Justice on the Job

By Joshua M. Javits

Last week, a federal appeals court affirmed a jury award giving a Metro North Railroad employee 25 years in "advance" pay (full pay without working until he reaches retirement age) in a case of retaliation in which not even he but another employee was discriminated against. Multi-million dollar verdicts in employment law cases are now common. The vast numbers of employment lawsuits being filed are overwhelming companies and the courts.

Internal company processes, including mediation, ombudsman, fact finding, arbitration and peer review, are a viable alternative. They enable companies and their employees to resolve disputes peaceably and equitably and avoid years of public, expensive, disruptive and unconstructive litigation. Many companies have adopted such programs. They are designed with good intentions, but tend to be left on the shelf, rather than being actively applied. One reason is that the plans are too inflexible and not suited to handling the wide variety, dynamics and personalities involved in workplace conflicts. Another reason is that current law discourages the adoption of such procedures by offering litigants a "second bite at the apple" even after a fair hearing under the alternative process. Managing disputes more effectively and legislative reform should be a priority.

Workplace disputes can quickly sour morale, lead to violence, produce a whopper of a lawsuit (including poor publicity, unpredictable jury verdicts and punitive damages), and undermine the trust and communication essential to a productive and harmonious workplace.

The traditional avenues of worker recourse have been employee protective legislation on the one hand or unionization on the other. But with the continued shrinkage of government and unions representing only 10% of the private sector (and anticipated to decline to 5% by 2000), where will workers turn to redress grievances and vent frustrations? In France, as we saw last year, it's the streets. Here in America it has been, increasingly, the court system. But the courts are proving ill-suited to the task.

Courts and government agencies are being overwhelmed by over 200,000 employment discrimination filings each year, increasing annually at a rate of about 25%. Legal costs alone of employment lawsuits average $100,000 for each side. Beside the high costs and delays, the legal system is distanced from the world of work, exalting generic legalisms over workplace realities. It is a win-lose adversarial process which actually exacerbates workplace conflict. It produces hostility and mistrust in an environment where people must continue to work together. It dispenses inflexible remedies which most often fail to address the underlying problems.

Ostensibly employment cases are based on allegations of discrimination (race, sex, age, religious, national origin or disability) or unlawful discharge (contrary to employment expectations or public policy). But a deeper look reveals that they are really work complaints about demotions, promotions, pay, transfers, evaluations and ability. They are cases ranging from why Jack was promoted over Jill to whether Bill was really fired because he is a Druid or because he cursed the boss. At the core of these suits is a search for fairness in the workplace.

There is a better way to obtain justice on the job and that is a workplace-based system of redress. Such systems, rather than being "one size fits all," like litigation, are less formal dispute resolution methods which can be adapted to the particular industry, company and workforce.

They offer a way to resolve actual problems rather than the tortured traditional, legalistic path which seeks to fit a specific work problem into a legal box. The law is layered on processes and remedies maybe suited to grand public policy purposes but mostly fail to resolve actual workplace problems, whether it be a raise, a promotion or simply fair treatment. These alternative processes address the problem and work through those directly involved, not outside expensive lawyers or divert the time of upper level management as with litigation. They can also address the great variety of job related complaints that deeply effect employment but which may not transgress employment statutes.

The advantages of these processes are speed of resolution, low cost, (average cost of arbitration is $3,000), minimal disruption to employee and employer, and a sensitivity to workplace relationships, operating requirements and market concerns.

Critics assert that, absent a union representative or plaintiff's attorney employees will be disadvantaged. However, due process protections such as the right to representation, mutual selection of the neutral and a broad range of remedies can be incorporated in these processes.

Why would employers voluntarily choose a system where employees could, on demand, take a shot at the boss? First, workplace dispute resolution systems are quicker, cheaper, more private, predictable (versus juries), and pragmatic than litigation. Second, they expose poor supervision and address detrimental interpersonal friction. Third, they reassure valuable employees, including managers, that they will be treated fairly, thereby reducing turnover and enhancing productivity and morale.

What is needed is legislation to establish a framework for basic fairness in workplace dispute resolution processes, which, if adopted by companies, would be deferred to by courts and government agencies. Currently, deferral is ad hoc at best and companies are unwilling to offer a resolution process that can be simply ignored by an unsuccessful complainant.

Consistent with continued economic deregulation, government downsizing, and devolution of federal authority to localities, the workplace itself needs to be fashioned as a responsible community for the fair treatment of its members, rather than as a trigger point for a distant battle field of government agencies and the courts. Employment disputes should be turned over to workplace dispute resolution procedures and for fair, quick and cost effective treatment.

While Democrats are lip synching the Republican composed chorus against big government, their object of belt-tightening is Executive and Legislative branch largesse. Yet it could be argued that it is the 3rd branch of government, the judiciary, that is in greatest need of a diet, and that its tentacles and ensnare society in the greatest unchecked and unwarranted governmental intrusion into the private sector.

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