

2-1-2002

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Recommended Citation

Allison Balc, *Making it Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 Pepp. Disp. Resol. L.J. Iss. 2 (2002)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol2/iss2/3>

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Making It Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality

Allison Balc*

I. INTRODUCTION

Courts and administrative agencies are bombarded with more than 200,000 employment discrimination filings each year, a number that increases at about 23% percent annually.¹ With the increase in legal representation fees and court costs and the backlog of court dockets and the time invested in litigation, various legal sectors are now implementing, or already have implemented, alternative dispute resolution ("ADR") programs.²

The ADR option is a "win/win" alternative to be considered in almost every employment case.³ In traditional litigation, one side has to win and one side must lose; however, in many cases where ADR techniques are implemented, there can be a "win/win" outcome for both parties, "or at least an outcome that both sides can endure and view as better than going through the cost and uncertainty of litigation."⁴

The recent Alternative Dispute Resolution Act of 1998 defines ADR as including any "process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation,

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1. Margaret L. Shaw & Lynn P. Cohn, *Employment Class Actions Provide Unique Context for ADR*, 5 DISP. RESOL. MAG. 10, 10 (Summer 1999)(citing Joshua. M. Javits and Francis T. Coleman, *High Court to Revisit Issue of Mandatory Arbitration*, NAT'L L.J., Oct. 5, 1998, at B1.

2. JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 149 (1997). Mediation in the employment setting is a successful alternative in light of the increasing frustration with budget restraints, reduced government enforcement, court delays and costs of litigation, and reduced access to effective public regulatory agencies. *See id.* *See also* SANDRA E. GLEASON, *WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY* 1 (1997). ADR programs in the employment field provide an organized and mediated forum in which to identify, discuss, and attempt to resolve disputes in the workplace. *See id.*

3. *See* Eileen Barkas Hoffman, *The Impact of the ADR Act of 1988*, 35 TRIAL: NEGOTIATION AND SETTLEMENT 30, 31 (Fall 1999). Washington D.C. attorney and mediation proponent states that with today's economic environment, litigators "have to think about ADR in most every case they handle". *Id.*

4. *Id.*

mediation, mini-trial, and arbitration”⁵

This Comment discusses the ADR process of *mediation* in the employment setting, specifically addressing its benefits and effects on the employer/employee relationship and the potential for a non-neutral mediator who is paid by, or has some previous tie to, one of the parties. Section IA examines judicial and legislative views of ADR and mediation. IB discusses mediation’s effectiveness in the workplace. Section II discusses the mediation process in an employment dispute. Section III discusses the effects of mediation on the employer and employee, empirical studies, the neutrality of mediators, and potential remedies. IIIA illustrates mediation’s relationship maintaining function. IIIB looks at empirical research and findings in employment mediation. IIIC evaluates whether reinstating an employee in the company is an appropriate remedy. IIID evaluates at modifying the workplace structure and environment as a remedy. Section IV discusses neutrality in the mediation process. IVA examines whether the origin of the mediator’s compensation may affect neutrality. IVB looks at the imbalance of power between the employer and the employee. Section V concludes that mediation is a cost and time effective alternative to traditional litigation and is increasingly utilized by employers. VA and VB illustrate this point by examining both: (1) a recent case of a successful mediation; and (2) recent employment disputes where mediation was ineffective or not used at all, arguing the possibility that mediation, correctly implemented, would most likely have produced a more favorable result.

A. *Judicial and Legislative Views of ADR and Mediation*

Retired United States Supreme Court Chief Justice Burger proposed to the American Bar Association in his 1982 address that alternatives to traditional litigation be explored.⁶ Chief Justice Burger stated, “[t]o fulfill our traditional obligation [serving as healers of human conflicts] means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.”⁷ Burger continued, “[e]ven when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time lapse, the expense, and the emotional stress inescapable in the litigation process.”⁸

5. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (Supp. 2000).

6. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274, 275 (1982).

7. *Id.* at 274.

8. *Id.*

In his same address, Justice Burger quoted Abraham Lincoln, stating, “[d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time.”⁹

Although a comparatively unexplored method of resolving legal disputes,¹⁰ mediation has been referred to as the “sleeping giant of ADR” and “the fastest growing form of ADR.”¹¹ United States District Court Judge Pauley stated, “the benefits of mediation include its cost-effectiveness, speed and adaptability,” reasoning that “with the heavy caseloads shouldered today by federal and state courts alike, *mediation provides a vital alternative to litigation.*”¹²

Congress asserted that ADR may provide various benefits including “greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in resolving settlements,” and a reduction in case backlog which would allow the courts to more efficiently process existing cases.¹³ The federal district courts are now required by the United States Code to establish ADR programs under local rules.¹⁴ ADR practitioners propose that the courts “will focus not only on docket control but also on using ADR to help litigants reach creative and satisfying solutions,”¹⁵ and predict that the ADR Act will promote “evolutionary change.”¹⁶

9. *Id.* at 275.

10. Kenneth P. Kelsey, *Mediation: The Sensible Means for Resolving Contract Disputes* (Nov. 14, 2000) <<http://www.mediate.com/articles/kelsey.cfm>> (stating that mediation is just beginning and is looked upon as a new business opportunity and thus states and organizations have not established certification requirements).

11. BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES 1* (1998)(acknowledging the importance of arbitration yet pointing out that it suffers from the same setbacks as does litigation).

12. *Fields-D'Arpino v. Restaurant Assoc.*, 39 F. Supp. 2d 412, 417 (1999)(emphasis added). In a Title VII employment discrimination claim, the employee argued that her employer discriminated against her based on her gender and pregnancy. *Id.* The court held that “mediation is an informal approach to dispute resolution that lacks the exacting procedural rules of the judicial process.” *Id.* at 415. The Alternative Dispute Resolution Act of 1998 requires the federal district court to locally use ADR processes in civil actions. *Id.* at 417-18.

13. Pub. L. No. 105-315, § 2, 112 Stat. 2993.

14. 28 U.S.C. § 651(b) (Supp. 2000).

15. Hoffman, *supra* note 3, at 31 (quoting Peter Steenland Jr., Senior Counsel for ADR for the U.S. Department of Justice).

16. *Id.* at 31 (citing Magistrate Judge Wayne Brazil).

State courts have also begun implementing ADR programs following Attorney General Janet Reno's 1995 mandate that the Department of Justice to pursue greater use of ADR options in civil litigation.¹⁷ In 1998, for example, California enacted a new chapter of the Evidence Code governing mediation and defining its scope.¹⁸

B. Mediation's Effectiveness in the Workplace

Mediation is an informal and voluntary process by which disputants can confidentially try to reach a non-binding agreement.¹⁹ Mediation offers several advantages to traditional litigation. It is: (1) voluntary; (2) collaborative, in that parties are encouraged to solve problems by working together; (3) controlled, because no decision or agreement can be imposed; (4) confidential; (5) informed, because the parties can obtain some legal and expert advice from outside sources before making a decision; (6) impartial, neutral, balanced and safe because the mediator has an ethical duty to be neutral and disclose any biases; and (7) satisfying and self-empowering, because parties are more actively involved in the outcome of the dispute.²⁰

One's place of work in American society has been called the "center-piece of the nation's economic performance and of its concern with productivity, quality and competitiveness,"²¹ because one can take personal and professional satisfaction in it and accordingly invests an extensive amount of time. Professional relationships and personal friendships develop among individuals who would otherwise have no other common bond.²² However, "[n]o

17. ADR AND THE LAW 153 (MICHAEL F. HOELLERING ET AL. eds., 13th ed. 1997).

18. Ron Kelly, *California's Mediation Code* (Nov. 14, 2000) <<http://www.mediate.com/articles/ab939.cfm>>. The Code broadly defines mediation as "a process in which a person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement". CAL. EVID. CODE § 1115(a)(West 2000).

19. PICKER, *supra* note 11, at 2-3. *But see* Hoffman, *supra* note 3, at 34 (stating that parties must be aware that "any statement made during mediation will educate the other party and that this information could be used at trial if no settlement is reached"). Further, "[w]hile neither side can use any information specifically produced for the mediation, each can use documents and evidence that could be obtained in other ways." *Id.*

20. *Mediation Information, About Mediation: What is Mediation* (Nov. 14, 2000) <<http://www.mediate.com/about/what.cfm>>.

21. Dunlop, *supra* note 2, at 152-53. This is where people spend much of their time to an extent that it can dramatically affect their personal and home lives. *See id.* It "has become a central institution in our society." *Id.*

22. Cynthia L. Estlund, Essay, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMPLOYMENT L. 49, 58, (1998). These relationships, whether they are professional or personal, "transcend family, neighborhood, and often . . . racial and ethnic identity." *Id.*

two employees have identical perspectives about themselves, another person, an event or situation” and companies will pay a high price for the inevitable workplace disputes.²³ If the resulting disputes are not dealt with productively and in a timely manner, professional and personal relationships will deteriorate, resulting in “defensive and angry” employers and employees working together in an increasingly stressful and less productive work environment.²⁴

The mediation process provides a safe forum to explore underlying business interests and to examine the relationships between parties.²⁵ When a grievance is filed or a dispute arises within the workplace, mediation is an increasingly popular forum for resolving those disputes.²⁶ Depending upon the company or employer's structure, the mediation is conducted either within the workplace or externally through a third party.²⁷ If the mediation program is set up appropriately, the employee or a representative will have input in the choice of mediator, where the mediation will be held, and the distribution of costs.²⁸

An example of an employment setting where mediation proves ideal is when an employee remains employed and seeks to re-establish an amicable and productive working relationship under modified circumstances.²⁹ Alternative dispute resolution forums, specifically mediation, are more conducive than a judicial forum for reaching amicable and practical resolutions in employment settings.³⁰ With such a large percentage of time and effort spent at the workplace, employees want to be content with their environment, policies, co-workers, and remain free from unfair burdens or unlawful practices.³¹

23. Jack A. Hamilton & Elisabeth Seaman, *Turning Around Polarized Mindsets in Workplace Mediations* (Nov 14, 2000) <<http://www.mediate.com/articles/workplace.cfm>>. “Today's workplace abounds with a tremendous variety of people, all with different viewpoints.” *Id.*

24. *Id.*

25. PICKER, *supra* note 11, at 3 (stating that a skilled mediator can hold parties overcome hostilities and re-examine interests in order to develop solutions).

26. Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 135-36 (1999).

27. *Id.*

28. *See id.*

29. Wayne N. Outten, *Negotiations, ADR, and Severance/Settlement Agreements: An Employee's Lawyer's Perspective*, 604 PLILit 235, 249-50 (1999). Maintaining or re-establishing a relationship would be much more difficult to do if parties are adversaries in the litigation process. *See id.*

30. *Id.* at 260-61 (reasoning that a mediated conference provides the employee with a more comfortable environment in which to assert his or her claims with less apprehension).

31. *See* Hamilton, *supra* note 23.

However, some degree of conflict and disagreement will exist in the workplace based on the nature of people and society in general.³²

To obtain satisfactory results, prior to entering into mediation, the party filing the grievance must assess her own situation and decide what she is seeking to obtain from the mediation.³³ In an employment context, the party filing the grievance must know whether she is seeking to re-establish a working relationship with the other party, whether she wants a purely financial settlement, or whether she is seeking a hybrid of the two.³⁴ This determines whether the parties are more interested in the outcome of the mediation or in changing the behavior of one or more of the parties.³⁵ Studies indicate that sincere participation and the opportunity to fully express one's opinion results in positive feedback for the mediation process and satisfaction with the results.³⁶

II. THE MEDIATION PROCESS IN AN EMPLOYMENT DISPUTE

Although there are various forums for conducting mediation,³⁷ this article addresses only two types. The first is where one party files a claim and the mediation takes place internally within the company/employer by a staff mediator.³⁸ The second forum is where the mediation takes place outside of the company/employer and the parties select and pay the mediator.

Further, this article discusses two practical approaches to conducting a

32. GLEASON. *supra* note 2, at 2-3. Conflict in the workplace spawns from the high level of social interaction and interdependence among co-workers and among employees and employers. *Id.* There are three general conclusions about workplace conflict. *Id.* at 2. First, "conflict is a pervasive element of social life in the workplace." *Id.* Second, workplace conflicts occur between competitive and cooperative personalities. *Id.* And third, conflict is constructive if dealt with correctly. *Id.*

33. Nancy Kauffman & Barbara Davis, *What Type of Mediation do you Need?*, 53 DISP. RESOL. J. 8, 12-13 (1998).

34. *Id.* at 12.

35. *Id.*

36. *Id.* at 9-10 (citing The Mediation Center, 1995 Annual Report (1995)). Because mediators have different styles, a party should assess their circumstances early on so that the mediator is clearly informed of their objectives and goals for the outcome. *See id.*

37. Wayne D. Brazil, *Comparing Structure for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 747-49 (1999)(referring to five "models" of mediation).

38. *See* Wayne N. Outten, *Alternative Dispute Resolution of Employment Disputes*, 600 PLI/Litig. & Admin. Practice Course Handbook Series 627, 632 (1999). More companies are increasingly instituting internal dispute resolution procedures. *Id.* Companies implementing such programs should be understanding of the natural skepticism by employees that may accompany such a program and should thus take careful steps in designing and running such programs to enhance credibility and ensure fairness. *Id.*

mediation based on the party's goals.³⁹ "Outcome-oriented" mediation is generally used when the working relationship has already been severed.⁴⁰ Conducting the mediation under this theory is more likely to result in an agreement between the parties when the employee has no intent to return to the workplace in any capacity.⁴¹ Under these circumstances, the mediator will play a more active role as an "evaluative" mediator by offering his or her opinion on relevant facts and concerning what value the case may have or its potential outcome in a judicial setting.⁴² Employee/employer cases are more frequently negotiated under the "change-oriented" mediation.⁴³ Change-oriented mediation emphasizes the process of the mediation rather than merely focusing on the outcome.⁴⁴ The distinguishing factor of the change-oriented approach is that the mediation functions in a more productive environment with the goal of ensuring both parties the liberty to safely discuss their concerns and needs without the fear of repression or physical or emotional harm.⁴⁵

It is also possible that a mediation proceeds under a hybrid process between the outcome-oriented and change-oriented theories.⁴⁶ This may occur, for example, where an employee seeks monetary damages along with replacement in the workplace and requests a verbal agreement in mediation prior to re-placement.⁴⁷ Regardless of the mediation's orientation, the decision to perform it internally or externally is typically based on whether or not the employer or company has established dispute resolution procedures internally.⁴⁸ Although many employers, both large and small, are currently experi-

39. KAUFFMAN & DAVIS, *supra* note 33, at 10-11.

40. *Id.* at 11.

41. *Id.* (adding that some believe that an evaluative mediator may be impartial following an assessment of the facts or suggestion of a potential outcome in court).

42. *Id.* (noting that it is possible in an outcome-oriented mediation to refrain from performing an evaluation of the case).

43. *Id.*

44. *Id.*

45. See KAUFFMAN & DAVIS, *supra* note 33, at 10-11. (providing a productive environment where, at the very least, the parties positions are heard and acknowledged because lines of communication are opened).

46. *Id.* at 12.

47. *Id.* (stating there is no clear line of distinction between outcome-oriented and change-oriented goals). For example, where an employee claims that he or she is sexually harassed and seeks both a monetary outcome and seeks to prevent the perpetrator's harassing patterns. *Id.*

48. MARY ROWE, DISPUTE RESOLUTION IN THE NON-UNION ENVIRONMENT: AN EVOLUTION TOWARD INTEGRATED SYSTEMS FOR CONFLICT MANAGEMENT, IN WORKPLACE DISPUTE RESOLUTION:

menting with or are in the process of implementing ADR procedures, there are still many smaller companies without designated programs.⁴⁹

III. EFFECTS ON EMPLOYEES & EMPLOYERS DURING AND AFTER MEDIATION

Effective mediation can help disputants reduce the substantial monetary, temporal, and psychological expenses that typically result from litigation. Further, the mediator and his or her neutrality and effectiveness play a substantial role in the success of the mediation.

A. *Mediation's Relationship-Maintaining Function*

Regardless of whether the mediation is conducted by a mediator from within or without the company, parties typically seek to preserve an existing working relationship, or end one amicably.⁵⁰ "Mediation provides an opportunity to redirect emotions in a productive manner . . ." and "is designed to put the parties at ease in the context of exploring their interests and needs."⁵¹ Other more salient positive effects are more apparent in high profile cases involving sensitive or highly controversial issues.⁵² For example, in sexual harassment claims mediation may be a preferred forum for plaintiffs because parties proceed in a less formal setting and will most likely not endure the same degree of badgering or embarrassment that may accompany a public trial.⁵³ Employees have stated that mediation gave them more control in the opportunity to "tell their own stories in their own voices," freeing them from the more structured litigation forum of depositions or testifying on the witness stand.⁵⁴ However, although the "venting" process is useful, mediation

DIRECTIONS FOR THE TWENTY-FIRST CENTURY 79 (Sandra E. Gleason ed., 1997).

49. *Id.* The United States General Accounting Office reported in 1995 that most employers having over 100 employees had implemented some sort of ADR procedures. *Id.* at 80.

50. MEDIATION INFORMATION, *supra* note 20. "Many disputes occur in the context of relationships that will continue over future years. A mediated settlement that addresses all parties' interests can often preserve a working relationship in ways that would not be possible in a win/lose decision-making procedure. Mediation can also make the termination of a relationship more amicable." *Id.*

51. Harkavy, *supra* note 26, at 158.

52. *Id.* at 157. Mediation offers confidentiality, which is beneficial to both the complainant and the individual, or business against which the complaint is filed. *Id.*

53. Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 599 n.98 (1999); *see also* Harkavy, *supra* note 26, at 156-58.

54. *Id.* at 601-02; *see also* Carol A. Wittenberg et al., *Why Employment Dispute Mediation is on the Rise*, 605 PLI/Litig. & Admin. Practice Course Handbook Series 637, 642 (1999).

does not fill the role of a therapy session.⁵⁵ Similarly on the part of the employer, where a complaint or claim is raised against an individual, he or she may be angry or have adverse feelings, which requires discussion and a resolution before being able to work productively with the employee.⁵⁶

Employers note that saving time is a substantial benefit of mediation.⁵⁷ More than 90% of civil cases settle before going to trial, showing that there is a high probability that disputes will reach a consensus at some point.⁵⁸ Mediation provides the opportunity to evaluate whether a particular dispute can be settled earlier, saving time and money for both parties.⁵⁹ The Equal Opportunity Employment Commission ("EEOC") recently headed a pilot mediation program in which 267 groups agreed to mediate. Interviews were subsequently conducted with employers on the effectiveness of the mediation program.⁶⁰ Almost all employers stated that the time saved through mediation was a beneficial and important factor, in addition to the lower attorneys fees and litigation expenses.⁶¹

B. *Empirical Research*

Although many practical and theoretical questions remain unanswered, pieces of empirical findings provide evidence of the frequency and outcomes of mediation.⁶² Mediation is specifically growing as a means of resolving Title VII employment discrimination claims.⁶³

The EEOC's pilot mediation program⁶⁴ randomly assigned eligible

55. Hoffman, *supra* note 3, at 34.

56. *Id.*

57. Yelnosky, *supra* note 53, at 599. One program decreased the resolution time by 52%. *Id.* at 598-99.

58. Outten, *supra* note 38, at 633-34.

59. *See id.* at 634.

60. Yelnosky, *supra* note 53, at 597-98.

61. *Id.*

62. Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 105-07 (1996) (reporting that empirical research on mediation tends to concentrate on the assessment of the process and its effectiveness).

63. Yelnosky, *supra* note 54, at 597 (reporting findings from the EEOC's and the General Accounting Office's ("GAO") pilot mediation program).

64. *Id.* at 597. Before an employment discrimination complaint can be filed in federal court, an individual invoking a Title VII claim must follow the EEOC's established procedure of first filing a discrimination charge with the EEOC itself. *Id.* at n.80. The EEOC then researches the charge and must find reasonable cause for approval. In 1993, the EEOC initiated a pilot me-

charges⁶⁵ to either a control group for processing through the EEOC's traditional means or to a mediation group for processing.⁶⁶ There were 920 charges assigned to a mediation group. Although 87% of the charging parties and 43% of the employers agreed to mediate,⁶⁷ in 267 of the 920 charges (29%), both parties agreed to mediate.⁶⁸ Results were obtained in 1994 on the 267 cases mediated and were then compared and contrasted with five private companies and five government companies who mediated disputes internally.⁶⁹ Fifty-two percent of those who agreed to mediate reached a settlement agreement.⁷⁰ Results also showed that the decrease in time invested in resolving an employee/employer dispute was one of the primary benefits of mediation.⁷¹ Mediations in the in-house programs lasted between one-half to six hours and the EEOC's mediations lasted approximately 3.6 hours each.⁷² Successful mediations appeared more common where there was an early resolution of the existing dispute "because the parties can begin discussions before antagonistic positions have solidified around doctrinal arguments and litigation tactics."⁷³ Early attempts at mediation, rather than waiting to mediate, which may result in increased hostilities, were more likely to result in the reinstatement or preservation of an employee/employer relationship.⁷⁴ Seventeen percent of the EEOC's mediation settlements included an agreement to rein-

diation program in four offices. *Id.* The resulting approval of the "National Enforcement Plan" incorporates the EEOC's recently adopted 1995 policy on ADR, following the completion of the mediation pilot program. *Id.* Under this policy, the EEOC expressed its commitment to ADR and in 1999 it began a nationwide mediation program. *Id.* (citing EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements, 1999 Daily Lab. Rep. (BNA) No. 29, at C-1 (Feb. 12, 1999)).

65. Yelnosky, *supra* note 53, at 597 (stating that for the pilot program, "eligible charges" were defined as those filed under Title VII, the American with Disabilities Act (ADA), and the Americans with Disabilities in Employment Act (ADEA) and excluded claims arising from reasonable accommodation, harassment, class action, and equal pay charges). *Id.* at n.81.

66. Yelnosky, *supra* note 54 at 597-98. Seventy-nine percent of all of the charges involved discharges from employment. *Id.* at n.82 (citing McEwen at iii). "Of these, 48% alleged race discrimination, 21% sex discrimination, 17% age discrimination, and 14% disability discrimination." *Id.*

67. Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, 1023 (Winter 1996).

68. Yelnosky, *supra* note 53, at 597.

69. *See id.* at 597-98.

70. Hodges, *supra* note 67, at 1023.

71. Yelnosky, *supra* note 53, at 598.

72. *Id.* (citing U.S. Gen. Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, at 6-7 (1997)).

73. Yelnosky, *supra* note 53, at 599.

74. *Id.*

state or modify the employee's status.⁷⁵

In addition to the EEOC's pilot program, there have been other less in-depth inquiries on the numbers of individuals who engage in mediation.⁷⁶ A 1990-1991 survey given to 552 lawyers who were members of the construction bar, revealed information on respondents' actual experiences with mediation and other ADR methods.⁷⁷ The survey revealed that mediation is extensively employed in the construction field.⁷⁸ Almost two-thirds (64.2%) of respondents had been involved in at least one mediation, and of those mediations, most of them (58.3%) have taken place within the last two years.⁷⁹ Survey respondents indicated that mediation was an appropriate method of dispute resolution in employment circumstances where the parties: (1) wish to maintain an on-going business relationship; (2) seek confidentiality and privacy; (3) wish to resolve the dispute quickly; or (4) require a more cost-efficient method than litigation.⁸⁰ Respondents indicated that mediation was least appropriate in the employment circumstances when: (1) the dispute involves a novel question of law; (2) a witness's credibility is at stake; or (3) one of the disputants or his or her counsel is considered untrustworthy or unlikely to compromise.⁸¹

In a survey conducted of 320 American Bar Association members, there were 548 reported experiences with ADR and 459 of those (83.8%) involved mediation.⁸² In addition to the employment discrimination pilot project, the EEOC and the Department of Justice funded advanced training for mediators of ADR claims filed under the Americans with Disabilities Act ("ADA").⁸³

75. See *id.* at 599 (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1004 (1991)). See also Craig A. McEwen, *An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program 4-5*, 52 (Mar. 1994) (unpublished manuscript, on file with author).

76. See generally Henderson, *supra* note 62, at 128, 130.

77. See *id.* (citing Thomas J. Stipanowich & Douglas A. Henderson, *Settling Construction Disputes with Mediation, Mini-Trial, and Other Processes – The ABA Forum Survey*, CONSTR. LAW 6 (Apr. 1992)).

78. See Henderson, *supra* note 62, at 128.

79. *Id.*

80. *Id.* at 129.

81. *Id.*

82. *Id.* at 130 (noting that the 1990 study listed overall ADR experiences to include "mediation, mini-trials, summary jury trials, non-binding arbitration, and various other processes").

83. See Hodges, *supra* note 67, at 1025. Training the mediators was in preparation for an ADA pilot program. *Id.*

Following the EEOC's pilot program, two common remedies sought in a settlement by both employees are: (1) reinstatement of the employee; and, (2) a modification the workplace policies. The next two sub-sections address these remedies.

C. *Reinstatement of the Employee — Is it Appropriate?*

Although reinstatement of the employee may not be an appropriate remedy under all circumstances, it is an important consideration in many employment disputes.⁸⁴

One of the principal values of mediation—the resolution of a dispute in a manner so that the parties can continue their business, professional, or personal relationships —makes mediation appear superior to adjudicatory forms of dispute resolution. Judicial litigation and private arbitration, with their emphasis on adversary procedures, tend to drive parties farther apart, thus making continuance of the employer-employee relationship much more difficult. Mediation, by contrast, emphasizes a non-adversarial exploration of the parties' common interests and personal concerns, thereby making it far less likely that the employment relationship becomes irreparably fractured.⁸⁵

When a complaint is lodged, dispute resolution steps taken early on can help restore a successful working relationship.⁸⁶ Where possible, the sooner a prevailing plaintiff is reinstated to his or her position, the more likely it is that the relationship will lead to long-term employment.⁸⁷ Other employers report that reinstatement is a remedy more appropriate and successful in anti-discrimination cases.⁸⁸ In cases where the parties are seeking reinstatement, “[d]irectly resolving their own disputes empowers the parties and can help them develop a framework or relationship for working together constructively in the future.”⁸⁹

Conversely, mediation also provides a greater possibility of job reinstatement.

84. See discussion, *supra* note 2; see also Yelnosky, *supra* note 53, at 599 (noting that seventeen percent (17%) of the settlements reached in the EEOC's pilot program included employee reinstatement of some sort).

85. Harkavy, *supra* note 26, at 160.

86. Yelnosky, *supra* note 53, at 599 (stating that “early dispute resolution efforts tend to be more successful because the parties can begin discussion before antagonistic positions have solidified . . .”).

87. *Id.*; but cf. Yelnosky, *supra* note 53, at n.71. It is impractical to reinstate plaintiffs as a remedy under a claim of discriminatory discharge. *Id.* “Several studies of reinstatement as a remedy for various forms of wrongful discharge concluded that few employees accept reinstatement if it is offered, and those who do are often discharged or leave quickly.” (citing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 86 (1990)).

88. Yelnosky, *supra* note 53, at n.71.

89. *Id.* at 601.

ment when the party against whom the complaint is lodged is an employee.⁹⁰ For example, in a sexual harassment claim, a mediation settlement may allow the offending employee to keep his or her job under tight supervision and structured rules which would otherwise be impermissible under the personnel policy.⁹¹ This leaves open the possibility for an employee to have a second chance under close scrutiny and to "retain his livelihood in a way that might not have been possible if the case were litigated."⁹²

D. Modification of Workplace Structure and Environment

Under the EEOC pilot mediation program, employers consented in twenty-two percent of the resolutions to modify workplace rules and practices.⁹³ Mediation engages the parties in cooperative and creative problem solving through a private and confidential forum providing them the opportunity to vent their grievances and voice their opinions.⁹⁴ As a result, some employers report that employees are more willing to raise a complaint where there is now the option of mediation over litigation.⁹⁵ This has both negative and positive effects for the employer. It may result in frivolous complaints⁹⁶ or excessive reporting.⁹⁷ However, employers report that the increased participation in mediation has made the management and supervisory boards more aware of policies and employee concerns based on employee complaints.⁹⁸ ADR provides better awareness of problematic issues in the workplace and allows them to better respond to issues that may go unaddressed if dealt with merely through litigation.

90. See e.g., Harkavy, *supra* note 26, at 159.

91. See *id.*

92. *Id.*

93. Yelnosky, *supra* note 53, at 603 (noting that ninety-two percent (92%) of mediation participants reported that the process was very or somewhat fair).

94. Outten, *supra* note 38, at 634-35.

95. Yelnosky, *supra* note 53, at 599-601.

96. *Id.* at 600.

97. *Id.* at 599-600.

98. *Id.* at 599-600 (stating that these reports may have otherwise remained unknown to the managerial or supervisory staff). See also Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements are an Effective Alternative to Employment Litigation*, 52 ALT. DISP. RESOL. J. 19, 22 (1997).

IV. NEUTRALITY AND THE MEDIATION PROCESS

An effective mediator is “the single most important factor in successful mediations.”⁹⁹ Although the mediator has no power to impose a resolution,¹⁰⁰ depending on the depth of the mediator’s involvement, his or her relationship with the employer-company or professional background may have the potential to alter the mediator’s ability to remain neutral. Two factors that have a propensity to alter the neutrality of the mediation process are (1) the mediator’s financial relationship, knowledge of confidential information, or other ties to the employer,¹⁰¹ and (2) the imbalance of power between employer and employee.¹⁰²

A. *The Mediator: Who Pays the Bill?*

1. Ties to the Employer or Employee

Regulations and common sense state that an ADR mediator must be a neutral party and the employer’s mediation procedure for resolving disputes must be established and fair.¹⁰³ Whether the mediation process is done internally within the company or externally through an organization that selects a mediator, where the employer pays the mediator’s fees, or the external mediator regularly works with the employer, there is a possibility of non-neutrality.¹⁰⁴

The existence of biases based on funding sources, professional ties, or previous representation are valid concerns.¹⁰⁵

99. Outten, *supra* note 38, at 640.

100. Yelnosky, *supra* note 53, at 600.

101. See Brazil, *supra* note 37, at 752-53. Concerns about “money messages” commend ADR models where the courts visibly pay for the mediator’s service. *Id.* at 753.

102. Yelnosky, *supra* note 53, at 605-06 (stating “resource disparities between the parties will influence negotiated or mediated settlements . . .”). *But see* Henderson, *supra* note 62, at 129-30. In a survey presented to construction professionals, “the survey group registered strong opinions on the role of the dispute resolution advisor in mediation.” *Id.* at 129. But when asked to indicate the relative importance or unimportance of thirteen mediator attributes, “familiarity to the parties was viewed as a relatively unimportant factor”. *Id.* at 129-130.

103. See Agnes Wilson, *Resolving Employment Disputes: A Practical Guide*, 578 PLILR. 119, 129-30 (1998).

104. Brazil, *supra* note 37, at 769 (stating that parties to the mediation may have many reasons for concern about the mediator’s partiality); *But see id.* at 130 (stating that if an external organization such as the American Arbitration Association is designated to administer the external component of the program and specify the governing rules, their duties include regulating a mediator’s continued service to one employer).

105. *Id.* at 769.

For example, parties might wonder whether a mediator with a private ADR practice might tend to favor a major institutional player that might serve as a source of repeat business for that mediator in her private practice. More commonly, a party could have serious questions about the neutrality of mediators who have active law practices in which they spend disproportionate percentages of their time either on the plaintiff's side or on the defense side. A plaintiff might worry that a lawyer who usually represents corporate defendants, for example, would have so absorbed one perspective that she is not capable of bringing a truly open mind to a mediation assignment.¹⁰⁶

With the enactment of the 1998 ADR Act and the expanded use of mediation and ADR, courts have addressed and professionals have acknowledged the concern over mediator neutrality and the potential for conflicts of interest.¹⁰⁷ In addition to a potential bias or conflict of interest in regularly representing an employer as its mediator in claims filed by employees, the potential for biases or a conflict of interest may also exist against the employer.¹⁰⁸

Courts have held that where a lawyer serves as a neutral mediator chosen by both parties, that lawyer cannot later represent one of those parties in a subsequent litigation with same or factually similar matter.¹⁰⁹ Under local rules of professional conduct, a Utah District Court ruled in *Polysoftware In-*

106. *Id.* at 769.

107. Hoffman, *supra* note 3, at 32. The CPR-Georgetown Commission on Ethics and Standards in ADR drafted a "Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral" which addresses concerns over attorneys who may either switch roles from mediator to advocate or mediate for one side on more than one occasion. *Id.* (citing CARRIE-MENKEL MEADOW & ELIZABETH PLAPINGER, CPR-GEORGETOWN COMM'N ON ETHICS AND STANDARDS IN ADR, PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL (1999)). Rule 4.5.3(b) on impartiality states that "[a] lawyer who serves as a third-party neutral should: (1) disclose to the parties all circumstances, reasonably known to the lawyer, why the lawyer might not be perceived to be impartial. These circumstances include (i) any financial or personal interest in the outcome, (ii) any existing or past financial, business, professional, family or social relationship with any of the parties, including, but not limited to any prior representation of any of the parties, their counsel and witnesses, or service as an ADR neutral for any of the parties, (iii) any other source of bias or prejudice concerning a person or institution which is likely to affect impartiality or which might reasonably create an appearance of partiality or bias, and (iv) any other disclosures required of the lawyer by law or contract." Rule 4.5.4(d) states that "[A]fter accepting appointment and while serving as a neutral, a lawyer shall not enter into any financial, business, professional, family or social relationship or acquire any financial or personal interest which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias, without disclosure and consent of all parties." *ADR Ethics Forum: A Model Rule for Lawyers as Third Party Neutrals*, 17 ALT. HIGH COST. LIT. 78-79 (1999).

108. See generally Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, 4 NO. 2 DISP. RESOL. MAG. 3, 5 (1997).

109. *Polysoftware Intern Inc. v. Su*, 880 F. Supp. 1487, 1492 (Utah 1995).

tern Inc. v. Su that “a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.”¹¹⁰

In *Polysoftware*, two disputing parties agreed to mediate a copyright action, however one party sued the other shortly after reaching a settlement in the mediation.¹¹¹ The other party moved to disqualify the attorney in light of his prior status as the party’s mediator.¹¹² The judge referred to a proposed code of ethics for mediators, which states that “[w]ithout the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter.”¹¹³ Similarly, an attorney who served as a party’s mediator in an unsuccessful mediation was disqualified from representing that same party in the same court action.¹¹⁴ The court reasoned that the attorney was privy to confidential information that was revealed in the mediation, and relevant to the litigation.¹¹⁵ The court added that the disqualification applied to other members of the attorney’s law firm as well.¹¹⁶

Conversely, a California appellate court more recently held that if a lawyer mediates for one party against another and the mediation reaches a settlement, that same lawyer can later represent another party in litigation against the previously adverse party when confidential information about the adverse party was obtained through the first mediation.¹¹⁷ The court held in *Barajas v. Oren Realty and Development Co.* that the attorney could represent the first plaintiff as mediator and the second plaintiff in the litigation despite the defendant being the same party.¹¹⁸ The court reasoned that if disqualification

110. *Id.* at 1492 (quoting Utah. Prof. Conduct Rules, Rule 1.12(a)).

111. *Id.* at 1489.

112. *Id.* at 1491-92.

113. *Id.* at 1492 (quoting NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* (2d ed. 1994)).

114. *McKenzie Construction v. St. Croix Storage Corp.*, 961 F. Supp. 857, 863 (V.I. 1997).

115. *Id.* at 860-61.

116. *Id.* at 863.

117. See *Barajas v. Oren Realty and Develop. Co.*, 67 Cal. Rptr. 2d 62, 68 (Ct. App. 1997). Apartment tenants filed a suit against the builders of a complex, which was damaged in an earthquake. Oren Realty filed a motion to disqualify the tenant’s attorney because the same attorney had served as another tenant’s mediator in a previous related, yet separate claim against the same defendant. *Id.* at 63. The Court of Appeals held that the local evidence code providing that all communications, negotiations, or settlement discussions during mediation are to remain confidential does not mandate that an attorney who represents a plaintiff in a mediation is disqualified from representing a different plaintiff in a related case against the same defendant. *Id.* at 63, 68.

118. *Id.* at 68.

in separate yet related cases after mediation was required, it would follow that disqualification would also be required in the same case after an unsuccessful mediation.¹¹⁹ The court stated that this policy would be contrary to “long-established practice” because “[w]hen mediation fails to achieve settlement, the same attorneys who handled the case before and during the mediation commonly continue to handle the case thereafter through trial and beyond.”¹²⁰

In addressing the potential conflict of interest in an employment setting, the *Polysoftware* court stated that the mediator should be precluded from representing the party or parties in a subsequent matter including, but not limited to, the following circumstances: (1) when confidential information is disclosed which may disadvantage the other party, or (2) when a claim is substantially related to the previous mediation.¹²¹ If the determination of whether a claim is substantially related to a previous mediation cannot be reached by the involved parties, it may result in the case being handled in a judicial setting.¹²² Further, a lawyer can mediate a subsequent matter involving a previous client and another party after obtaining informed consent by both parties.¹²³ In order to avoid potentially non-neutral mediators, parties should agree on and participate in the selection of the mediator and also agree on his or her qualifications for the position.¹²⁴

2. The Cost of the Mediator

Employment ADR programs should have an equitable method of cost sharing between the employer and employee to ensure affordability and fairness.¹²⁵ If an employee objects to an ADR program's policy that the employee only pays a small portion and wants to assume a larger percentage of the costs, the employer should allow the employee to do so because it ensures

119. *Id.* at 66.

120. *Id.* (adding that a decision like this may discourage parties from attempting to reach a settlement through mediation in the first place).

121. See *Polysoftware*, *supra* note 109, at 1492.

122. See *e.g.*, *Polysoftware*, *supra* note 109; see also *Barajas*, *supra* note 117.

123. See *PolySoftware*, *supra* note 109, at 1494.

124. James H. Keil, “Hybrid ADR” in the Construction Industry, 54 *DISP RESOL. J.* 14, 21 (1999).

125. Wilson, *supra* note 103, at 130.

objectivity in the mediation process and allays the appearance of bias.¹²⁶ Where dispute resolution processes are internal, employees “may legitimately view such procedures with some skepticism.”¹²⁷

However, while some employers’ objectives in paying the entire mediation bill is to increase the appeal and induce participation, other employers take the position that without financial investment on the part of the plaintiff, the employee may be disinclined to partake completely and “wholeheartedly” in the process.¹²⁸ An alternative option is to have the employee contribute a percentage based on his or her income.¹²⁹ In 1996 cases referred by the courts to mediation, two-thirds of the programs required both parties to pay the mediator’s fees.¹³⁰ As these concerns develop with the increased use of mediation, some federal and state courts, professional organizations of lawyers, and neutrals are drafting standard ethical guidelines required for serving as a neutral mediator.¹³¹

B. *Imbalance of Power Between Employer and Employee*

An additional factor, which has the potential to result in an inequitable resolution, is the possibility of unequal bargaining power between the employer and the employee.¹³² This disparity may result in an employee/plaintiff succumbing to the will of the employer and ultimately reaching an agreement, which may not reflect the true interests of the employee.¹³³ Where an employee seeks to return to the workplace under modified conditions, there may be a hierarchical system that inevitably carries over into the mediation. In this situation, an employee reluctant to speak out against his or her current employer may feel more comfortable and be better represented by an advocate speaking on his or her behalf.¹³⁴ Further, mediation frequently succeeds in avoiding these circumstances of inequity between the employer and employee

126. *Id.*

127. Outten, *supra* note 38, at 632.

128. Carol A. Wittenberg et al., *Alternative Dispute Resolution: What the Business Lawyer Needs to Know, Why Employment Disputes Mediation is on the Rise*, 605 PLI/LIT 637, 641-42 (1999).

129. *Id.* at 642.

130. Hoffman, *supra* note 3, at 33.

131. *Id.* at 32.

132. Yelnosky, *supra* note 53, at 606 (stating that racial minorities, women, and the low income are particularly at risk because their opponents are likely to be more powerful and familiar within the process and alternative litigation process).

133. *Id.* at 607.

134. See Andrew Kramer et al., *Mandatory Arbitration as an Alternative Method of Resolving Workplace Disputes*, VLR 994 ALI-ABA 177, 223 (1999).

because using a neutral mediator reduces posturing by avoiding face-to-face negotiation between the parties.¹³⁵ Mediation allows one party to discuss settlement options with a mediator and helps reduce any existing animosity or discomfort between the parties because the parties themselves do not have to directly negotiate.¹³⁶

V. CONCLUSION

The American Arbitration Association concluded that mediations reach a settlement in more than 85% of cases.¹³⁷ It is estimated that 90% of U.S. businesses today will be sued at least once and a 1985 study reported that two-thirds of the \$35 billion spent annually on litigation was used for legal fees and costs.¹³⁸ Recent publicized successful mediations and disputes in employment settings which resulted in unsuccessful and deadly outcomes show that although awareness of mediation as an alternative is growing, it is still not utilized in employment situations where it could be most effective.¹³⁹

A. *Recent Successful Mediations*

Companies of all types and sizes are turning to mediation in an attempt to resolve employment disputes.¹⁴⁰ For example, recently US Airways threatened to shut down the airline's operations if contract negotiations with its flight attendants proved unsuccessful.¹⁴¹ Flight attendants requesting higher pay, improved retirement benefits, and increased job security reached an agreement under discussions mediated by the National Mediation Board.¹⁴²

135. *Id.*

136. *Id.*

137. Michael J. Roberts, *Why Mediation Works* (Nov. 14, 2000) at <<http://www.mediate.com/articles/roberts.cfm>> (adding that this statistic includes situations where previous attempts at resolution have failed because it brings "all necessary parties to the bargaining table where they can realistically evaluate their positions and safely explore settlement options.").

138. Keil, *supra* note 124, at 20.

139. See e.g., K. Connie Kang, *Suicide is Symbol of Workplace Prejudice, Bias: Korean American's Diary Details Long Term Harassment by his Japanese Supervisors*, L.A. TIMES, Mar. 27, 2000, at B1.

140. See e.g. *US Airways, Union Reach Deal, Avert Strike*, L.A. TIMES, Mar. 26, 2000, at A12.

141. Stephen Gregory, *US Airways to Halt Flights if Talks Fail, Travel: Shutting Down During Flight Expected to Have Little Impact in California*, L.A. TIMES, Mar. 23, 2000, at C2.

142. See *US Airways*, *supra* note 140, at A12.

This agreement averted a strike or halt in airline operations which would have resulted in an estimated revenue loss of \$27 million per day.¹⁴³

B. Recent Employment Disputes Which Could Have Benefited from Effective and Timely Mediation

Although mediation may take place, it may at times be ineffective and take place too late.¹⁴⁴ After allegedly enduring four years of workplace harassment at a worldwide shipping company, Korean immigrant Mike Lee hanged himself in his garage three days after reaching a settlement in his discrimination lawsuit.¹⁴⁵ Nippon agreed to pay Lee \$50,000 but refused to admit any wrongdoing.¹⁴⁶ Lee's wife turned over his diary, which revealed that he had endured years of humiliating and disparaging comments targeting his Korean ethnicity.¹⁴⁷ One passage in Lee's diary revealed, "whenever I saw them [his supervisors], I would feel such pain and rage that I felt like I would go crazy . . . I hated my plight — the plight of having to be in the same room with these people."¹⁴⁸ Lee lodged a discrimination complaint in 1998, which the company dismissed.¹⁴⁹ After Lee's deposition was subsequently taken in a co-worker's 1999 unrelated discrimination suit, the company's human resources manager came from the firm's New York headquarters to mediate Lee's allegations of discrimination. Lee's widow stated that he "was so happy to find someone from the company who seemed sympathetic to his situation that he spoke from his heart."¹⁵⁰ This intervention was too late, as Lee developed hostile feelings and admitted that he felt like killing his supervisors.¹⁵¹ This statement resulted in his arrest at work and the filing of criminal charges.¹⁵² Lee's threat was described as an expression of pent-up anger and resentment and his widow stated that her husband "saw no way out of his problems."¹⁵³ It is the legal responsibility of a company to prevent a hostile workplace, and if Lee's complaint was initially taken seriously and if the human resources manager had intervened earlier, this story may have

143. *US Airways, Union Keep Talking Past Strike Deadline*, L.A. TIMES, Mar. 25, 2000, at A24.

144. *See* Kang, *supra* note 139, at B1.

145. *Id.*

146. *Id.*

147. *Id.* at B3.

148. *Id.*

149. *Id.*

150. Kang, *supra* note 139, at B1.

151. *Id.*

152. *Id.*

153. *Id.*

had a different ending.¹⁵⁴

Another situation where mediation may prove effective involves an investigation of racial and sexual harassment complaints within the Los Angeles County Sheriff's Department.¹⁵⁵ There is now a class action suit consisting of 1,180 female officers against the Sheriff's Office.¹⁵⁶ Under these circumstances, a confidential attempt at mediation may have avoided the present situation where "employees who report being harassed . . . are tagged as disloyal 'for complaining about the conduct of fellow officers, rather than commended for attempting to set the department on the right track.'" ¹⁵⁷ Complaints became public knowledge in the department and resulted in forms of retaliation such as being "accidentally left without backup in dangerous situations."¹⁵⁸ The article reported that in 1993 the Sheriff's Office was required to develop and implement a sexual-harassment policy and it has not complied with this policy.¹⁵⁹

Despite the existing potential for a non-neutral mediator, where both parties have input in the careful selection of the mediator, the positive effects of mediation outweigh the potential for the abuse of an employee financially or intellectually inferior to the employer. Further, the successful agreements and remedies of mediation are a favorable alternative in several respects when compared to traditional litigation. For example, "the vast majority of employment-related disputes do not need or warrant litigation, which is simply too expensive, slow, inefficient, and inflexible for many such disputes."¹⁶⁰ Yet as the data presented attests, "ADR addresses the complaint while often preserving the employment relationship, leading to a more harmonious resolution and aftermath."¹⁶¹ Despite mediation's popularity, valid questions of fairness and mediator neutrality arise when there is a private external mediator paid by the

154. *Id.*

155. Edward J. Boyer, *Harassment in Sheriff's Department Decried, Workplace: Independent Report Calls for a Civilian Commission to Review All Complaints on Race, Gender Issues*, L.A. TIMES, Mar. 29, 2000, at B1.

156. *Id.*

157. *Id.* at B3.

158. *Id.*

159. *Id.*

160. Outten, *supra* note 38, at 631.

161. Paul Steven Miller, *Disability, Civil Rights, and a New Paradigm for the Twenty-First Century: the Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMPLOYMENT L. 511, 525 (1998). The agreements reached in employment mediation often result in a "win-win" situation for both parties. *Id.*

employer or where there is an internal mediator in the company directly paid by the employer. However, as the economy continues to grow and legislation expands, the use of mediation is a welcomed trade-off to litigation.¹⁶²

162. See DUNLOP, *supra* note 2, at 153.