within their dispute resolution programs, subject to meeting their statutory bargaining obligations.

Conclusions

1. Dispute Management Is Fundamentally a Managerial, Not Legal, Task – Yet Managers Remain Reactive.

The essential prerequisite to any successful employment dispute program is an attitudinal adjustment: a recognition that managing employment disputes is a legitimate, ongoing task of management, rather than an unexpected and intrusive interruption meriting reference to legal counsel to determine and advocate the parties' rights. Sophisticated managers are accustomed to managing, for example, the risk of interest rate fluctuations through hedging and other techniques. They manage inventory levels. They manage other business contingencies that, although not predictable, are nevertheless anticipated.

There is an increasing acceptance that employment disputes are in that same category. Employers are recognizing that workplace conflict can be managed to the satisfaction of all parties once such conflict is recognized as a chronic, unavoidable and in many ways healthy contingency.

In this context, it is notable that all of the programs reviewed in this study are initiated by an employee seeking self-help, rather than by management proactivity. For example:

- At Anheuser-Busch, employees are required to present a written Notice of Dispute to the immediate supervisor or a local human resources representative. Disputes not resolved immediately may be raised to higher levels of management within the department. Each business unit designs it own procedures for handling such disputes.

- GE Corporate encourages employees to initiate discussions with their manager, their human resources representative or ombudsman as necessary, and reports that "95+% are resolved informally" at this stage.

- Halliburton has established an "Open Door" tradition, with four resources to complaining employees: (a) immediate supervisor, (b) higher-level supervisor, (c) business unit human resources personnel, and (d) ombudsman office, contactable through a "hot line." The stated purpose of this infrastructure os "to resolve most routine problems within the company."

None describes a policy or practice whereby the employer actively seeks to identify problems in order to correct them; rather, they rely solely on the employee to identify problems and bring them to management.[11]

[11]The Air Force has certain practices and programs that may constitute an exception to this generalization. It expects the process of mediation to alert supervisors to

This approach is not the only possible one. To use a crude example, car manufacturers do not wait for a customer complaint before examining assembly processes for quality. Nor is it the approach that seems implied by the Supreme Court in *Ellerth* and *Faragher*. Those cases – both concerning sexual harassment of employees by supervisors – offer employers affirmative defenses to vicarious liability for the unlawful acts of their managers if they could show that the employer exercised "reasonable care to prevent and correct promptly" the unlawful supervisory conduct. It is unclear whether an employer's mere promulgation of a policy forbidding unlawful conduct, and thereafter awaiting employee complaint, would be sufficient in a given instance. An effective and trusted procedure calling for a passive management to await a claim of harm by an offended employee may satisfy the second branch of the holdings in these cases – which addresses the reasonableness of the employee's conduct in availing herself of "preventative or corrective opportunities provided by the employer or to avoid harm otherwise" – but still leaves the employer's fate largely in the employee's hands, and makes the employer's legal posture a function of the employee's conduct rather than its own.

More persuasive is the managerial, rather than legal, approach. Nearly all of the programs studied contain language explicitly acknowledging that employment dispute

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> underlying problems and issues that have not manifested themselves as specific complaints, but may do so in the future. It also uses two tools to identify and correct workplace problems before they produce complaints. One, the unit climate assessment, studies the workplace environment to determine whether it harbors any equal opportunity or treatment issues (including sexual harassment issues). Another, the unit compliance inspection, examines an organization for a host of compliance issues. The Air Force reports that supervisors are "routinely and repetitively trained on various human relations subjects to keep them vigilant to problems before they become grievances or formal complaints."

resolution programs are aimed at keeping employees loyal and productive, maintaining a mutually beneficial employer/employee relationship, and decreasing the cost and increasing the efficiency of predicable and unavoidable workplace conflict.[12] If these are, in fact, the core values and management goals that give rise to such programs, then there is likely a better way to design them than to wait until an employee has been hurt before taking action in response. Recognizing and managing the conflicting, but equally legitimate, interests of management and employees is a daily task, and may be one best addressed affirmatively rather than reactively.

The only program that seems to include this kind of managerial skills improvement is the U.S. Postal Service, which reports that enhanced dispute identification and management skills by supervisors is perhaps the most prominent by-product of its "transformative mediation" program. Supervisors learn, in the course of a mediation, how their relationships with employees can be enhanced. Iterative mediation experiences, then, serve as a substitute for "just-in-time" training, providing supervisors not merely with a resolution of a particular problem, but also with insights and skills to manage future problems. Indeed, program administrators report that experienced USPS managers, advised of the filing of a claim, frequently seek out the complainant and resolve the matter prior to mediation.

2. Framing Issues as Interests, Not Rights, Is Key

Employment disputes are specially difficult to defuse because they are almost always initially framed as an individual "right." Indeed, employment lawyers frequently

12 An example is this clearheaded and articulate statement from Shell's program brochure: "Unresolved conflict in the workplace, as in any setting, hurts everyone who is involved and often touches those on the sidelines as well. Left unchecked, conflict rarely goes away on its own. It can disrupt our relationships, prevent us from effectively performing our jobs, and lead to costly, time-consuming litigation."

refer to employment law as "a bundle of rights." Managers often approach employment disputes from a base-line of "at-will employment," reserving the right to sever the relationship at any time, for good reason, bad reason or no reason. By contrast, employees often start at the base-line of their "rights" – to be free of harassment and discrimination; to be paid for overtime; to work in a safe environment.

It is vital, in such an environment, to avoid framing disputes in terms of rights and obligations, and to urge disputants to articulate their long-term, underlying interests. Although there are infrequent exceptions, by far the majority of disputants are not motivated by a desire to be vindicated. Rather, they want to continue their employment with a problem fixed. Skilled problem-solvers know to distinguish between what a disputant wants ("I want my supervisor to be disciplined") and what a disputant needs ("I need to be able to come to work and not be looked at like a piece of meat").

In the heat of a dispute it is not realistic to expect the disputants themselves to reframe their vocabulary to articulate underlying interests. Particularly in the employment context, many tensions are caused by factors not evident even to the disputants themselves. It is therefore more important in this area than in most areas of dispute resolution that the managers charged with addressing employee concerns be skilled at assisting disputants in articulating the interests that need to be addressed in a workable solution, and to set aside the "rights" that they perceive have been violated or that they think need to be vindicated. The point is to solve the problem at hand.

3. Only the Unavoidable Needs to Be Adjudicated – and it Always Did

It is ironic that employers, attorneys and courts have devoted so many resources to the back end of the employment dispute resolution system – mandatory, final and

binding arbitration – when so few disputes ever survive to that stage. It is also regrettable that many employee and employer advocates judge employment dispute systems on the attributes of this last, least used stage.

For each intractable employment dispute, that will not be consensually resolved and must be adjudicated to yield a "winner" and a "loser," there are dozens – hundreds – of disputes that are consensually resolved, but far later than they might have been. And reverse-engineering the intractable disputes – looking back on them in "20/20 hindsight" – often supports the conclusion that no amount of managerial attention or skill could have resolved them.

Thus, the resources available to the dispute resolution manager are best placed in the managerial and non-adjudicative stage. It is at this level that employee loyalty will be generated, cost savings will be realized, lawsuits and arbitrations will be avoided, and the long-term interests of the employer will be best served. Of course, attorneys are always an essential resource to problem-solvers, and close teamwork among the Law Department, HR Department and operating managers is ideal. Nevertheless, in light of the results of the programs in this study, the system designer and administrator is better advised to train managers in problem-solving skills than to train attorneys in winning arbitrations and trials.