Alternative dispute resolution methods

Law, Court

Introduction It is now commonplace to use Alternative Dispute Resolution (ADR) to resolve employment disputes, including discrimination cases arising under Title VII, the ADEA, and state and local legislation. Employment agreements frequently contain mandatory arbitration provisions that are legally binding and enforceable. In addition, virtually every court or administrative agency empowered to hear discrimination cases now requires mediation as part of the formal adjudication process (Spangler, 2003) . After explaining briefly these ADR techniques, it is the purpose of this paper to discuss their relative advantages and disadvantages in comparison with traditional litigation. Discussion There is a wide range of ADR techniques available to assist in resolving issues in controversy relating to workplace conflict. These include negotiation, facilitation (i. e., facilitative mediation), evaluative mediation (neutral evaluation and the " settlement judge" approach), fact-finding, mini-trials, summary trials with binding decision, arbitration, and the use of ombuds, as well as mix of these techniques (The U. S. Equal Employment Opportunity Commission, 2002). Mediation Mediation is almost always a required procedure built into the litigation process to divert cases away from the court and voluntarily selected by the parties to secure a prompt and cost-effective resolution of an employment dispute (Baker and Ali, 2002). Either way, the parties appear before a neutral third party who is commonly a lawyer familiar with employment law and/or litigation. The parties meet initially to discuss ground rules and to sign a mediation agreement that invariably contains a provision making strictly confidential all matters and proposals discussed in mediation. During the initial session, the mediator often asks each party to discuss the merits of

the case as well as potential settlement alternatives. The mediator talks separately and privately with each of the parties in order to explore in depth settlement alternatives. The mediator may repeat this process several times with or without further common sessions until an acceptable resolution of the controversy is reached. Mediation plays a useful role whenever the parties prefer settlement to protracted litigation and, better yet, allows the parties to devise a solution that suits their particular needs without the limitations imposed by the legal process (Baker and Ali, 2002) . Arbitration Arbitration is often required by legally binding provisions contained in employment contracts or regulatory requirements that are enforceable against the employee (e. g., dispute resolution rules that apply to brokerage and employment disputes in the securities industry). Once again, the arbitrator is commonly a certified neutral third party, but also may be a retired judge or law professor. This private judge is commonly familiar with employment law and/or litigation. Arbitration proceedings are modeled after court proceedings, but they are generally more streamlined and informal. As a result of recent judicial precedent, the process must afford the employee the same fundamental right that he or she would be entitled to receive if the matter had gone to court in the first place. These protections include requiring the employer to pay for virtually all of arbitration costs, including the arbitrators, when mandated by contract or regulatory provision. One key difference is that the parties a mutually select a private judge to hear the dispute, and this individual is only required to issue a brief opinion in the form of an arbitration award at the end of the proceeding. By statute in every jurisdiction, there are summary procedures for enforcement of the

arbitration award. Once confirmed, the same court can enforce the arbitration award against the non-complying party in the same manner as any other court order (Rosenblatt, 2006) . Department of Labor Pilot Test In the 1990's, the Department of Labor undertook a pilot project to test the cost effectiveness, timeliness, and general usefulness of ADR methods versus traditional methods of trial. A comparison of non-ADR and ADR cases showed that, in general, the average cost of an ADR case was less than the average cost of a non-ADR case. The estimated cost savings through the use of ADR range from $223 to $659 per case (Reich, 1994) . According to the data collected, the average duration of an ADR case was lower than the average duration of a non-ADR case. Four methods of comparison showed that the duration of an ADR case was between two and six months shorter than the duration of a non-ADR case. A regression analysis and a survey of participants also supported the conclusion that, in general, the use of ADR tended to reduce the duration of a case (Reich, 1994). The analysis of settlements produced inconsistent results. The four methods of calculated comparisons demonstrate that ADR cases, on average, resulted in higher settlements. By contrast, the regression analysis predicted that settlements from the ADR cases were lower than would have been realized if ADR had not been used. Of the survey respondents, a majority believed that the outcome would have been about the same with or without the use of ADR (Reich, 1994). The majority of the private attorneys who responded to a follow-up survey were comfortable with the use of in-house mediators and the process of mediation. In general, they believed that they saved resources and resolved the cases more quickly through the ADR program

(Reich, 1994) . A Recent ADR Study In late 2002, the Dispute Resolution Journal published and article concerning a laboratory study, in which graduate business students " acted as parties to simulated disputes and went through six different ADR processes, which they then evaluated according to level of satisfaction" (Cohen, C. E., & Cohen, M. E., 2002) . Although this simulated study had several limitations, the results supported the theory that control over the process and outcome is quite relevant to satisfaction with ADR. According to Cohen and Cohen, " the processes in which the student subjects had the most control over both the process and the outcome (i. e., negotiation, mediation and med-arb) were rated higher than the processes in which control was in the hands of a third party (i. e., peer review and arbitration)" (2002). The authors also pointed out the fact that the med-arb exercise was rated higher than the mediation excercise. An explanation of this may be due to the fact that " med-arb allows the parties the opportunity to settle their dispute, while still providing an opportunity for an arbitrator to issue a final and binding award in the event that the parties cannot reach an agreed settlement" (Cohen, C. E., & Cohen, M. E., 2002). It is also suggested that the preference for med-arb was due to increased level in confidence, as it was done towards the end of the course. Cohen and Cohen conclude: " In summary, the relationship between control of the process and the outcome and the satisfaction of the student subjects was significant. This suggests that actual users might reach the same conclusion. If that is so, to the extent that ADR systems can be designed or altered to include processes that offer greater control prior to steps that provide for a final and binding decision, the better actual users may feel about them. It is

noteworthy that the benefits of closure from a final, binding decision may not be reflected in the satisfaction levels of the student subjects. These benefits may be better measured against alternative processes that provide for closure, such as litigation" (2002) . The evidence of the results can according to the authors, be used as a framework for new ADR designs. Recent Policy Changes A growing number of companies are requiring that employees with grievances pursue alternative dispute resolution (ADR), in which differences are quickly decided by an arbitration board instead of through a lawsuit. Robert Mead, senior vice president of the American Arbitration Association , a New York-based nonprofit group that coordinates arbitration cases, announced in 2002 changes to its rules to provide additional safeguards for employees involved in the arbitration process. " Several recent state and federal court decisions as well as a U. S. Supreme Court decision, Circuit City Stores, Inc. v. Saint Clair Adams , have examined due process and equity in the employment area. In an ongoing commitment to fairness in our employment arbitration cases, the AAA will modify its rules to reflect these case law developments," said the Association's Senior Vice President, Robert E. Meade (2002) . " The primary changes require the employer to deposit the full amount of the anticipated compensation for the arbitrator, unless the employee chooses to pay a portion, and cap the filing fee for the employee at $125 for employer-promulgated plans" (2002) . The modifications also include changes in the administrative fees, as well as in the arbitrator's compensation . ADR and Litigation According to an article in Missouri Lawyers Weekly, in recent years, the courts have favored the use of mediation and arbitration to resolve employment disputes. Not only is

litigation extremely expensive and time-consuming, but the courts are also " ruling on the merits of the underlying legal dispute without affording the parties a trial before a jury. Employers are well aware of this trend and commonly file motions for summary judgment in which they ask the court to resolve the underlying dispute based on legal principles as if all of the evidence had been presented in court" (James, 2006). In reality, the evidence considered by the trial judge consists primarily of " self-serving affidavits, business records, and depositions offered by both sides as a preview of the evidence at trial" (James, 2006) . James says that: " Due to their heavy caseload, trial courts and other tribunals hearing employment cases are routinely granting summary judgment motions in favor of the employer". It is not only very expensive to assemble evidence and legal arguments to defeat a motion for summary judgment, but employers are refusing to discuss settlement until the employee defeats this motion. Even if successful, there are many other legal barriers before an employee is permitted to present his or her case to a jury. In addition, post-trial motions and appeals make litigation all the more frustrating, expensive and time-consuming. " Arbitrators are more reluctant to entertain and grant summary judgment because their basic mandate is to be fairness to all parties, including the complaining employee", says James, " and it is in their own economic interest to hear the matter to its conclusion through hearing or settlement" (2006). Evaluation The procedures and techniques discussed above are the most commonly employed methods of ADR. If mediation fails, the parties may proceed with binding arbitration. The goal with each type of ADR is for the parties to find the most effective way of resolving their dispute

without resorting to litigation. Despite its success over the past three decades, ADR is not the appropriate choice for all disputants or all legal disputes. Many individuals and entities still resist ADR because it lacks the substantive, procedural, and evidentiary protections available in formal civil litigation. For example, parties to ADR typically waive their rights to object to evidence that might be deemed inadmissible under the rules of court. If a disputant believes that he or she would be sacrificing too many rights and protections by waiving the formalities of civil litigation, ADR will not be the appropriate method of dispute resolution. ADR processes, like litigation processes, are difficult to evaluate. Litigation processes have seldom been evaluated, except in regards to delay, appeal and filing rates. There is limited data to indicate litigant satisfaction, compliance with outcomes, access, party participation or the timing or private costs of litigation processes. Disputes which come or are referred to ADR or which proceed to litigation are varied. Some are more or less open to settlement. In addition, there are difficulties in comparing the efficiency or otherwise of ADR as compared with litigation processes. These difficulties arise because the general benefits of ADR and/or litigation are difficult to measure. Although this research provided somewhat inconsistent results in certain areas, they all agreed upon that mediation and arbitration save businesses time and money in resolving disputes, with greater control over outcomes and confidentiality (James, 2006) . While arbitration will never replace litigation, it does provide a cost effective, time-effective adjudication method. Properly run, arbitration can provide parties with similar or better legal decision-making than the court system without the hangover that result from tight

court budgets and the resulting reduced legal services (Reich, 1994) . ADR may also be better suited and a more cost effective alternative in certain types of cases. For example, ADR can be well suited to resolve large and complex cases. With ADR the parties can select as mediator or arbitrator, a professional with special technical or scientific expertise in the subject area of dispute or with general expertise in managing the arbitration of complex cases. While some studies have evaluated ADR programs related to the U. S. courts and tribunals, more research is needed in this area.

Recommendations In the current legal environment, it is advisable to be very cautious about litigation and, at least, be willing to consider the use of mediation or arbitration as a supplement or alternative to litigation. Even when the client is interested in ADR, the employer and/or its lawyers may not be willing to divert the dispute away from the courts. More often than not, however, ADR is an option worth exploring or proposing and often provides a cost-effective and relatively expeditious alternative to traditional litigation. ADR can be less expensive than litigation where agreement is reached. The Department of Labor Pilot Test (1994) , showed that the average cost of an ADR case was almost always lower that litigation. Although most research favors ADR as an alternative to litigation, it is worth noticing that ADR can make dispute resolution more expensive if there is no agreement and the matter is then litigated. In those cases, the costs of ADR can be an additional component, unless the ADR process has, for example, narrowed the issues, reduced the need for pre-trial processes, or contributed to a shorter hearing. ADR may also be better suited and a more cost effective alternative in certain types of cases. For example, ADR can be

appropriate to resolve large and complex cases. With ADR the parties can select as mediator or arbitrator, a professional with special technical or scientific expertise in the subject area of dispute or with general expertise in managing the arbitration of complex cases. ADR can in most cases solve these cases with faster, less costly, and with a higher degree of finality. While some studies have evaluated ADR programs related to the U. S. courts and tribunals, more research is needed in this area. The aspect of process and outcome has also shown to be major factors, which are relevant to satisfaction with ADR. These factors can be used as a framework for future ADR designs, where greater control over the process can provide a more satisfactory final decision. In my opinion, mediation is, if possible, the preferred method in regards to dispute resolution. One major reason for this decision is the benefit of resolving employer/employee disputes without risking serious disruption in the operation of the organization. At the same time, mediation gives the employees a speedy and less costly means of obtaining closure. The objective of mediation employment disputes, rather than going to court, is to preserve the working relationship between employer and employee as much as reasonably possible under trying circumstances. Mediation also generally provides a more satisfactory outcome than going to court; moreover it is less confrontational and is more user-friendly. It is much cheaper than traditional litigation and it achieves finality of results much faster (cases are decided much more quickly, and there is no appeal process). Since rational decisions are made by neutral professionals with subject-matter expertise, the expensive and long-drawn (often years) litigation process can be avoided. Conclusion In summary,

Alternative Dispute Resolution (ADR) and conflict prevention have become popular in recent years because they are timely, more efficient, and more cost-effective than the traditional and formal systems. The use of ADR also tends to repair or improve the overall relationship between the parties because the " focus is largely on the community's or disputants' interests, while litigation focuses on positions" (Burger, Gonzales and Ray, 2006) . In addition, the parties create the agreement or solution themselves and are generally more committed to the agreement than when a judge enforces a solution. ADR and conflict prevention processes also can allow the parties to develop a more flexible or creative solution than is generally possible in court or formal hearings and appeals. Alternate dispute resolution is a welcome alternative to the usual remedies for handling complaint within business law. There may be a few more years of " shaking out" before ADR is completely accepted, but professional organizations are making sure that ADR is here to stay. References Baker, C. M., & Ali, A. H. (2002). A cross-comparison of institutional mediation rules. Dispute Resolution Journal, p. 13. Retrieved October 6, 2006, from http://findarticles. com/p/articles/mi_qa3923/is_200205/ai_n9060837 Burger, K. & Gonzales, J., & Ray, A. (2006, May 1). Experts offer tips on effective ADR programs. LRP Publications, Federal EEO Advisor. 9, (4). [Online]. Available: http://web. lexis-nexis. com. ezproxy. umuc. edu/universe/document? _m= 9db9711be508e2099c2665300aa1e159&_docnum= 13&wchp= dGLbVzb-zSkVb&_md5= cd7f26798260ad804063cdcd2c0634dc Cohen, C. E., & Cohen, M. E. (2002, Nov. – 2003, Jan.). Relative satisfaction with ADR: Some empirical evidence. Dispute Resolution Journal, p. 4. Retrieved October 6,

2006, from http://www. findarticles. com/p/articles/mi_qa3923/is_200211/ai_n9339212 James. W. F. (2006, July 3). Alternate dispute resolution and mediation resolves disputes more effectively and efficiently. Missouri Lawyers Weekly. 1280 words [Online]. Retrieved October 6, 2006, from http://web. lexis-nexis. com. ezproxy. umuc. edu/universe/document? _m= 13c7d1771276c1f6d725880c0d44dfbf&_docnum= 1&wchp= dGLbVzb-zSkVb&_md5= 529a1ed9a2513f133e087d55051a7601 Meade. R. (2002, October). American Arbitration Association announces changes aimed at fairness for employees in arbitration. The American Arbitration Association (AAA). (AAA Pressroom). Retrieved November 11, 2006, from http://www. adr. org/sp. asp? id= 21969 Reich, R. B. Philadelphia Mediation Pilot Test. The U. S. Department of Labor. (Office of the Assistant Secretary for Policy (OASP)). (1994). Retrieved November 12, 2006, from www. ncjrs. gov/pdffiles1/ojjdp/191213. pdf Rosenblatt, I. (2006, June 19). Difference Between Mediation, Arbitration ADR Procedures. San Fernando Valley Business Journal. 1353 words [Online]. Available: http://web. lexis-nexis. com. ezproxy. umuc. edu/universe/document? _m= 9e37965f73fe3dd7678a19e03ff56542&_docnum= 1&wchp= dGLbVzz-zSkVA&_md5= 14216530a6c2f413b4d2a032ac6f855e The U. S. Equal Employment Opportunity Commission. (2002). Types of ADR Techniques. Retreived October 4, 2006, from http://www. eeoc. gov/federal/adr/typesofadr. html