WORKPLACE COMPLAINTS NEEDN’T WIND UP IN COURT

Why can’t we treat conflict as a mutual problem requiring a solution?

* * * As an attorney--albeit a “recovering” one--I’ve laughed at my share of lawyer jokes. I think Shakespeare may have made a fair point, when he has a character planning a utopian society in Henry VI, Part II, say “The first thing we do, let’s kill all the lawyers”--although I would substitute the word “litigators” for “lawyers.”

Litigation is an expensive, time-consuming, and ultimately arbitrary way to resolve disputes, especially employment disputes. The litigation process is fraught with inefficiencies, from the smack of the process server’s delivery into your outstretched palm, through the tortuous exchange of documents and depositions, to the nail-biting hurry-up-and-wait of trial by 12 bored and probably biased jurors,.

Employment litigation is more emotionally charged than any other type of lawsuit except divorce.

After all, we spend more than half our waking hours at work, and our status and relationships there take on enormous importance. The adversarial process exaggerates these emotions by forcing a polarization of positions. When an employment termination decision is challenged, the fairness, professionalism, and very character of the manager who made the decision, as well as the organization he represents, is put at issue. Similarly, a merely so-so employee is demonized as the employer dredges up every possible misdeed in the personnel record to justify its actions.

The expense of employment suits makes early settlement desirable, but this polarization makes settlement difficult, and when it is achieved, it often leaves a sour taste in the mouth of the litigants. The employee feels cheated of his day in court. And the employer, while understanding the business wisdom of the settlement, worries that its reputation will be tarnished by the widely held belief that settlement indicates guilt.

Is there a better way?

Around 1990, a few employers decided there had to be a better way. They experimented with alternative dispute resolution (ADR).

Back then, most employment-related ADR programs culminated in mandatory binding arbitration by a third-party neutral, with some preliminary internal steps, such as Open Door complaint, peer review, or mediation. They met with strong resistance from the plaintiffs’ bar, and government agencies like the Equal Employment Opportunity Commission.

The resistance was justified by the argument that arbitration undermined the employee’s due process rights. Critics pointed to the New York Stock Exchange’s program, which required all disputes with licensed brokers to be arbitrated, including claims against their Wall Street employers. However, the NYSE’s panel of available arbitrators comprised older white males, veterans of the financial industry, with no knowledge of employment law and little sympathy for women or minorities alleging discrimination. Some of these “final and binding” arbitration decisions were set aside as unconscionable.

The U.S. Supreme Court weighed in on the issue of mandatory employment arbitration in 1991 in Gilmer v. Interstate/Johnson Lane. The Court ruled that mandatory employment arbitration agreements are enforceable only if the employee’s due process rights are secured. These rights include accurate and timely notice, and the ability to retain counsel, to secure adequate discovery, and to receive a reasoned award; and the right to secure the same forms of relief available to plaintiffs in litigation.

In other words, all the time-consuming and expensive “process” required in litigation. Since Gilmer, as employment arbitration began to look more and more like litigation, employment ADR has lost some of its shine.

Is there a better, better way?

The problem is not with alternative dispute resolution, but with the favored method: arbitration. Regardless of whether employee rights to notice, counsel, discovery, and unlimited relief are guaranteed, arbitration remains an adversarial process like litigation.

And, for the reasons I outlined above, arbitration remains unsatisfactory as a way of handling employment disputes.

What is needed is an attitude shift about conflict generally, an approach that avoids the pitfalls of the zero-sum mentality implied by adversarial processes: you win/I lose.

Call me a “Pollyanna,” but couldn’t we look at conflict as a problem to be solved, and the best way of solving it is to pool our resources?

Let’s call this approach Collaborative Conflict Resolution (CCR). (The fact that these are the initials of my all-time favorite band, Credence Clearwater Revival, is purely coincidental.)

A collaborative approach to resolution

I am not the first person to come up with this. In different parts of the country, there are individuals and organizations devoted to a new way of dealing with disputes.

In my own Washington state, the legislature enacted a framework for local Dispute Resolution Centers 20 years ago. These DRCs provide “interest-based” mediation and facilitation services in a variety of contexts, including employment. A highly trained volunteer brings the parties to a dispute together to work on identifying their underlying interests. These may be quite different from the legal “positions” staked out in a lawsuit. Then the parties are encouraged to collaborate to brainstorm ways their mutual interests can be met.

The process--if it works (about 75% of the time)--can be quite magical. For example, an employee may surface a long-ago incident, disregarded by the manager, that led to a series of misunderstandings. Sometimes the simple acknowledgment by a manager that he made a mistake can heal the breach.

Because DRCs are non-profits charging fees on a sliding scale, their services are within reach of everyone. They are widely used in family cases, small claims, and neighborhood disputes, and have been instrumental in taking some pressure off the overloaded court system. More importantly, they have introduced hundreds of people to a new way of looking at conflict resolution.

“DIY collaboration”

The collaborative approach has not yet caught on strongly with the employer community. I don’t know why. I encourage you to investigate whether there is a similar program in your local area, and try it out next time you have an employment claim that seems headed for court. You have nothing to lose and a lot to gain if you can achieve a mutually satisfactory resolution and restore a relationship, without the expense of time, emotion, and money involved in litigation.

Better still, take a conflict mediation class yourself.

Look for the buzz words “interest-based,” “facilitative,” or “collaborative.” The skills and techniques you learn will be valuable not only in resolving workplace disputes, but in your family and community as well.

After all, conflict, like the poor, is always with us. However, we can change how we manage it without resorting to litigation.

Which reminds me: Have you heard the one about the lawyer who walked into a bar . . . ?

About the author

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