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Hot Topic "Future Worker Management"

STATEMENT

On

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Submitted by

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To

THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

U.S. Department of Labor

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I. Statement of Interest

Fujitsu America, Inc. ("Fujitsu") is pleased to submit the following comments to the Commission on the Future of Worker-Management Relations (the "Commission") concerning alternative forms of dispute resolution ("ADR") at the workplace and in the application of employment laws.

In the United States, Fujitsu develops, manufactures, markets, and supports a broad range of high-technology products. In the United States, Fujitsu and its subsidiaries and affiliates employ approximately 3,500 persons working at scores of facilities, including three manufacturing complexes and several research and development centers.

Given all the challenges we face as a large employer and that we and our employees face in succeeding in the computer industry, we firmly believe that ADR — and in particular, binding arbitration — is the best way of resolving the inevitable disputes that arise between an employer and its employees.

II. The Employment Litigation Explosion in America: The Magnitude of the Problem

Resolution of employment law disputes through a judicial or administrative forum has not functioned well. At the end of the 1992, more than 100,000 employment discrimination cases were administratively backlogged at the EEOC and state and local agencies. During the past two decades employment discrimination cases have increased 2,116 percent, and nearly one-third of the federal courts' current case load is comprised of suits alleging employment discrimination or violation of civil rights.

At the same time, the delay in reaching trial can be substantial. In one major metropolitan area, the state court system is reportedly experiencing delays as long as eight years.

Our average cost of litigating employment disputes is six figures. This amount merely represents attorneys' fees, and does not include the cost of lost work time, management time, or the cost of settlements and jury awards.

The transaction costs — in terms of time and dollars — for resolving employment law disputes through the court system have become intolerable for employers and employees alike.

The cost of litigating employment law claims before a court has evolved to where claims for relatively small sums are no longer adjudicated on their merits. A completely frivolous claim might be settled for the same amount as a legitimate claim. Some claimants recover more than the merits of their claim would justify, while others recover less.

The immense investment of time required by the court system is daunting to both parties. Employers routinely invest tremendous hours of employee time in complying with the demands of litigation.

In addition, the time between when a claim is filed and its adjudication creates ongoing uncertainty for employers that can dampen morale of remaining employees, and complicate financial disclosure and planning matters for the employer.

The time demanded for judicial resolution of an employment law dispute creates unnecessarily intense pressure on employees with employment law grievances. Because of the protracted nature of a court action, employees understand that the filing of a complaint against their employer will result in their being in an adversary relationship with the employer for a significant period of time. The discomfort created by that expectation tends to intimidate many employees, and cause them to defer

lodging a complaint against their employer until the dispute reaches an unnecessarily high degree of intolerance. Disputes that, if addressed earlier on could have been resolved with minimal tension, end up being resolved in a highly confrontational manner.

The adverse consequences of resolving employment law disputes through the judicial system has resulted in employers and employees seeking alternatives. An alternative chosen by many is binding arbitration.

III. The Business Community Position on ADR

A growing number of major companies have committed to alternative dispute resolution as a mechanism from eliminating litigation and legal expenses, minimizing unfavorable publicity, resolving disputes expeditiously, promoting positive employee morale, and fostering labor-management cooperation.

Currently, well more than 500,000 employees nationwide are subject to employer-initiated arbitration agreements. Typically, if there is an employment law dispute, it is presented to a neutral arbitrator whose decision is *equally* binding on both the employee *and* the company. Also typically, the arbitrator is a professional accredited by the American Arbitration Association, the Federal Mediation and Conciliation Service, and/or the Judicial Arbitration & Mediation Services.

Nonetheless, legislation is now under consideration on Capitol Hill — the ill-named, ill-defined, and equally ill-advised S.2012, "The Protection from Coercive Employment Agreements Act of 1994," and H.R. 4981, "The Civil Rights Procedures Protection Act" — which would make employer-initiated arbitration agreements illegal.

The American Trial Lawyers' Association — the plaintiffs' bar — has bottled up tort reform on Capitol Hill for 14 years — despite overwhelming public, business, and Administration support. This same lobby — comprised of 100,000 plaintiffs' lawyers — is now taking the *offensive* — trying to ban employer-initiated arbitration agreements, in large part because they effectively decrease litigation, legal fees, and these lawyers' common, contingency-fee-based attacks on the business community.

This legislation would wipe out an employment practice now in place which: (1) positively affects both hundreds of companies and hundreds of thousands of employees; (2) often has been championed by employee representatives and collectively bargained; (3) is — in many, many respects — both pro-employer *and* pro-employee; and (4) is effectively and professionally administered by hundreds of qualified, certified, objective, and experienced arbitrators.

IV. Comments on the Commission's Fact Finding Report

The high cost of resolving employment law disputes through litigation has resulted in inequitable consequences for both employers and employees. The Commission notes in its May 1994 Fact Finding Report (the "Report") that for every dollar paid to a deserving claimant, another dollar must be expended on attorneys' fees and other costs of handling meritorious and non-meritorious claims (p. 110)[1]. The Report acknowledges that the source cited for this admittedly conservative estimate actually found the compensation-legal costs ratio to be "significantly worse than fifty-fifty." Id. However, both these figures grossly underestimate reality.

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[1] All citations are to the Commission on the Future of Worker-Management Relations, Fact Finding Report (May 1994), unless indicated otherwise.

Based on Fujitsu's experience, and that of other major corporations with which we are familiar, the amount of compensation paid to meritorious claimants would be only one or two percent of the total amount expended in resolving all employment-related disputes. In other words, for every $1 paid a meritorious complainant, approximately $50-$100 has been spent on attorneys' fees and on settling claims with marginal or no merit. Meritorious claims generally are resolved internally and quickly. If the facts are against you, what point is there in contesting the issue? Not only will the case be lost, but litigation of the case can result in employees developing a mistrust of management.

The Report properly recognizes that to require employees to resolve their employment law disputes through litigation works against low-paid workers (pp 112-113). The Report found that a preponderance of terminated employees seeking to initiate a lawsuit are executives and professionals. Id. The reason cited for this phenomenon is that individuals terminated from high-paying jobs provide the potential for contingency fees large enough to justify the investment of attorney time necessary to prosecute the case. Id. To provide a forum for all employees, a less costly dispute resolution alternative must be available.

The Commission expresses concern that neutrals who resolve claims must have sufficient substantive expertise to warrant deference to their judgment (pp 113-114). What substantive experience does a jury have? Yet we defer to their judgment. If the issue is substantive expertise, both employers and employees are better off with an arbitrator who has experience in the relevant industry and employment law. Arbitration could easily accommodate a requirement that arbitrators possess a requisite level of expertise. Our current judicial system would not tolerate imposing such a requirement on potential jurors for employment law cases.

Finally, the Commission notes the prevalence of six- and seven-figure awards in employment litigation cases (p. 113). The Commission also recognizes the adverse consequences of such awards, such as employers adopting unduly defensive personnel practices, and the perception of the judicial system as a lottery rather than a dispenser of justice. Id. In this lottery, the employer is severely handicapped. An employer's odds of losing a case and the unpredictability of the award are well-known to settlement judges and trial judges.

The only predictable result of the courts are enormous attorneys' fees to employers and a substantial commitment of time for all litigants. These weaknesses of the system are routinely exploited by plaintiff lawyers who create enormous discovery burdens on employers as a pressure tactic to extract settlements based on litigation costs if nothing else. In our experience, various useful motions such as demurrers, summary judgment, and requests for exclusion of evidence are routinely denied — in order to force employers to settle rather than face the risk of trial. All of these factors, taken together with the cost of litigating a controversy, have resulted in employers searching earnestly for an alternative forum to resolve employment law disputes. For many employers, ADR represents the only rational option.

V. Fujitsu's ADR Program

At Fujitsu, we employ the best people we can, and give them the means to do their best work. Anything less would translate into an inability to successfully compete in the marketplace. Like any other responsible employer, we have absolutely no interest in instituting, maintaining or promoting any system, practices or policies that discriminate against or harass our employees. We do, however,

have an interest in resolving employment law claims in an expeditious and equitable manner, and we recognize that this is in all parties' interests.

Most employers have adopted ADR only recently. Fujitsu's ADR program has been in place only two years. We believe the most effective form of ADR is binding arbitration. Fujitsu adopted binding arbitration for all employment disputes based on claims of wrongful termination, discrimination, and harassment. Fujitsu also has agreed to resolve claims brought against employees in this forum, with the exception of claims related to criminal activity, of which trade secret theft is one example.

Under Fujitsu's ADR program, the arbitrator is mutually selected from the Federal Mediation and Conciliation Service or a similar state panel familiar with employment law.

To further ensure due process, the arbitration process is structured to closely resemble the applicable state code of civil procedure with the filing of complaints, answers, and opportunities for discovery and pre-trial motions.

The fair and prompt resolution of employment disputes is important to both employers and employees. Fujitsu's arbitration policy is set up to resolve disputes within a year at most, and has the ability to process disputes in as little as four months.

VI. Summary of Advantages of ADR

The key advantages of the ADR process are savings of time and cost, greater predictability of result, and assurance of appropriate confidentiality. Both sides desire to get the dispute behind them and get on with their lives and their business. The prompt resolution of disputes is particularly

necessary where the employee is still employed and has filed a claim. The sooner that an employee and that employee's department are free from the spotlight of litigation, the better for everyone.

Less time, of course, means less costs. Arbitration generally limits the scope of discovery to relevant documents and relevant areas of inquiry, and it discourages fishing expeditions. The resulting lower cost of arbitration has advantages to both sides. The employer's reduced attorneys' fees under arbitration not only maintains the health of the employer's business, it also encourages settlement. In negotiations, employers commonly will make offers based on a litigation budget. The less money paid to attorneys, the more money will be available to pay a claimant.

In addition, the lesser amount of attorney time required of plaintiff attorneys should enable claimants to negotiate lower contingency fees than the 40 percent that is common today. Lower contingency fee payments mean more money in the hands of successful claimants. Lower costs also provide more employees access to the dispute resolution process.

Moreover, where appropriate, arbitration can provide confidentiality. This is particularly important, for example, in harassment cases where both the victim and the accused wish to avoid the publicity which can result from open court, and where the accused individual can suffer dire long-term consequences simply as a result of the accusation, even when there is no finding of guilt.

Furthermore, in many cases, providing just such a measure of confidentiality may encourage victims to come forward where they otherwise would not, which ultimately assures a much wider protection of employee rights.

VII. The Specific Advantages of ADR

(a) *Reduced Litigation Costs*

It is undeniable that arbitration is a less costly method of resolving problems in the workplace than traditional litigation. In a study on all court-supervised arbitration, the Institute for Civil Justice of the Rand Corporation concluded that arbitration resulted in a 20 percent cost savings to the parties. In the employment context, recent arbitration programs have resulted in *at least* a 50 percent reduction in litigation costs. Cost savings is clearly one of the major advantages of arbitration.

(b) *Faster Resolutions*

Traditional litigation is a time-consuming process. Litigation, including an appeal, can range from three-to-eight years before a final decision is rendered. Arbitration offers faster resolutions. The Institute for Civil Justice of the Rand Corporation concluded that the average processing time from the initial complaint until an arbitrator's decision is 8.6 months. In almost all cases, arbitrations are resolved in under a year which, compared with traditional litigation, is dramatically faster.

(c) *Greater Privacy*

Although there is an obligation for a certain degree of public distribution of an arbitration award, there is no question that arbitration offers a greater potential for privacy than the public court room. Traditional litigation is often highly publicized, depending upon the nature of the dispute and the parties involved. In contrast, having a matter resolved by a neutral arbitrator is dramatically more private and focused, and less stressful and/or psychologically detrimental to the individuals involved.

(d) *More Objectivity*

Currently, the jury is a prominent feature of plaintiff attorneys' strategies in wrongful discharge and civil rights litigation in the United States, no matter how marginal or frivolous a claim. Compared

with most other areas of the law, juries in wrongful discharge and civil rights litigation are less predictable. Moreover, they tend to be less objective and less capable of addressing complex legal issues than a trained and experienced arbitrator. Furthermore, a jury often identifies very closely with the employee plaintiff because, indeed, most jurors are employees. Shifting the decision-making to an arbitrator who is a professional with a high degree of knowledge and experience in analyzing workplace disputes, results in a fairer resolution and greater predictability of the outcome.

(e) ***Reduced Bias***

The ADR process offers reduced bias. The ability of an arbitrator to function like a judge, and filter out some of the biases commonly associated with juries, is a significant advantage in assuring fair and equitable resolutions.

(f) ***Enhanced Settlement Potential***

ADR encourages resolution without litigation. When a more predictable system exists — and the parties know how long it will take to resolve the dispute and how much it will cost — the parties have a better understanding of what the probable results will be. As a result, it is easier for both sides to put a value on the case and resolve the matter quickly.

(g) ***Enhanced Image***

Employers who want to demonstrate to their employees that the company respects and values them and wants to protect their rights, often effectively send this message with a properly structured arbitration system that is fair and balanced, and equally assures the rights and responsibilities of both parties.

(h) *Increased Competitiveness*

The lower transaction cost of resolving disputes through ADR, rather than through litigation, together with the more rational awards made by arbitrators tend to reduce the overall cost to employers of resolving employment law disputes. As noted above — and as found by the Commission — a predominant portion of the costs involved in employment law disputes are attributable to the process, *not* to paying claims. The cost savings that arbitration affords employers enables them to allocate funds — otherwise applied to resolving employment law claims — to more productive purposes, such as pursuing more research and development, or hiring or retaining more employees. Employees share the employer's interest in remaining competitive, inasmuch as the more profitable an employer, the more job security it can provide. Furthermore, a more profitable company can provide more generous employee benefits, and such programs as profit-sharing and employee stock ownership plans will have a higher value to employees.

(i) *Increased International Competitiveness*

Binding arbitration for employment disputes is very common throughout the vast majority of industrialized countries, and it works well wherever it has been commonly implemented. Our society is the *most* litigious and the *least* arbitration-oriented of the major industrialized nations — to our great detriment. In an increasingly global economy, litigation costs are an enormous competitive disadvantage and threaten to economically strangle American business. Widespread, fair, and effective ADR programs can loosen that hold and restore or enhance competitiveness for many companies.

VIII. CONCLUSION

Our experience at Fujitsu indicates that binding arbitration is far preferable to the lengthy, costly, and burdensome judicial process for employers and employees resolving their labor and employment claims. We concur with the Commission's finding that ADR techniques, including arbitrations, are not being utilized to their full potential for resolving employment law disputes (p. 127). We continuously reevaluate Fujitsu's ADR policies and procedures in pursuit of greater efficiency and equity in resolving disputes with our valued employees, and feel ADR as a concept and a practice — already positive and effective — can only get better through experience and refinement.

In this regard, Congress, the Administration, the Commission, and other prominent policy-makers and advocates should be reluctant to impede, discourage, or defeat the widespread adoption of employer-initiated arbitration agreements, particularly at this stage when ADR is just emerging as a fair and equitable alternative to the employment law litigation explosion.

In fact, ADR has already proven to be so promising that we recommend the Commission formally endorse a national policy in favor of binding arbitration for resolution of employment disputes.

On behalf of Fujitsu, I appreciate your consideration of our views on this issue, and would be pleased to work with the Commission in developing a fair and balanced program for facilitating an expansion in the use of arbitration for resolving employment law disputes.

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