III. EEO MEDIATION AT THE EEOC

LAMONT E. STALLWORTH *
ARUP VARMA **

> In addition to demeaning the human condition, discrimination is profoundly un-American. It is contrary to the principle first inscribed in the Declaration of Independence—"All men are created equal, endowed by their Creator with the inalienable rights of Life, Liberty and the Pursuit of Happiness." These are the words that precede the founding of the United States. Thus, to treat someone else differently due to race, color or gender is an offense against, not merely the individual, not merely the state, but in fact our Creator.[1]

Introduction

The testimony of House Speaker Gingrich[2] and Equal Employment Opportunity Commission (EEOC) Chair Igasaki's acknowledgment that "discrimination in the workplace continues to be a very real and widespread problem"[3] underscores the challenge and responsibility placed upon the EEOC and other state and local EEO enforcement agencies and fair-minded employers and labor organizations to address the issue of discrimination in the workplace. The testimony of EEOC Chair Igasaki specifically recognizes

---

*Member, National Academy of Arbitrators; Professor, Institute of Human Resources and Industrial Relations, Loyola University Chicago, and Founder and Chair, Center for Employment Dispute Resolution.

**Associate Professor, Institute of Human Resources and Industrial Relations, Loyola University Chicago, and Senior Research Fellow, Center for Employment Dispute Resolution.

The authors would like to express their appreciation to Dr. Vida E. Stanius, Associate Director, Center for Employment Dispute Resolution, Ruth E. Hollemans, Center for Employment Dispute Resolution, and May Speck, graduate assistant at the Institute of Human Resources and Industrial Relations, Loyola University Chicago for their assistance in preparing this chapter. The comments and conclusions are, however, solely those of the authors.

[1]Selected Testimony on Future of EEOC for the House Committee on Education and the Workforce Subcommittee on Employer-Employee Relations: Testimony o[f] House Speaker Newt Gingrich Before the House Subcommittee on Employer-Employee Relations on "The Future Direction of the Equal Employment Opportunity Commission," March 3, 1998, 1998 Daily Lab. Rep. (BNA) (Mar. 4), No. 42:E6, E6.

[2]*Id.*

[3]Selected Testimony on Future of EEOC to the House Committee on Education and the Workforce Subcommittee on Employer-Employee Relations: Statement of Paul M. Igasaki, Chairman, U.S. Equal Employment Opportunity Commission Before the Subcommittee on Employer-Employee Committee on Education and the Workplace, U.S. House of Representatives, March 3, 1998, 1998 Daily Lab. Rep. (BNA) (Mar. 4), No. 42:E7, E7 [hereinafter cited as Igasaki].

the reality of our industrial society that unlawful discrimination still takes place in the workplace. The challenge facing the EEOC, the courts, and us as a civilized and humane society is how to design and implement effective public and private policies and strategies to fairly and efficiently address these "statutory-based issues of diversity" in a fair and cost-effective fashion.[4] In recent years public policymakers, corporations, and labor organizations have turned to various alternative dispute resolution (ADR) or appropriate dispute resolution processes, such as mediation, as holding promise to accomplish this goal of responsibly addressing conflicts and disputes related to claims of discrimination and unfair treatment in the workplace.

One of the common strategies and public policies supported by EEOC Chair Igasaki and House Speaker Gingrich is the expanded use of alternative methods of dispute resolution, specifically mediation.[5] Indeed, to underscore the congressional support for the expanded use of mediation in EEO matters, House Speaker Gingrich and Representative Fawell,[6] Chair of the House Workforce Subcommittee on Employer-Employee Relations, have conditioned President Clinton's current proposed 15 percent increase ($37 million) in the budget of the EEOC upon the expanded use of mediation and the cessation of the use of testers.

Purpose

The purpose here is to examine the development and implementation of the EEOC's voluntary EEO mediation program and to present proposed legislation, entitled the National Employment Dispute Resolution Act (NEDRA), which provides for a type of mandated or "required" mediation of EEO and other statutory-based workplace disputes applicable to federal contractors.

Specifically, an attempt is made here to examine the catalyst behind the development of the EEOC's voluntary mediation

---

[4]Statutory-based diversity disputes are defined as those controversies that may or may not have a proven unlawful discrimination basis; however, these conflicts and disputes have their root in multicultural differences. *See, e.g.*, Stallworth & Malin, *Conflicts Arising Out of Work Force Diversity*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 104. In addition, mediation may also be used effectively to resolve a wide variety of other types of employment disputes in addition to EEO disputes.

[5]*Supra* notes 1 and 3. And see comments by Representative Harris W. Fawell, in Montwieler, *Republicans Tie EEOC Budget Boost to Elimination of Initiative on Testers*, 1998 Daily Lab. Rep. (BNA) (Mar. 4), No. 42:AA1.

[6]Montwieler, *supra* note 5.

program and examine its utilization, or more specifically underutilization, of the EEOC's voluntary mediation program. Based upon an exploratory empirical study, a further attempt is made to examine some of the potential factors or barriers to using voluntary EEO mediation. The feasibility of adopting a public policy or Presidential Executive Order "directing" or "mandating" participation in EEO mediation is also explored. This proposed Presidential Executive Order and model statute can also be adopted by state and local municipalities.

EEOC's ADR Public Policy Initiative: Voluntary Mediation

As we approach year 2000 and the current era of streamlining government regulatory agencies, a number of agencies have actively sought and implemented efficiency efforts and strategies using a variety of methods. Included among these administrative regulatory agencies are the Occupational Safety and Health Administration (OSHA),[7] the National Labor Relations Board,[8] and the EEOC.[9] There have been at least six primary catalysts or factors prompting such government efficiency initiative and the promotion of ADR. These catalysts are: (1) criticism from the general public and business community,[10] (2) external statutory case law and the fear of jury damage verdicts and legal costs,[11] (3) legislation incorporating and encouraging ADR,[12] (4) government agency

---

[7]*See, e.g.*, Fleming, *Reinventing OSHA: A Progress Report,* 7 Job Safety & Health Q. 10 (Fall/Winter 1995).

[8]National Labor Relations Board, Fifty-Ninth Annual Report of the National Labor Relations Board for Fiscal Year 1994 (U.S. Gov't Printing Office 1994); *Statement by William Gould, Chairman, National Labor Relations Board on FY 1997 Authorization,* News Release, June 13, 1996.

[9]*See, e.g.*, EEOC-ADR Public Policy Statement and Case Processing Program, Pub. L. No. 102–106, 105 Stat. 1081 (1991).

[10]For examples of research critical of government enforcement agencies, *see* Gross, Broken Promise: The Subversion of U.S. Labor Relations Policy 1947–1994 (Philadelphia: Temple Univ. Press 1995); Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity (Madison: Univ. of Wis. Press 1993); Bell, Faces at the Bottom of the Well: The Permanence of Racism (New York: Basic Books 1992); Arndt, *Overworked, Ineffective: EEOC Can't Keep Up,* Chicago Tribune, Feb. 12, 1995.

[11]*See, e.g.*, Olson, The Excuse Factory: How Employment Law Is Paralyzing the American Workplace (Free Press/Martin Kessler Books 1997).

[12]The Americans with Disabilities Act (42 U.S.C. §§12101–12213) and the Civil Rights Act of 1991 (Pub. L. No. 102–166, 105 Stat. 1071 (1991)) contain provisions that expressly encourage the use such ADR processes as negotiations, mediation, and early case evaluation to resolve EEO disputes. In addition, the Judicial Improvements Act of 1990 (Pub. L. No. 101–650, 104 Stat. 5089 (1990)) authorizes experimentation with ADR in the federal district courts. And the Administration Dispute Resolution Act of 1990 (5 U.S.C. §571) requires each federal agency to adopt a policy that recognizes ADR as a means of dispute resolution and case management in adjudications, rulemaking, litigation, etc.

initiatives,[13] (5) employer-sponsored conflict management and ADR systems,[14] and (6) a demographically changing and more litigious work force.[15]

Additionally, the Supreme Court's decisions in *Gardner-Denver*[16] and *Gilmer*,[17] and the enactment of legislation expressly incorporating and encouraging the use of ADR has also prompted employer and worker disputants to consider and, in a number of instances, use ADR as an alternative to administrative agency procedures and court litigation. Practically speaking these initiatives have also been prompted, in some instances, by the desire to preserve continued employment relationships.[18]

As it relates to the resolution of workplace disputes, particularly in the nonunion setting, there are two primary pieces of legislation that expressly encourage the use of ADR: the Americans with Disabilities Act and the Civil Rights Act of 1991. Both of these statutes contain similar ADR provisions.[19]

Although other federal agencies have recently announced programs to use ADR,[20] the EEOC has most recently received considerable public attention that has prompted it to adopt an ADR Public Policy Statement encouraging and actually implementing

---

[13]*Supra* notes 9, 10, and 11.

[14]Westin & Feliu, Resolving Employment Disputes Without Litigation (BNA Books 1988). *See* Costantino & Merchant, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations (Jossey-Bass 1995); Ury, Brett & Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict (Jossey-Bass 1988).

[15]*See* Stallworth & Malin, *supra* note 4; Malin & Stallworth, *Grievance Arbitration: Accommodating an Increasingly Diversified Work Force*, 42 Lab. L.J. 551 (1991).

[16]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

[17]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991). *See, e.g., W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983). *See also* Americans with Disabilities Act, 42 U.S.C. §12213, Alternative Means of Dispute Resolution: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act." There is similar language in Civil Rights Act of 1991, 42 U.S.C. ch. 21 (1981); proposed Senate bill, Employment Dispute Resolution Act of 1992 (S. 3356, Oct. 6, 1992); Administrative Dispute Resolution Act, 5 U.S.C. §571; Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089 (Dec. 1, 1990); Civil Justice Reform Act of 1990, 28 U.S.C. §1; and Negotiated Rulemaking Act of 1990, 5 U.S.C. §580.

[18]*See, e.g.,* Casellas, Chair, *Equal Employment Opportunity Commission: Priority Charge Handling Procedures* (unpublished government document June 1995); Equal Employment Opportunity Comm'n, *Commission Votes to Incorporate Alternative Dispute Resolution Into Its Case Charge Processing System: Defers Decision on State and Local Agencies*, News Release, Apr. 28, 1995; Equal Employment Opportunity Comm'n, Annual Report of the Equal Employment Opportunity Commission for the Fiscal Year 1994 (U.S. Gov't Printing Office 1994).

[19]*See supra* note 17 for text of the statute.

[20]*See, e.g.,* Billings, *Labor Department to Seek Comment on Expanded Dispute Resolution Program*, 1997 Daily Lab. Rep. (BNA) (Feb. 12) No. 29:A4–A5.

the use of voluntary mediation on a nationwide basis.[21] The EEOC's ADR Public Policy Statement was based, in large part, on the result of a 1-year pilot mediation study.[22] The result of the study affirmed that voluntary mediation can be an effective means to assist the EEOC in managing its usual "case inventory" or "backlog" of some 80,000 to 100,000 cases per year.[23]

Current Status: EEOC Voluntary Mediation Program

During the past year, the EEOC has attempted to implement voluntary EEO mediation programs in its 25 district area offices located throughout the country. The EEOC's goal was to complete the national implementation of its mediation program by September 1997.[24] The EEOC has used law school interns as well as mediators as outside professional mediators.[25] In a number of district offices, the EEOC has also used trained EEOC staff members as mediators. This is an interesting reversal of policy. In the earlier words of the ADR Task Force "by facilitating resolutions where agreement is possible, ADR [could] free up Commission resources to place greater emphasis on identifying discrimination in the workplace and perform more expeditious and thorough investigations in those cases that are not resolved through alternative process."[26] It remains to be seen whether the EEOC's use of staff as mediators is the most effective use of agency resources and staff, particularly where there is a growing corps of private professional EEO mediators available to serve as third-party neutrals. A

---

[21]Equal Employment Opportunity Comm'n, *EEOC's ADR Public Policy Statement*, July 1995. *See* Rolph & Moller, Evaluating Agency ADR Programs: User's Guide to Data Collection and Use, Rand Inst. for Civil Justice, Sept. 1994 (Dru-843-ACUS/IC); McEwen, *Mediation in Equal Employment Cases*, Disp. Resol. Mag. 16 (Spring 1996); McEwen, An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program, Washington, D.C.: Center for Dispute Settlement, 1994 (Contract No. 2/0011/0168).

[22]McEwen, An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program, Washington, D.C., Center for Dispute Settlement, 1994 (Contract No. 2/0011/0168). Under the EEOC Pilot Mediation Program, approximately 58% of cases submitted to mediation were successfully resolved.

[23]As discussed later, a number of state EEO enforcement agencies implemented formal mediation programs prior to the EEOC's pursuit of its mediation programs. The Illinois Human Rights Commission commenced its voluntary mediation and final and binding arbitration program in 1993. *Illinois Human Rights Commission and CEDR Offer ADR for Job Bias Cases*, 5 World Arb. Mediation Rep. No. 4, 76 (Apr. 1994).

[24]Fried, *EEOC Mediation Program Nears Launch Despite Snags*, The Recorder No. 230 (Nov. 25, 1996).

[25]*See supra* note 5, in which Representative Fawell is opposed to the use of law students as mediators.

[26]*See* U.S. Equal Employment Opportunity Commission (doc.), News Release, "Commission Votes to Incorporate Alternative Dispute Resolution into its Case Charge Processing System: Defers Decision on State and Local Agencies" (April 28, 1995). Chairman Gilbert F. Casellas. U.S. Equal Employment Opportunity Commission: Priority Charge Handling Procedures (June, 1995) (unpublished government document).

number of these private mediators are willing to serve on a for-fee, reduced fee, or even pro bono basis.[27] It is suggested here that a more effective alternative would be for the EEOC to develop a "public/private partnership" using government contract mediators (including trained EEO mediators of the Federal Mediation and Conciliation Service, FMCS) or affording the disputants the free choice to select a private for-fee mediator. This is the model in which the Chicago, St. Louis, and Kansas City EEOC District Offices and the Illinois Human Rights Commission have recently agreed to participate.[28]

It is further suggested that a more effective and sorely needed use of EEOC staff would be for the EEOC to use staff as "technical assistants" for unrepresented disputants, most of whom are charging parties. Among other things, this would directly address the EEOC's obligation to address the "imbalance of power" that often exists where unsophisticated, inexperienced, and economically disadvantaged charging parties are permitted to participate in EEO mediation without representation. The use of staff members in this capacity and as actual representatives (where probable cause has been found) has been adopted by other state government agencies.[29] Furthermore, the use of staff members in this capacity would to some degree assure that the public policy prohibiting discrimination in the workplace is not being abandoned through the mediation process. The latter public policy is the undisputed mission of the EEOC.[30]

In addition to adopting a policy of using a combination of EEOC staff members, law student intern mediators, and private professional mediators, a number of the EEOC district offices have or will be attempting to identify which cases are most eligible or appropriate for mediation. This selection process is directly related to the EEOC's new case categorization process.[31] Under this program, it has been decided that "B" category cases are most appropriate for

---

[27]In 1997, the EEOC District and Area Offices in Chicago, St. Louis, and Kansas City, Kansas, entered into a cooperative mediation program with the Center for Employment Dispute Resolution (CEDR) in Chicago. Under the ADR Consortium mediation program, EEO disputants are afforded the opportunity to select mediators for fee, reduced fee, and pro bono. CEDR is the program administrator of the ADR Consortium. The William and Flora Hewlett Foundation provided support to initiate this program.

[28]*Id.*

[29]*See, e.g.*, Cal. Fam. Code, amended by Stats. 1993, ch. 219 (A.B. 1500) (support person); Colo. Rev. Stat. §6-9-106(3) (mediator assists); Iowa Code §654A.7 (financial analyst and legal assistance); Minn. Stat. §583.26 (financial analyst and farm advocates).

[30]Equal Employment Opportunity Comm'n, *supra* note 20.

[31]Casellas, *supra* note 18.

mediation, particularly those cases where there is a continued employment relationship.[32] "A" cases, which are those cases slated for litigation, are excluded from mediation by EEOC policy. In the authors' opinion, this is a policy that should be rethought. Specifically, the authors believe that with the exception of those cases involving novel issues of law versus issues of fact that mediated settlements may be very effective.[33]

The issue related to the unrepresented EEO disputant and the underfunding of EEOC's mediation initiative are critical issues that also must be addressed. Otherwise, it is doubtful that the EEOC's goal of eventually resolving approximately 10 percent of all "eligible cases" through mediation will ever be achieved. On this score, it is interesting to note that the Republican Congress is conditioning President Clinton's proposed budget increase for the EEOC on the expanded use of mediation.[34] This issue of underfunding and the unrepresented charging party and the need to actively include external professional mediators, including FMCS mediators, must be addressed immediately; otherwise, as one EEOC official stated, mediation will continue to be implemented in "baby steps."[35]

With successful pilot mediation programs, the support of EEOC Chair Igasaki, and an ADR Task Force directing its implementation, the future use of voluntary mediation in resolving EEO workplace disputes has considerable promise. However, most of EEOC's efforts at this point have been more procedural than substantive. The most current available statistics support this conclusion.

Since the EEOC's implementation of the Priority Charge Handling Procedure program and the EEOC's mediation program, the backlog or "case inventory" of the EEOC has decreased from 111,345 in fiscal year 1996 to 64,100 in fiscal year 1997. This is more than a 40 percent reduction in the EEOC's case inventory.

According to the EEOC, the average charge processing time is also "beginning to show signs of dropping and benefits obtained

---

[32]McEwen, *supra* note 22. A "B" case is an EEO charge in which it is believed that with further investigation there might be a basis for probable cause finding.

[33]The recent settlement involving Mitsubishi Motor Manufacturing and the EEOC pursuant to a court consent decree is an example of an "A" case that resulted in a $34 million settlement and adoption of sexual harassment and diversity training. *See, e.g.*, *Mitsubishi Will Pay $34 Million*, Chi. Trib., June 12, 1998, at 1, 20.

[34]Fried, *supra* note 24. In fiscal year 1996, each district office was provided $8,000 for ADR and mediation training of staff.

[35]*Id. See* Aswad, *Chairman Frustrated by Commission Enforcement Efforts Under New Plan*, 1996 Daily Lab. Rep. (BNA) (Dec. 23), No. 246:C1.

are increasing."[36] Parenthetically, the more timely and expeditious investigations of charges might, ironically themselves, be a disincentive for respondent-employers agreeing to voluntary EEO mediation. Specifically, if a case may be investigated and a disposition rendered in 90 days, for example, many employers might prefer not to mediate a case that they believe to be without merit. Also, according to the EEOC, while still experimenting and assessing how best to develop a fully operational and effective mediation program, the EEOC's overall mediation experience indicates that a combination of external and internal mediators provide "an optimal foundation of learning and training interactions upon which we can build a quality mediation program," according to Chair Igasaki.[37]

However, it should be noted that the EEOC's current mediation program has been essentially implemented by reallocating its already overburdened existing staff to manage the program and is highly dependent upon the availability of pro bono mediators.[38] In the opinion of the authors, this fact raises serious credibility questions about the true commitment of the federal government to fund and implement a truly effective EEO mediation program.

The EEOC admits that its ADR efforts are modest ones but asserts that these efforts are "impressive nonetheless."[39] Since implementation, the number of charges resolved through the mediation program has increased from 67 in fiscal year 1996 to 841 in fiscal year 1997. According to the EEOC, the benefits (i.e., mediated settlements) received through the mediation program have increased from $946,000 in fiscal year 1996 to $10.9 million in fiscal year 1997.

In the fourth quarter of fiscal year 1997, there were 670 cases settled, resulting in monetary benefits of $10,842,566. In the second quarter of fiscal year 1998, there were 551 cases settled, resulting in monetary benefits of $7,478,578.[40]

These comparative statistics are impressive and should not be readily dismissed. However, the mediated settlement of 841 cases through the EEOC's voluntary mediation program falls far short of the 10 percent goal initially sought. Consequently, one of the major challenges facing the EEOC and in fact other state EEO

---

[36]Igasaki, *supra* note 3, at E7.
[37]*Id.* at E8.
[38]*Id.*
[39]*Id.*
[40]ORIP Data Summary Report, May 20, 1998, provided pursuant to the Freedom of Information Act.

Table 1. EEOC Mediation Program Activity

Mediation Settlements Fiscal Year 1996	*Monetary Benefits Settlements Fiscal Year 1996*	*Mediation Settlements Fiscal Year 1997*	*Monetary Benefits Settlements Fiscal Year 1997*	*Mediation Settlements Fourth Quarter Fiscal Year 1997*	*Monetary Benefits Settlements Fourth Quarter Fiscal Year 1997*	*Mediation Settlements Second Quarter Fiscal Year 1998*	*Monetary Benefits Settlements Second Quarter Fiscal Year 1998*
67	$946,000	841	$10,900,000	670	$10,842,566	551	$7,478,578
			Average Monetary Benefits Per Case				
	$14,119.40		$12,960.76		$16,182.93		$13,572.74

Note: Case Inventory: Fiscal Year 1996, 111,345; Fiscal Year 1997, 64,100.

Source: Freedon of Information Act, May 20, 1998.

enforcement agencies and the courts is to identify what methods, strategies, or public policies should be devised and implemented to "truly encourage" and effectuate the public policy encouraging the resolution of EEO disputes through mediation and conciliation. Or, cast in more basic terms, How can more charges be submitted to, and hopefully resolved through, mediation? Is some form of "directed" or "mandated" mediation necessary and appropriate, as a matter of good and responsible public policy? This is a point that will be returned to later in connection with the proposed Presidential Executive Order entitled the National Employment Dispute Resolution Act.

Federal and State EEO Enforcement Agency ADR Initiatives: Early Evidence

In addition to the EEOC, there have been a number of state EEO enforcement agencies that have experimented with the use of mediation and final and binding arbitration to resolve employment disputes. First among these agencies is the Illinois Human Rights Commission (IHRC), the Illinois Department of Human Rights (IDHR), and the Massachusetts Commission Against Discrimination (MCAD).[41]

The EEOC recently completed the implementation of voluntary EEO mediation programs in each of its district and area offices. Consequently, there is limited preliminary empirical evidence available as to how well any one EEOC-sponsored mediation

[41]*See, e.g., Illinois Human Rights Commission and CEDR Offer ADR for Job Bias Cases*, *supra* note 23.

program is currently operating. However, there is some empirical statistical evidence available related to the ADR mediation programs sponsored by the IHRC, the IDHR, and the MCAD. These statistics again support the utility of voluntary mediation in this area. The empirical data from these undertakings provide valuable insights into both the impediments and facilitative factors that will affect the future use of ADR systems, particularly the mediation of statutory-based workplace disputes.

Factors and Barriers to Using Voluntary EEO Mediation: An Exploratory Inquiry

There is no doubt that mediation, when used, garners both a respectable number of settlements and also a high degree of satisfaction of the disputants.[42] A recent General Accounting Office study supports this conclusion,[43] as do the most recent mediation initiatives of the Postal Service.[44] Notwithstanding, one of the major challenges facing the EEOC is to identify what some of the critical factors or barriers are to using voluntary mediation, how these barriers might be overcome and, if necessary, as a matter of good and responsible public policy, under what circumstances might participation in mediation be "directed" or "mandated."[45]

An exploratory study attempted to address some of these issues.[46] Based on the literature, a 24-item survey that included a series of questions related to the use of voluntary and "directed" or "mandated" EEO mediation was developed. Most of the questions were on a 5-point Likert scale, while some questions required the surveyed respondents to rank order the items listed. The questions on this survey included but were not limited to the following areas:

---

[42]Guthrie & Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Disp. Resol. 3 (1998).

[43]Alternative Dispute Resolution—Employers' Experienced With ADR in the Workplace, General Accounting Office Report to the Chair, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, Aug. 1997. *See also* Lipsky & Seeber, The Use of ADR in U.S. Corporations: Executive Summary, Cornell/PERC, Institute on Conflict Resolution (1997); Lipsky & Seeber, A Report on the Growing Use of ADR by U.S. Corporations, Cornell/PERC, Institute on Conflict Resolution (Dec. 14, 1996).

[44]*See, e.g.*, Bingham, *Mediating Employment Disputes: Perceptions of Redress at the United States Postal Service*, 18 Rev. Pub. Personnel Admin. 20 (Spring 1997).

[45]*See, e.g., Mandatory Mediation and Settlement Pressures*, in Mediation: Law, Policy and Practice, 2d ed., eds. Rogers & McEwen (Clark, Boardman & Callaghan 1994).

[46]The data collected in this exploratory study provide the basis for some preliminary findings. The authors are conducting a broader and more in-depth empirical study related to the "Barriers to Using Voluntary EEO Mediation." The study focuses on the mediation programs of the EEOC (in Chicago, St. Louis, and Kansas City) and the Illinois Human Rights Commission.

1. Familiarity and satisfaction of the respondents with the various ADR methods, that is, mediation, factfinding, and arbitration;
2. Opinions of the respondents on the effectiveness of three types of mediation, that is, transformative, facilitative, and evaluative;
3. Experience of the respondents with mediation and the handling of EEO cases;
4. Opinions of the respondents on factors that often act or serve as barriers to mediation; and
5. Views of the respondents on "directed" or "mandated" EEO mediation.

In addition to these and other related questions, there was a section on demographic information pertaining to the respondents (e.g., age and gender).

Sixty-one individuals attending a 1-day conference on EEO issues responded to the survey.[47] Of the surveyed respondents, 50 were human resources professionals and/or affirmative action managers, and 11 were attorneys; 66 percent of the respondents were female and approximately 70 percent were white. The average age of the respondents was 38 and they had an average of 13 years' work experience.

Hypothesis and Results

Based on the literature, several hypotheses related to "directed" or "mandated" mediation and related topics were developed. Since no experiment was conducted and no variables were manipulated, only "correlational hypotheses" as opposed to "causal hypotheses" were developed.[48] As such, correlations and descriptive statistics were used to analyze the data.

Hypothesis 1: There will be a significant relationship between familiarity of the respondents with voluntary mediation and the number of cases they have actually submitted to mediation.

---

[47]Strategies for Implementing Effective EEO Policies and Practices, 11th Annual EEO Conference, Sponsored by the Institute of Human Resources and Industrial Relations, Loyola University, Chicago, Apr. 28, 1998.

[48]*Correlation Hypotheses:* These are hypotheses developed to examine the occurrence of two seemingly unrelated events/variables at the same time. In other words, a change in one of the events/variables is accompanied by a change in the other. However, there is no assumption that either caused the other. A finding of statistical significance in the correlation coefficient means that this co-occurrence is not merely by chance; rather, these two events have a strong relation. *Causal Hypotheses:* On the other hand, these hypotheses are developed to test if one of the events/variables caused the other to occur.

In other words, individuals (human resources managers and attorneys) who are familiar with, and aware of, the availability of voluntary EEO mediation as an ADR process will be more likely to have submitted cases for resolution through mediation. Results showed that there was a strong correlation between familiarity with voluntary mediation and the number of cases the respondents had submitted to EEO mediation ($r = .46, p < .01$). However, familiarity with "factfinding" and "final and binding arbitration" had no correlation with the number of cases submitted.

Hypothesis 2: Individuals who believe that voluntary EEO mediation is effective in resolving and bringing closure to EEO charges would be more likely to use mediation.

Results showed that there was no significant relationship between individuals' belief in the effectiveness of voluntary mediation and their usage of EEO mediation.

Hypothesis 3: Individuals who believe that mediation is an effective tool to resolve EEO disputes will believe that all three types of mediation (i.e., transformative, facilitative, and evaluative) are equally effective. Further, they might believe that each of these types of mediation is differentially appropriate at different stages of the dispute (i.e., precharge, postcharge/EEO administrative, and court).

Results showed that respondents considered all three types of mediation to be effective at the precharge stage; however, at the postcharge stage only transformative mediation was considered appropriate, while none of the three types was considered appropriate at the third and final stage, that is, once the dispute reached the courts.

Hypothesis 4: The number of EEO disputes that an individual submits to mediation would have a strong relation to his/her satisfaction or dissatisfaction with voluntary EEO mediation as a tool to resolve EEO disputes.

Results showed that individuals who were dissatisfied with voluntary mediation submitted a significantly lower number of cases to mediation than those who were satisfied. However, an interesting finding was that those who were "ambivalent" about their satisfaction with EEO mediation submitted a significantly lower number of cases than those who were dissatisfied with the process.

In addition to analyzing the data to test for the above "correlated" hypotheses, the data were further analyzed to identify demographic differences in satisfaction with the usage of the voluntary mediation process.[49]

Further, data related to the following were analyzed: (1) the certification and licensing of EEO mediators, (2) support for legislation "mandating" or "directing" participation in mediation, and (3) whether the federal government should subsidize the cost of EEO mediation.

Key Findings

1. One of the questions asked of the surveyed respondents was, "To what extent do you believe that mediators should be certified/licensed?"[50] Results (mean = 4.67 and standard deviation = .62 on a 5-point Likert scale) clearly showed the significant majority believed that mediators should be licensed/certified.
2. In connection with "directed" or "mandated" mediation, the surveyed respondents were asked the degree to which they would support legislation "directing" or "mandating" participation in EEO mediation. Results (means = 3.36 and standard deviation = 1.36 on a 5-point Likert scale) showed slight positive support for mandated mediation.
3. In connection with legislation that would direct or mandate participation in EEO mediation where at least one party to the dispute had expressed an interest in mediation, results showed that there was stronger positive support for this (mean = 3.70, standard deviation = 1.10) than for broad or general legislation requiring "directed" or "mandated" mediation, discussed earlier.

   Further, strong positive intercorrelations were reported between the measures of certification/licensing, legislation requiring the government to pay all the costs for

---

[49]There has been some research related to the potential negative effect that ADR may have on racial minorities and women. *See, e.g.*, Hermann, LaFree, Rack & West, The Metrocourt Project Final Report (Rand Corp. 1994); Grillo, *The Mediation Alternative Process Dangers for Women*, 100 Yale L.J. 1545 (1991).

[50]*See, e.g.*, Dobbins, *The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry Into the Market?* 7 U. Fla. J.L. & Pub. Pol'y 95 (1994–1995). *See also* Barrett, *Mediator Certification: Should California Enact Legislation?* 30 U.S.F. L. Rev. 617 (1996). *See* Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. Rev. 723 (1996).

mediation, and the two types of legislation requiring "directed" or "mandated" EEO mediation. Further analyses revealed that the surveyed respondents who had not used EEO mediation agreed with all four questions in this section of the questionnaire. For those who have used EEO mediation in the past, a slightly different pattern of correlations was revealed. In the latter case, strong agreement was found on only two of the relationships, that is, a positive correlation between legislated mediation and the "NEDRA model" of "directed" or "mandated" mediation (i.e., where one party has expressed an interest in mediation) and a strong correlation between directed and mandated EEO mediation and 100 percent government financing of mediation.

4. Finally, there was interest in identifying the opinions of the respondents on how likely they would be to use EEO mediation, depending on who was paying for the mediation costs.

Significance of Findings

It is not possible here to discuss the implications and significance of all the preliminary findings of this study. However, a number of the findings from this exploratory study are particularly interesting and noteworthy. First, as may be expected there was a significant relationship between familiarity with voluntary EEO mediation and the number of cases submitted to mediation ($r = .46$, $p < .01$) (Hypothesis 1). Similarly, it was expected that those individuals who are dissatisfied with EEO mediation submitted a significantly lower number of cases than those who were satisfied with mediation. However, those individuals who were "ambivalent" about EEO mediation submitted fewer cases to mediation than those individuals who were "dissatisfied." This finding suggests that those individuals who are "ambivalent" about the concept of mediation are so "indifferent" that they are considerably more reluctant to even try mediation. This is a logical consequence. (Hypothesis 4).

In addition to the respondents indicating that any type of mediation is effective at the precharge stage, there was general support for the requirement that EEO mediators should be either licensed or certified (mean = 4.67, standard deviation = .62 on a 5-point Likert scale) (Key Finding 1).

One of the major findings of this exploratory study involved the support for "directed" or "mandated" mediation. The response to

this public policy issue was addressed on three levels. First, there was slightly positive support for public policy or legislation supporting general directed or mandated EEO mediation (mean = 3.36, stand-ard deviation = 1.36 on a 5-point Likert scale) (Key Finding 2). However, there was strong support for a public policy or a Presidential Executive Order supporting "directed" or "mandated" mediation where participation in mediation would be required where at least one of the EEO disputants expressed an interest in mediation (mean = 3.70, standard deviation = 1.10 on a 5-point Likert scale) (Key Finding 3). This preliminary finding is particularly noteworthy because it further suggests support for the proposed National Employment Dispute Resolution Act (NEDRA).

There was also strong positive intercorrelation among measures of certification and licensing, legislation requiring government funding of EEO mediation and "general mandated" EEO mediation, and the NEDRA model of "directed" or "mandated" EEO mediation (Key Finding 3).

An even more noteworthy preliminary finding is the response from the more frequent users of EEO mediation. The response of this group of experienced respondents indicated a strong positive correlation among the proposed NEDRA-type of mediation or Presidential Executive Order and 100 percent funding of mediation by the federal government (Key Finding 3).

In sum, there appears to be some positive, if not considerable, support for some form of mediation modeled after the proposed NEDRA, particularly if the government, in some way, funds "mandated" or "directed" EEO mediation (Key Finding 4).

National Employment Dispute Resolution Act: A Proposal

It has been said that "alternative dispute resolution continues to be a solution in search of a problem."[51] This assertion is, of course, subject to debate. However, it may be more accurate to assert that there is a need to have a more systematic and institutional marriage between the undisputed problem related to this country's "statutory-based promise of enforcing workplace civil rights" and the establishment and implementation of fair and efficient methods for resolving workplace civil rights disputes, using ADR, particularly mediation. In the authors' opinions, there is a need to have a

---

[51]Schneider-Denenberg & Denenberg, *The Future of the Workplace Dispute Resolver,* 49 Disp. Resol. J. 48 (June 1994).

federal statute or Presidential Executive Order to promote effectively the use of "structured negotiations" or mediation of employment disputes. This is particularly the case under Title VII where the initial objective of "conciliating" EEO charges was the cornerstone of that statute.[52]

This public policy objective of conciliation, and, presumed here, mediation, is the rationale for the proposed NEDRA. As it stands today, there is a serious underutilization of voluntary mediation,[53] which only serves to perpetuate the already overburdened dockets of our public justice system and cause the expenditure of scarce public and private resources.[54] Furthermore, this underutilization of the voluntary EEO mediation and other interest-based dispute resolution systems also places an undue emotional, psychological, and economic hardship on EEO disputants. The "directed" or "mandated" use of mediation is a more responsible, civil, and humane way to resolve workplace disputes. This appears to be not only the opinion of the authors but, based on their exploratory empirical study, there is apparent support for some form of "directed" or "mandated" mediation, particularly if there is government funding of such "directed" or "mandated" interest-based processes.[55]

---

[52]The EEOC attempts to resolve cases throughout its administrative process. The process of resolving a case before a determination of discrimination has been made is a predetermination settlement, which is more commonly referred to as a "settlement." A case resolved after a determination is issued is identified as a "conciliation." A case that has been referred to the EEOC's ADR program for mediation can result in a "mediated settlement."

With the implementation of the Priority Charge Handling Procedures in June 1995, the EEOC unanimously approved the following with respect to settlements:

> That settlement efforts be encouraged at all stages of the administrative process and that the Commission may accept settlements providing "substantial relief" when the evidence of record indicates a violation or "appropriate relief" at an earlier stage of the investigation.

See Igaski & Moller, Priority Charge Handling Task Force Litigation Task Force Report, Mar. 1998.

[53]*See* Response to EEOC FOIA Request No. 98-08-FOIH-283 (May 22, 1998).

[54]*See* Stallworth & Stroh, *Who Is Seeking to Use ADR? Why Do They Choose to Do So?* 51 Disp. Resol. J. 30 (1996), where the researchers found almost a 50-50 split in employers and claimants expressing an interest in mediation. However, *see also* McEwen, An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program, Washington, D.C.: Center for Dispute Settlement, 1994 (Contract No. 2/0011/0168), where he finds that claimants are overwhelmingly more interested in mediation than respondent employers are. One of the major barriers to the rise of mediation has been getting both disputants to agree to mediation. A number of courts have adopted a policy of mandated mediation as a condition precedent to a trial.

[55]In their survey, four questions in connection with NEDRA were posed. The responses showed very strong support for certification/licensing of EEO mediators (mean = 4.67/5.00), strong support for 100% government financing of mediation (3.74/5.00), and also for mandated mediation in general (3.35/5.00), as well as mandated mediation when one of the parties has expressed an interest in mediation (3.70).

As suggested by the EEOC's ADR Public Policy Statement, the forthcoming "Mediation Guiding Principles" of the ADR in the Workplace Committee of the Society of Professionals in Dispute Resolution and ABA's ADR Due Process Protocol, a number of elements and safeguards should exist in what the authors term a "fair and legitimate" EEO mediation program. Among other things, this includes the qualifications and training of the EEO mediator and the thoughtful and responsible addressing of "imbalance of power issues." It is with these preconditions that the preliminary elements of the proposed NEDRA are being offered. The basic elements of NEDRA are as follows:

1. NEDRA would cover any federal contractor receiving federal funds in the amount of $200,000 or more, for example, or having 20 workers or more; the federal contractor would be required to establish internal dispute resolution programs, providing as a voluntary option access to external third-party neutrals, that is, trained and qualified EEO mediators.[56]
2. Affected federal contractors would be "directed" or "mandated" to participate in mediation where the claimant or charging party has filed a charge and the charging party expressly seeks EEO mediation. Similarly, claimants or charging parties of the affected federal contractors would be "directed" or "mandated" to participate in mediation where the "respondent federal contractor" has expressed a desire to mediate. The mediation outcome would be strictly voluntary, however. The relevant government regulatory agency would provide "technical assistance" to the unrepresented disputant where a formal charge has been filed. This also may be carried out by providing support to and services from the Legal Services Corporation, area law schools, civil rights organizations, and members of the state and local bar associations. In addition, a corps of trained "EEO paralegal negotiators" could be developed to work under the supervision of an experienced EEO attorney.[57]
3. All agencies, including Title VII, §706 or "work-sharing" agencies and federal courts, would be required to partici-

---

[56]*See, e.g.*, Dobbins, *supra* note 50. *See also* Barrett, *supra* note 50. *See* Waldman, *supra* note 50.

[57]*See, e.g.*, Stallworth, *Finding a Place for Non-Lawyer Representation in Mediation*, 4 (2) Disp. Resol. Mag. 19 (Winter 1997).

pate and cooperate in "certified" mediation programs administered by private mediation centers.[58] At a minimum, this means that government regulatory workplace agencies and the courts would cooperate with the "certified" mediation center in informing disputants of the mediation alternative (e.g., distribute informational packets) and cooperate with external entities (mediation centers) providing a conduit or referrals to trained and qualified mediators. Attorney and nonattorney mediators would be certified after completing 40 hours of training, for example.[59]

4. In preformal charge disputes, there should also be a tolling of statutory time limits where the EEO disputants voluntarily enter into an agreement to attempt to resolve a workplace dispute internally without filing a formal charge or lawsuit and where the internal dispute resolution system is "fair and legitimate" and regular. The disputants would have 90 days within which to resolve the dispute. Where the dispute resolution process does not resolve the matter, the employer must formally advise the claimant that the ADR process has been concluded and that the claimant is free to pursue his or her rights under the applicable local, state, or federal statute. Such voluntary private tolling agreements also shall be enforceable in court.
5. The filing of an internal grievance by an employee with the affected federal contractor and subsequently the "certified" mediation center, constitutes a "nominal filing" with the appropriate agency and thus tolls the applicable statutory time limits.[60] As stated above, the tolling period shall be for a reasonable time period and not to exceed 90 days unless other-wise mutually and formally agreed to, in writing, by the disputants.

---

[58]A §706 or "working agency" is a state or local antidiscrimination administrative agency, such as the Illinois Department of Human Rights, Kansas Human Rights Commission, and Massachusetts Commission Against Discrimination, that has been contracted by the EEOC to investigate a specific number of EEO charges filed under Title VII, etc. Section 706 agencies receive an amount of approximately $450 per case as compensation under their work-sharing agreements.

The term "certified mediation program" is used here to describe any mediation program that conforms to the EEOC's ADR Public Policy Statement, for example, the ABA's ADR Protocol, AAA's National Rules for the Resolution of Employment Disputes, and Society of Professionals in Dispute Resolution's ADR in Employment Public Policy Report and Recommendations (forthcoming 1998).

[59]*See supra* note 55.

[60]Tolling is the suspension of the running of a statute of limitations for equitable reasons. *See, e.g.*, Lindemann & Grossman, eds., *Timeliness: II. Timeliness of Filing the EEOC Charge. C. Tolling of the Charge-Filing Period*, in Employment Discrimination Law, 3d ed. (BNA Books, 1996), 1335, 1363.

6. The federal government and/or the federal contractor shall assist in subsidizing the cost of the mediation. This comports with the preliminary findings of the exploratory study.
7. Prospective affected federal contractors that have such internal interest-based dispute resolution systems or programs and agree to abide by NEDRA shall be afforded preferred consideration in the awarding of federal contracts in the amount of $200,000 or more, for example.
8. All Title VII, §706 or work-sharing EEO enforcement agencies must comply with any mediation guidelines developed under NEDRA and the EEOC's ADR Public Policy Statement, including any guidelines related to the representation and technical assistance for unrepresented disputants. The EEOC and/or Office of Federal Contract Compliance Programs (OFCCP) would be charged with monitoring and enforcing this provision, for example, noncompliance may result in revocation of the section 706 agreement or loss of federal contract and possible disbarment from future federal contracts.
9. The matters discussed in EEO mediations are confidential and shall not be used in any subsequent local, state, or federal administrative or court proceedings.
10. Although participation in the mediation may be "directed" or "mandated," any settlement outcome is strictly voluntary and may not be mandated or "imposed."
11. The disputants shall have a right to factfinding and "limited discovery."
12. The destruction of any relevant evidence or some types of documents shall subject that offending party to any appropriate civil and criminal sanctions.[61]
13. The disputants agree not to engage in any retaliation against any participants, fellow workers, or associates of participants of the internal dispute resolution system or mediation program. Such retaliation shall subject the offending party to any appropriate civil sanctions.[62]
14. Affected government contractors that violate or fail to comply with NEDRA shall be subject to disbarment from future federal contracts until such time as they are found to

---

[61]*See, e.g.*, Wise, *Texaco Taps Armstrong, Higgin Botham: Pillars of New York Bar Seen Savaging Oil Company in Public Relations Mess,* N.Y. L.J. Nov. 14, 1996, at 1.

[62]*See* Lindemann & Grossman, eds., *Retaliation*, in Employment Discrimination Law, 3d ed. (BNA Books 1996), 649.

be in compliance. The OFCCP would be the authority over these matters.

The elements detailed above are not intended to be exhaustive but rather serve to accomplish the public policy goal and objective of "actually" getting EEO workplace disputants to "earnestly" and "in good faith" attempt to resolve their disputes voluntarily. The latter is an undisputed public policy objective. NEDRA breathes life and purpose into those relevant statutory provisions and ADR public policies that merely "encourage" the use of ADR, specifically mediation, but do not effectuate the utilization and "actual participation" of workplace disputants in EEO mediation. NEDRA also creates an efficient and effective public / private partnership among government regulatory agencies and private and public EEO mediators (FMCS / EEO mediators) and private ADR providers. NEDRA will also enhance the probability of settlement outcomes that do not erode the underlying applicable statutes and public policies and enforcement mission of government workplace regulatory agencies. The proposed statute or Presidential Executive Order would also serve to enhance the effectuation of government efficiency and effectiveness of the resolution of workplace disputes.[63] The goals and public policy objectives reflected by NEDRA warrant serious consideration.

---

[63]*See, e.g.,* Brett, Burnses & Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 Negotiation J. 259 (July 1996), where, in a study of 449 cases, the researchers found that whether disputes were resolved via voluntary or mandated mediation, there was a 78% settlement, respectively. It is presumed that the degree of satisfaction would also be similar under mandated or voluntary mediation processes.

It has been suggested that research evidence cannot address the philosophical debate related to mandatory versus voluntary mediation programs; however, research evidence makes it clear that settlement rates and party perceptions of fairness are often comparable in mandatory and voluntary programs. *See* Rogers & McEwen, *supra* note 45 (citing Pearson, Family Mediation, in National Symposium on Court-Connected Dispute Resolution Research, A Report of Current Research Findings—Implications for Courts and Future Research Needs, 51, 74, ed. Keilitz (1994); McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & Soc'y Rev. 1, 26 (1984)). *But see* Kobbervig, Mediation of Civil Cases in Hennepin County: An Evaluation (1991) (finding case outcome and party satisfaction dependent on initial willingness to undertake mediation). *See also* Henderson, *Mediation Success: An Empirical Analysis*, 11 Ohio St. J. on Disp. Resol. 105, 146 (1996) (finding that agreement in construction mediation was as likely when parties required to undertake the process as when they entered it voluntarily). *See, e.g.,* Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 Golden Gate U. L. Rev. 717, 761 (1993) (objecting on philosophical grounds that compulsory participation is inconsistent with the voluntary character of mediation). But others argue that the distinction between compulsion to enter mediation and compulsion to settle in the mediation process is crucial; only the latter is inconsistent with mediation. At a more pragmatic level, some assert that parties have to want to undertake mediation in

Potential Objections to NEDRA

There is, of course, a number of potential objections to NEDRA and the "mandated" or "directed" participation in EEO mediation. The most apparent objections to NEDRA are thought to be the following: (1) EEO disputants, particularly federal contractor employers, would resist a "mandate" or "directive" of any kind and would prefer "voluntary" EEO mediation; (2) there would be a greater degree of satisfaction and more settlements under a voluntary EEO mediation system versus any form of "mandated" or "directed" mediation; (3) it would be unfair to place the total cost burden for mediation on the affected federal contractor as opposed to the cost being partially shared by the charging party; and (4) the possibility of disbarment from future federal contracts for noncompliance with NEDRA is too severe.

The following response to these potential objections is offered. First, recent research indicates that most employers have some type of internal dispute resolution system.[64] However, most of these internal employment dispute resolution systems do not provide for the use of external third-party workplace dispute resolvers, such as professional mediators. Furthermore, most of these internal dispute resolution systems vest the initial decision to invoke the process using outside neutrals with the employer only. NEDRA changes these apparent shortcomings of the majority of internal employment dispute resolution systems. The research and actual experience strongly suggest that when employees are offered the option of using outside third-party neutrals, that this is a preferred option. Consequently, the type of directed or mandated mediation would be well received by workers and thus place more disputes in the mediation forum, invariably resulting in the resolution of more disputes that would otherwise be filed with an agency or the courts.

---

order for the process to work. *See, e.g.*, Plapinger & Shaw, Court ADR: Elements of Program Design (1992) (quoting Finkelstein & Stanley), at 14–15. *But see* Society for Professionals in Dispute Resolution, Mandated Dispute Resolution and Settlement Coercion: Dispute Resolution as It Relates to Courts (1991), 11–12; McEwen & Milburn, *Explaining a Paradox of Mediation*, 9 Negotiation J. 23 (1993), wherein others suggest that strategic and perceptual barriers may prevent voluntary entry into mediation by parties who can and will settle. Lastly, it should be noted that pro se cases are excluded from mandatory mediation by the U.S. District Court for the Southern District of New York. *ADR in the Eastern and Southern Districts*, I Fed. Bar News (Dec. 1994), at 11.

[64]Alternative Dispute Resolution—Employers' Experienced With ADR in the Workplace, General Accounting Office Report to the Chair, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, Aug. 1997.

Second, the research also suggests that whether mediation is offered on a voluntary[65] or mandated basis the frequency of settlement is similar, that is, a 78 percent settlement rate, and the degree of satisfaction appears to be the same under voluntary and mandated mediation.[66]

Third, research also suggests that under the theory of the "stakes hypothesis" disputants will be more serious about the mediation process, if both disputants have an economic "stake" in the dispute resolution process. Although generally this might be true in theory and in practice, it appears that because of the proximate relationship between the employer and the employee, employees generally take the dispute resolution process seriously because of their typically less powerful position in the employment relationship. The authors further suggest that the federal contractor bearing the cost of the mediation eliminates a potential economic barrier for the employee in electing to use mediation. In addition, placing the cost of the mediation on the federal contractor really is a matter of "internal government cost shifting." Specifically, if the matter were to be investigated by the EEOC or state EEO enforcement agency or filed in federal court, the cost for such an investigation would be borne by the federal government.[67] Consequently, having the federal contractor bear the cost of the mediation effectively shifts the mediation cost that otherwise would be directly borne by the federal government and now the cost would in-directly shift to the federal government via the federal contractor.

Fourth, the possibility of disbarment from future federal contracts for noncompliance creates a legitimate incentive for federal

---

[65]On a more theoretical basis, it may be argued that "mandated" or "directed" participation under NEDRA is voluntary. Specifically, a prospective federal contractor has the option of not pursuing a federal contract if it strongly does not want to agree to the type of mandated mediation program as contemplated under NEDRA. The *Gilmer* Court applied similar reasoning in concluding that mandatory predispute private agreements to arbitrate are voluntarily entered into by workers. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

It is suggested here that the President would have the authority to "make law" by implementing NEDRA as an executive order. *See, e.g.*, Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 Cardozo L. Rev. 337, 359 (1993), at 26–27, where the author asserts that, "The authority of the President to 'make law' by executive order does not exist in mid-air. It must find its taproot in Article II of the Constitution or in statutes enacted by the Congress. In some instances . . . a proposed executive order has been blocked on the ground that it exceeded the legal authority of the President." *See also* Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33, 35 (1971).

[66]*See* Brett, Burnses & Goldberg, *supra* note 63. *See also* Boomer, *Making the Most of Court Ordered Mediation*, 49 Disp. Resol. J. 17 (Mar. 1994).

[67]It is estimated that it would take 40 hours of a staff investigator's time to investigate a charge.

contractors to comply with NEDRA and the broader public policy supporting and encouraging the use of ADR, such as using mediation to resolve employment disputes.

Summary and Conclusion: Public Policy Recommendations

The purpose of this article was to examine the development and implementation of the EEOC's voluntary mediation program and to suggest enactment of a National Employment Dispute Resolution Act. Perhaps the more critical ADR public policy issue is the underutilization of the EEOC's voluntary EEO mediation program. It is beyond debate, and the research supports the general conclusion, that mediation, when used, is generally effective and garners a high degree of satisfaction from both disputants. This has been true even when participation in the mediation process is "directed" or "mandated."[68]

Thus, the EEOC, other local or state EEO enforcement agencies, and the federal government have at least two critical public policy challenges to address. The first is actively promoting the responsible and fair designing and implementation of "interest-based" workplace dispute resolution systems to resolve "statutory-based diversity" disputes prior to formal charges and lawsuits being filed. The second challenge is devising methods and strategies to "effectuate" the actual submission of more EEO and other statutory-based employment disputes to these systems for resolution.[69] Given the national public policy favoring and encouraging the use of ADR, the federal government, as the country's major employer, should take a leading role in truly effectuating this policy. As suggested by the authors and apparently supported by their exploratory empirical study, there is support for some form of directed or mandated participation in EEO mediation as contemplated by the proposed National Employment Dispute Resolution Act. Absent such measures, it is very doubtful that EEO mediation will ever achieve its true potential and promise in providing a fair, cost-effective, and humane way for resolving workplace disputes.

---

[68]Brett, Burnses & Goldberg, *supra* note 63.

[69]*See* Table 1 for statistics related to the number of settlements under the EEOC's nationwide voluntary mediation program.