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Narrative

Effective Alternative Dispute Resolution Strategies in Employment Litigation Matters

Most employment litigation is resolved through alternative dispute resolution. There are three types of alternative dispute resolution: (1) negotiations, (2) mediations (or settlement conferences, depending on the jurisdiction), and (3) arbitrations (if there is an enforceable arbitration agreement). Alternative dispute resolution has become such an integral party of litigation that many jurisdictions will require it as part of an early resolution program or as a necessary step in the litigation process through a scheduling order.

There are two main reasons why alternative dispute resolution is particularly beneficial to the retail, restaurant, and hospitality industry: public relations and costs. Litigation is public and expensive. Due to the fee shifting nature and the accrual of back pay in employment claims, they typically become more expensive with time. Alternative dispute resolution offers the best opportunity to resolve a dispute or lawsuit with as little public exposure and cost as possible. Pre-pandemic, employment lawsuits involving a defendant in the industry—due to the "me-too" movement—were very noteworthy in the media. Post-pandemic, there are few industries who have suffered more than the retail, restaurant, and hospitality industry. The industry has seen layoffs, furloughs, and even permanent closures. Consequently, claims in the industry are generally down for the time being, and the industry has been less of a target by the media. Regardless, however, no one in the industry can afford negative public relations, nor additional costs particularly in these precarious times, so alternative dispute resolution continues to remain the most effective tool in the current environment to reduce public exposure and costs from litigation.

I. STRATEGIES.

1. Negotiations.

The cheapest, most informal, and accommodating form of alternative dispute resolution is negotiations. There is no need for a third-party neutral, and negotiations can begin or end at any time. Negotiations are typically between counsel, the insurer, the

parties, or any combination of the aforementioned. Negotiations are the cheapest form of alternative dispute resolution. The only costs for negotiations are counsel's time. It is not binding.

However, because there is no third-party neutral, disagreements and emotions of the respective parties may create an impasse. Due to the nature of the employer-employee relationship and the allegations typically involved in employment litigation, the sentiment between the parties is oftentimes extremely fragile, requiring a third-party neutral to assist in the potential resolution process. In addition, it is not uncommon for employees in the retail, restaurant, and hospitality industry to work together closely, interface often, and socialize outside of work, compounding the difficulty in obtaining early resolution without a third-party neutral. Lastly, negotiations rely on the counsel and parties trusting the information being provided by each other to reach a resolution, which, when the relationship between the parties is so strained, is difficult to do. If you cannot garner or earn the trust of opposing counsel and/or the plaintiff, mediation is likely the best route for alternative dispute resolution. Negotiations are best in low-dollar situations, when the facts are not hotly disputed, and emotions are low, or where the respective counsel have a very strong, trusting relationship such that the intervention of a mediator or judge is not necessary.

2. Mediations.

Mediations are confidential and can either be binding or nonbinding, but most often, are nonbinding. The mediator will act as a third party neutral to facilitate resolution. Due to the special nature of the industry, it is recommended that the parties use a mediator who is familiar with the industry. The mediator usually requires an hourly fee unless the mediation is a part of a settlement conference before a magistrate judge. There is an obligation of good faith and typically the parties (and insurer) are required to attend in person. Mediations require the coordination of the parties' and representatives' schedules and typically last anywhere from a half day to a whole day. In my experience, due to the sensitive nature of employment litigation and the social nature of the retail, restaurant, and hospitality industry, mediation is my preferred method of alternative dispute resolution.

Disputes in this industry can involve co-workers, supervisors and subordinates, and any other combination. However, regardless of the levels of employees at issue, most commonly, there are vast differences in narratives between the parties. Mediations provide a platform for counsel to present a case in a safe, nonbinding way. When negotiations fail, mediations should be used as a vehicle for advocacy because defense counsel can provide a presentation of witnesses' statements and evidence to convince the mediator, opposing counsel, and the plaintiff of problems with the lawsuit. Alternatively, it can also be a vehicle for the defendant to discover the information that might cause a reevaluation of the value of the case and a new or different view toward resolving the case. For a mediation to be most effective, it is advisable for defense counsel to do their due diligence on the front end by interviewing witnesses, reviewing social media and electronic communications, and gathering affidavits and/or employment documents to bolster defendant's defense.

3. Arbitrations.

Arbitrations are less common than negotiations and mediations because an enforceable arbitration agreement is typically required. Arbitration agreements typically arise from an employment contract of some type or a restrictive covenant agreement. Arbitrations require the most time and expense. In addition, if a lawsuit is being pursued, the defendant will need to move to compel arbitration through motion practice based on an arbitration agreement. Motion practice is expensive and timely, which could cause further delays and additional expenses.

Furthermore, depending on the type of arbitration used, the actual arbitration might include the right to discovery and motion practice, which will increase time and expense. Arbitrations are different than the negotiations or mediation options because if, as part of the process, they do not yield a resolution of the matter, the parties will put forth their respective cases and an arbitrator will make a binding decision on the merits. Arbitrations are binding and do not usually include appeal rights. In addition, arbitrations are more expensive than negotiations or mediation because the parties must pay an arbitrator for pre-hearing proceedings, the arbitration itself and for the time the arbitrator spends in rendering a decision.

II. CASE SCENARIOS.

1. Heinous Facts/Hotly Disputed Claims/Using Inability to Pay to the Defendant's Advantage

The plaintiff was a female and a former housekeeper of a motel, and the accusations were against a male co-owner of the motel. The plaintiff alleged that she and previous housekeepers had been sexually harassed by the co-owner and that the motel was also being used as a prostitution ring. The co-owner vehemently denied any wrongdoing and claimed that the housekeeper was terminated as a result of a local lockdown order due to the pandemic.

In addition to the substantive defenses, there was also an argument that the motel did not have the requisite number of employees to implicate the federal and state discrimination statutes. An attempt was made to enter into negotiations with opposing counsel. Negotiations were attempted, and opposing counsel was advised as to the substantive and procedural defenses, advised that there was no insurance, and the motel's business had been significantly impacted by the pandemic. Regardless of this, due to the heinous nature of the allegations, opposing counsel made an unreasonable monetary demand and stated that opposing counsel believed that there was a management entity, and/or co-related entities, that would cause the defendant to have the requisite number of employees to implicate the federal and state discrimination statutes. It was clear that views of the case were too different to find resolution through negotiations.

Due to the motel's desire to reduce costs and avoid publicity, the motel elected to attempt mediation, and opposing counsel and the plaintiff agreed. The strategy was to present the motel's case during mediation. The motel's PPP loan application was used to

show the number of employees, the modest income of the motel (inability to pay), and that there were no related or management entities to help increase the number of employees. The former housekeepers were interviewed by defense counsel, and they provided affidavits stating that they were not sexually harassed by the male co-owner. It was also discovered that the co-owner called local law enforcement to request that the plaintiff leave the property after her termination. The police report revealed that when the police interviewed the plaintiff, she admitted that she was terminated due to the pandemic and did not report any sexual harassment to the police. With the help of the mediator and due to the presentation of previously mentioned evidence, the case was successfully mediated and resolved very early at a nominal cost, despite the heinous facts and hotly disputed claims.

2. High Publicity Cases/Joint Public Relations Statement As Condition of Settlement

The plaintiff accused her former co-worker of sexual harassment at a very popular and famous restaurant. The defendant was unable to deny the interactions between the co-workers. However, for employer liability of a co-worker's alleged harassment in the jurisdiction at issue, there must have been notice to someone at the employer who could reasonably be expected to refer the complaint and/or conduct to management. Here, at least from the employer's perspective, there was no notice to anyone at the employer who could reasonably be expected to refer the complaint and/or conduct to management. The plaintiff was sexually assaulted at her home, and the facts were gruesome. In addition, there were pictures and texts to substantiate the sexual assault. Although liability for sexual harassment was questionable based on the lack of notice, the value of this lawsuit was high because it would have easily shocked the senses of potential jurors and the public at large. Furthermore, this lawsuit was filed in a jurisdiction that did not have caps on emotional distress damages or punitive damages.

After the completion of discovery, the judge required the parties to attend a settlement conference. The magistrate judge helped resolve the case by not only bridging the monetary gap between the parties, but by also obtaining an agreed-upon joint public relations statement, stating that the parties had resolved the case, that the restaurant was saddened that this happened to a former employee, and that the restaurant is putting additional procedures, reporting, and training in place so that circumstances like this never happen again.

3. Class-Actions/Unemotional Claims/Avoidance of Any Further Expense

A class action was filed in a jurisdiction that required predictive scheduling for fast-serve restaurants. The defendant-restaurant, although substantially compliant, failed to follow the requirements for a large number of employees. Based on the number of class members and look-back period, and the corresponding potential statutory penalties, the damage exposure amounted to millions. Based on the high damage exposure of the case and because business was severely curtailed due to the pandemic, the defendant wanted to resolve this case as cost efficiently as possible, even avoiding mediation costs.

Counsel agreed to obtain an order staying the case and extending applicable class action deadlines to allow the parties to negotiate to attempt to resolve the case. The counsel agreed to informally exchange a sampling of documents and the defendant prepared a class list. Counsel worked collaboratively due to the unemotional, but technical, allegations at issue and were able to agree to a settlement. Counsel also jointly prepared settlement approval documents and obtained final approval of the settlement from the court.

III. **CONCLUSION.**

As the above-strategies and case scenarios demonstrate, each case is different based on the circumstances. Consequently, a thorough analysis is needed based on the characteristics of the lawsuit, the parties, the industry, and the allegations to determine the best course for alternative dispute resolution.