

RESOLVING RACE DISCRIMINATION IN EMPLOYMENT DISPUTES THROUGH MEDIATION: A WIN-WIN FOR ALL PARTIES[©]

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Introduction

Race-based employment discrimination in this country has had a long and troublesome history of discrimination directed at various minority groups. The primary difference between past and present discrimination is that today's discrimination is much more subtle.¹ In the past, it was not only lawful, but acceptable to simply state "We don't hire your kind here!" However, discriminatory practices have taken a much more indirect and less obvious approach with the advent of affirmative action programs, Title VII of the Civil Rights Act, and enforcement of civil rights laws by federal courts and the U. S. Equal Employment Opportunity Commission (EEOC). Some describe today's race-based discrimination as discrimination with a smile.² Undoubtedly, discrimination continues to persist in virtually every aspect of our society, such as housing, public accommodation, and employment matters, to name but a few problem areas. Indeed, discrimination today ranges from simply not calling someone for a job interview because their non-Anglo or African-American names happens to be Manuel, Mohammed or Jaquetta³, to disciplining minorities

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¹ See Sara Trenary, *Rethinking Neutrality: Race and ADR*, DISP. RESOL. J. Aug. 1999, 40,41 (raising issues with the use of ADR to resolve race disputes "[d]ue to its insidiousness, unconscious racism poses serious questions for the 'egalitarian' or 'neutral' elements trumpeted in ADR."); Also see, Lamont E. Stallworth, Thomas McPherson, and Larry Rute, *Discrimination in the Workplace: How Mediation Can Help*, DISP. RESOL. J., Feb.-Apr. 2001, 35 (discussing how mediation can be used to resolve subtle and unconscious forms of employment discrimination).

² Roy L. Brooks, Gilbert Paul Carrasco, and Michael Selmi, *Housing-The Social And Legal Environments*, p. 265 In CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 3rd ed. (2005) (describing how discrimination can occur in the housing market. The 'smile' principle also applies in employment discrimination.)

³ According to the National Bureau of Economic Research, despite laws against discrimination, affirmative action, a degree of employer enlightenment, and the desire by some businesses to enhance profits by hiring those most qualified regardless of race, job applicants with white names needed to send about 10 resumes to get one callback; those with African-American names needed to send around 15 resumes to get one callback. See, David R. Francis, *Employers' Replies to Racial Names* <http://www.nber.org/digest/sep03/w9873.html>. See also, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 THE AM. ECON. REV. 991 (2004), available at

more harshly than non-minorities for committing the same workplace infractions as their coworkers, or even to setting hiring criteria that more negatively impact minorities,⁴ such as grooming policies,⁵ testing requirements,⁶ criminal and credit reports.⁷

Congress and most states have promulgated a number of statutes to prohibit race discrimination in employment. Specifically, Congress passed Title VII of the Civil Rights Act of 1964⁸ to prohibit workplace discrimination, particularly racial discrimination.⁹ Plaintiffs primarily use Title VII to pursue race discrimination charges against employers. This has resulted in an explosion of race complaints filed with the EEOC and in federal courts.¹⁰

Approximately one hundred thousand claims of employment discrimination are filed with the EEOC every year.¹¹ Additionally, employees also file racial employment discrimination in federal court under sections 1981¹² and 1983 of the Civil Rights Act of

<http://econ.duke.edu/~hfl4/teaching/povertydisc/readings/bertrand-mullainathan2004.pdf>, NBER Working Paper No. 9873 NBER Working Paper No. 9873

⁴ *Griggs v. Duke Power Co.*, 401 U.S.424 (1971). (establishing the disparate impact theory of discrimination).

⁵ See *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 797, 798–99 (8th Cir. 1993) (granting the EEOC an injunction against a pizza restaurant because the burden of a narrow exception for Black men with PFB was minimal and the restaurant “failed to prove a compelling need for the strict no-beard policy as applied to those afflicted with PFB”).

⁶ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

⁷ *EEOC v. Peoplemark, Inc.* 2011 U. S. Dist. LEXIS 38696 (2011); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, *aff’d*, 702 F. 2d 221 (D.C. Cir. 1981); *Gregory v. Litton Systems*, 316 F. supp. 401 9 C. D. Cal. 1970) *modified on other grounds*, 472 F. 2d 631 (9th Cir. 1972); *Notice 915.061* EEOC, (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html.

⁸ 42 U.S.C. § 2000e et. seq. Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 in Pub. L. 102-166; Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 *HOW. L.J.* 45, 58–59 (2010).

⁹ See <http://www.eeoc.gov/> for more information about the EEOC.

¹⁰ “Federal employment discrimination lawsuits are up 268 percent since 1991, rising at a rate nine times as fast as other types of federal civil litigation” said Barry Goldman, an associate management professor who co-authored a study with professor Barbara Gutek and doctoral student Jordan Stein. Becky Pallack, *‘Litigation Explosion,’* AZ DAILY STAR, Dec. 10, 2006, at http://www.eller.arizona.edu/docs/press/2006/12/ArizonaDailyStar_Litigation_explosion_workplace_discrimination_claims_soar_Dec10_2006.pdf.

¹¹ In 2010, 99,922 charges were filed, of which 36% or 35,890 involved allegations of race discrimination. Over the past 12 years, race discrimination charges have accounted for greater than one-third of all charges filed. See, *Charge Statistics*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹² 42 U.S.C. §1981 (Section 1981) creates a federal cause of action for individuals claiming intentional racial discrimination. To support such a claim, a plaintiff must allege that he is a member of a racial

1866.¹³ Also, plaintiffs file charges with state fair employment practices agencies and in state courts under various under state and local laws.¹⁴ To address this influx of cases filed in both federal¹⁵ and state courts, mediation programs have been implemented throughout the judicial system.¹⁶ Mediation helps resolve cases prior to the expenditure of limited judicial resources on litigation. Every federal agency is required to have an alternative dispute resolution (“ADR”) system to resolve disputes in lieu of litigation.¹⁷ In addition, the Civil Rights Act of 1991 encouraged the use of mediation to resolve discrimination disputes.¹⁸

Moreover, private employers have developed various mandatory ADR systems, including mediation, to resolve all employment related disputes.¹⁹ Consequently,

minority, and that he was discriminated against within a particular group of activities set forth in the statute. Those activities include the right to “make and enforce contracts ,such as employment contracts, as is enjoyed by white citizens.”

¹³ 42 U.S.C. §1983 made legal equitable relief available to those whose constitutional rights had been violated by an actor acting under State or Federal Authority. Section 1983 can be used to enforce rights based on the federal constitution and federal statutes, such as the prohibition of public sector employment discrimination based on race. It rarely applies to private employers.

¹⁴ 29 C.F.R. 1601.13(a)(3)(i). All but two states have a FEPA to consider charges of employment discrimination. “List of State Fair Employment Practice Agencies,” 2010, The Law.com, <http://www.thelaw.com/guide/employment/list-of-state-fair-employment-practices-agencies/>.

¹⁵ As a percent of all federal civil filings, civil rights filings increased from 9% in 1990 to nearly 17% in 1998. Civil rights filings stabilized at about 16% of federal civil caseloads from 1999 through 2003. By 2006, 13% of federal civil cases involved civil rights issues. Employment discrimination accounted for about half of all civil rights filings in U.S. district courts from 1990 to 2006. See, *Special Report: Civil Rights Complaints in U.S. District Courts, 1990-2006*, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/pub/ascii/crcusdc06.txt>.

¹⁶ FED. R.CIV. P. 16; See generally Leonard Riskin, Nancy A. Welsh, *Is That All There Is? The “Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008).

¹⁷ Administrative Dispute Resolution Act of 1996 5 U.S.C. § 571. All federal agencies were required to establish or make available an ADR program during the pre-complaint and formal complaint stages of the EEO process. See 29 C.F.R. 1614.102(b)(2). One of the most successful federal mediation program is the REDRESS program, which is administered by the U. S. Postal Service. For a detailed discussion of this program see, Lisa Blomgren Bingham et. al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1 (2009).

¹⁸ “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 the Acts amended by this Act.” Civil Rights Act of 1991, Pub. L. 102-166, § 18.

¹⁹ Through the American Arbitration Association, employers and their employees can access alternative dispute resolution (ADR) practices to promptly and effectively resolve workplace disputes. Some companies mandate the use of this organization in lieu of private litigation. Learn more at www.adr.org. See also, CENTER FOR PUBLIC RESOURCES INSTITUTE FOR DISPUTE RESOLUTION, *EMPLOYMENT ADR: A DISPUTE RESOLUTION PROGRAM FOR CORPORATE EMPLOYERS*, (1995); and Suzette Malveaux, *Is it the*

mediation facilitates settlement in lieu of litigation or at an early stage of litigation which saves the parties time and money. There are substantial advantages to resolving race discrimination in employment disputes through mediation rather than relying on protracted administrative processes and burdensome litigation.

The first part of this article will briefly explore how the EEOC, the federal courts, and the private sector all use mediation to resolve race discrimination in employment disputes. Thereafter, the article outlines the advantages of resolving race discrimination in employment claims through mediation. This article does not suggest or conclude that mediation is a panacea for resolving all racial discrimination in employment disputes. The article, however, does conclude that even with some unresolved issues of justice and fairness,²⁰ mediation of race discrimination complaints can result in a win-win situation for all parties involved when used appropriately and effectively.²¹

I. Various Mediation Systems To Resolve Race Discrimination In Employment Disputes

As mediation developed into a successful means of resolving business disputes²² employers quickly realized that it was a positive alternative for resolving complex employment law suits. Beyond the courts, corporations, universities, the federal government, and non-profits organizations have all developed mediation and settlement programs to resolve employment disputes. In addition, some also have begun to implement internal mediation programs to resolve employment discrimination disputes.

"Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration, 2009 J. DISP. RESOL. 77 (2009).

²⁰ Jonathan M. Hyman, *Swimming in the Deep end: Dealing With Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19 (2004) (Discussing the issues of fairness and justice which may arise when mediating an employment discrimination claim) Richard Delgado et al, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution* 1985 WIS. L. REV. 1359 (1985). (Raises concerns that poorer claimants may be disadvantaged by the use of ADR to resolve disputes).

²¹ "One survey found that parties who participated in mediation were very satisfied with the process, and that 96% of employers and 91% of charging parties would use the mediation program again if offered. Studies of the EEOC Mediation Program From 1999 through 2010, almost 136,000 mediations have been held and over 94,000 charges, or almost 70% have been successfully resolved." *EEOC Mediation Statistics FY 1999 through FY 2009* *EEOC Mediation Statistics FY 1999 through FY 2009* *History of the EEOC Mediation Program*, <http://www.eeoc.gov/eeoc/mediation/history.cfm> EEOC (internal citations omitted). See also, Arup Varma and Lamont E. Stallworth, *Participants' Satisfaction with EEO mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 EMPL. RTS. & EMP. POL'Y J. 387, (2002). (discussing the degree of satisfaction with the use of mediation to resolve EEO complaints with and without representation).

²² While most people that mediation has a success ratio in excess of 70%, a study of 578 mediations conducted in Georgia in 2006-2007 showed an overall successful settlement rate of 53%. See, *Do Popular Mediators Have Higher Settlement Rates? Empirical Analysis of 578 Mediated Cases* by Cobb Mediation LLC at <http://www.mediate.com/articles/SharpGbl20081110A.cfm>.

A. The U.S. Equal Employment Commission Mediation Program

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. The EEOC administers discrimination charge investigations and attempt to resolve them through mediation and conciliation.²³ In addition, the EEOC works with state Fair Employment Practice Agencies (FEPAs) to manage charges of discrimination and the enforcement of civil rights laws. The EEOC and most affiliated state fair employment practices agencies have developed successful mediation programs to resolve discrimination disputes.²⁴

Prior to filing a racial discrimination claim under Title VII of the Civil Rights Act, the charging party is required to first pursue their claim through the EEOC. After the charge is filed, the grievied party and the employer are both offered the opportunity to engage in voluntary mediation to attempt to resolve the dispute. If both parties agree, mediation will be conducted prior to the start of the investigation process. A formal investigation of the charge filing will not occur until either the mediation attempt results in an impasse or a party objects to participating in mediation. Though not perfect, the mediation process has proven to be a successful one for the EEOC.²⁵ In a policy statement, the EEOC declared that: "used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination, as well as in Commission operations."²⁶ In a fact sheet from the EEOC, it list the following advantages to mediation: the parties avoid the investigative process, the purpose of the

²³ Prior to an exhaustive investigation, the EEOC encourages, but does not mandate, the use of their mediation program. After the parties have been informed by letter that the evidence gathered during the investigation establishes that there is "reasonable cause" to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions. During conciliation, the investigator will work with the parties to develop an appropriate remedy for the discrimination. The EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." See 42 U.S.C. 2000e-5. Also see *Resolving a Charge*, EEOC, <http://www.eeoc.gov/employers/resolving.cfm>

²⁴ For example, see Thomas A. Kochan et. al., *An Evaluation of Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233 (2000); Geetha Ravindra, "Reflections on Institutionalizing Mediation," DISP. RESOL. MAG., Spring–Summer 2008, at 28 (describing Virginia's experience with its Employment Dispute Resolution Agency); *Mediation*, Ohio Civil Rights Commission, <http://crrc.ohio.gov/mediation.htm> (describing Ohio's voluntary mediation program).

²⁵ "The EEOC's mediation program has been very successful and has contributed to our ability, over the past few years, to better manage our growing inventory and resolve charges in 180 days or fewer. In FY 2009, the EEOC's National Mediation Program secured 8,498 resolutions, and we obtained more than \$121.6 million in monetary benefits for complainants from mediation resolutions." See EEOC, "Enforcement," <http://www.eeoc.gov/eeoc/enforcement/index.cfm>.

²⁶ *Notice No. 915.002*, EEOC (July 17, 1995), <http://www.eeoc.gov/policy/docs/adrstatement.html>.

mediation is solely to discuss the charge and to resolve it, mediation's informality allows for lower preparation cost, and confidentiality precludes the admission of talks as evidence.²⁷ A number of studies on the EEOC's mediation program indicates that the process has reduced the time and the cost of processing discrimination complaints.²⁸

B. U.S. Federal Court Mediation Program.

The federal court system has integrated mediation into its process at both the district and appellate court levels. While individual mediation programs vary, federal courts have definitely embraced the mediation process. For example, a number of federal courts utilize a "settlement week" system where they hold mediations during the week. This system is repeated every quarter, or four times per year. The judges designate cases for mediation. Many of these cases will include complaints of discrimination filed under various federal civil rights statutes. Volunteer attorneys are often utilized as mediators at no cost to the parties.²⁹

The federal appellate courts also have a mediation program, which takes place just before the appellate briefs are due.³⁰ Courts offer mediation early in the appeals process to determine if the case can be resolved before the parties and the court expend additional time and effort on the briefing process. Unlike district courts, the mediation program is often compulsory in appellate court. Indeed, it can be sanctionable conduct for an attorney to refuse to cooperate with the mediation.³¹ Unlike federal trial courts, typically the mediators in appellate courts are court employees rather than volunteers. The potential benefits of appellate mediation include informing the parties of the nature of appellate proceedings, permitting a "global settlement" that could not be obtained

²⁷ EEOC, *Cleveland District Office: ADR Fact Sheet*, 92, on file with author Floyd Weatherspoon.

²⁸ See, Patrick McDermott et. al., , *An Evaluation of the EEOC Mediation Program*, EEOC (2001). <http://www.conflict-resolution.org/sitebody/acrobat/report1>; Patrick McDermott et. al., *The EEOC Mediation Program: Mediators' Perspective on the Participants, Processes, and Outcomes* (2001), available at <http://www.cpnflict-resolution.org/sitebody/acrobat/report2.pdf>; CRAIG A. MCEWEN, AN EVALUATION OF THE EEOC'S MEDIATION PROGRAM, <http://www.bowdoin.edu/faculty/c/cmcewen/pdfs/an-evaluation-of-the-equal-employment-opportunity-commissions-pilot-mediation-program-1994.pdf> (1994).

²⁹ See generally, James R. Holbrook and Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. CONTEMP. L. 1 (1995) and Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77 (2007).

³⁰ ROBERT NEIMIC, *MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS*, (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/\\$File/mediconf.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/$File/mediconf.pdf).

³¹ Fed. R. App. P. 33 states "The court may direct the attorneys-and, when appropriate, the parties-to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement."

through an appellate decision, and describing the “uphill battle” of appealing a case to help the parties approach the appeal more realistically.³²

Court annexed mediation programs are also used to resolve race discrimination complaints in lieu of litigation. Nevertheless, court annexed mediation programs are not immune to concerns that mediation may disadvantage minorities. Mediated settlements have no precedential value, and patterns of race discrimination may continue if individual cases are exclusively resolved in mediation and limited to the disputing parties. The U. S. Supreme Court has rendered a number of cases involving racial conflict in the country, which established legal precedent for lower court to follow. For example, if school desegregation cases such as *Brown v Board of Education*³³ and *Swann v. Charlotte-Mecklenburg Board of Education*³⁴ had not been litigated but mediated, racial segregation would still be prevalent. Individual mediated settlements would not have created the important legal jurisprudence that federal courts follow today. Nevertheless, not all race disputes need to be litigated. The benefits of mediating race discrimination suits will result in the creation of a more harmonious relationship between the parties, then an order from the court. Mediation may also result in the parties jointly supporting the eradication of overt and subtle discriminatory employment practices.³⁵

C. Private Sector Mediation Programs.

Private corporations have implemented mediation programs in an attempt to minimize the number of employment law suits and thus decrease their litigation budgets.

The most commonly utilized mediation program in the private sector is the one administrated by the American Arbitration Association.³⁶

³² Jeanette Bellon & Sharon D. Degnan, *The Appeal of Appellate Mediation: Making the Case for an Attractive Dispute Resolution Tool*, FLA. B.J. Mar. 2009, at 32. See also, Robert B. Moberly & Laura E. Levine, *The New Arkansas Appellate-Mediation Program*, 61 ARK. L. REV. 429, 434–38 (2008) (discussing the benefits of the Arkansas mediation program for the parties, the court, and the attorneys).

³³ 347 U.S. 483 (1954) Other examples of racial discrimination in the employment context include *Griggs v. Duke Power Co.*, 401 U.S.424 (1971). (establishing the disparate impact theory of discrimination) and *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973) (establishing the burden-shifting framework for alleging and proving disparate impact claims).

³⁴ 402 U.S. 1 (1971).

³⁵ See EEOC Notice No. 915.002 at note 26, *supra*.

³⁶ At the AAA, there is no up-front filing fee to file a mediation. There also is no fee to ask the AAA to invite the other party to mediate. The American Arbitration Association has reported that more than 85% of all disputes that went to mediation resulted in a settlement. See, *American Arbitration Association: Mediation*, www.aaamediation.com.

In addition to voluntary mediation programs, a number of major corporations have also implemented mandatory ADR programs to resolve employer disputes. Even though the imposition of mandatory ADR programs has resulted in protracted litigation, they are nevertheless widely used by Fortune 500 corporations.³⁷ The Supreme Court has sanctioned the use of mandatory ADR program within certain guidelines.³⁸ Whether mediation is voluntary or mandatory, corporations have acknowledged that there can be a substantial cost and time savings benefit to mediating employment disputes in lieu of litigation.³⁹

II. Advantages to Resolving Race Discrimination In Employment Disputes Through Mediation.

Employment discrimination cases are sometimes filed for both financial reasons and other times for psychological reasons. While the financial reasons are fairly obvious (if someone loses a job, they will struggle to pay bills and take care of family and financial responsibilities until a new job is found), the psychological reasons are often times overlooked. However, they are as important, if not more important, than the financial reasons.⁴⁰

Given this country's history of racial discrimination, it is not uncommon for an employee or applicant to sincerely believe that the adverse employment action they faced was due, at least in part, to his/her race. This becomes especially true when there is an impression, be it real or perceived, that non-minorities have received favorable treatment in similar circumstances. For, example, an African American female may wonder why a co-worker was not fired for missing three days at work while she was fired for the same

³⁷ See Jonathan Wexler, AllBusiness.com, "In-house Resolution of Employment Disputes," <http://www.allbusiness.com/human-resources/1133345-1.html>.

³⁸ EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (finding that the EEOC could still pursue relief on behalf of victims in spite of an arbitration clause requiring all employment disputes to be submitted to binding arbitration); Circuit City Stores, Inc. v. Adams, 532 U. S. 105 (2001) (holding that employment contracts may contain arbitration provisions for employment disputes under the Federal Arbitration Act unless the contract is with a transportation worker); Gilmer v. Interstate/ Johnson, 500 U. S. 20 (1991) (holding that age discrimination claims may be arbitrated under a compulsory arbitration clause in the employer's contract).

³⁹ Jim Golden et. al., *The Negotiation Counsel Model: An Emphatic Model for Settling Catastrophic Personal Injury Cases*, 13 Harv. Negot. L. Rev. 211, 246–47 (2008), citing Miguel A. Olivella Jr., *Toro's Early Intervention Program, After Six Years, Has Saved \$50M*, 17 Alternatives to High Cost Litig. 65, 65 (1999) (finding that the Toro Company's approach of offering voluntary non-binding mediation resulted in 90–95 percent of claims against it being mediated. Before Toro Co. implemented its in-house ADR program in 1992, the cost of the average litigation file to Toro Co. was more than \$47,521). After only two years of experience with the ADR program, the cost per claim was slashed by seventy-five percent.

⁴⁰ See, JAMES J. ALFINI, ET. AL., *MEDIATION THEORY AND PRACTICE*, 338–42 (2001) (excerpting and discussing Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663–71, 2692 (1995)).

workplace infraction.⁴¹ This results in mental frustration and possibly even emotional distress relative to the perceived unfairness of the employer's practices. This situation is further exacerbated by the fact that most employers choose not to give the terminated employee any definitive reason for the termination and may refuse to listen to the ex-employee's rationale for the situation or arguments of unfairness. This creates a lack of "closure" that can make it difficult for the ex-employee to just let the situation go and move on with life. Instead, the employee may feel compelled to file a charge of race discrimination with the EEOC and even a complaint in federal court.

By contrast, mediation provides the advantage of giving the employee an opportunity to be heard by the employer. A properly run mediation will provide the aggrieved ex-employee a meaningful opportunity to state his/her case (or more appropriately to "vent") in front of the employer's representative, which would normally be a human resource person or perhaps even the supervisor involved in the termination. The mediation process permits each party an opportunity to present their positions and interests to a neutral mediator who will assist them in reaching an acceptable agreement.⁴² After both parties state their case, discussions about how to resolve the conflict begin and the ex-employee can better be able to discuss resolution now that he/she has finally had the opportunity to be heard.

All the parties benefit if they resolve their disputes in mediation and avoid the time, cost, stress and hostile environment that so often accompany protracted litigation.⁴³ The following sections discuss these and other benefits of mediating race discrimination disputes in lieu litigation.

A. Reduce Administrative and Litigation Cost

The cost of litigating an employment discrimination law suit can be astronomical. There can be a tremendous cost-savings to the employers by erasing litigation from the equation or at minimum reducing the length of litigation by engaging in mediation early in the discovery process.⁴⁴ There might also be savings to the employee as well, especially if the employee's attorney is being paid by the hour and not on contingency.⁴⁵

⁴¹ *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973)

⁴² ALFINI, note 40, *supra*, at 37.

⁴³ Sara Trenary, *supra*, note 1 (describing other goals and the effect of ADR as "improved accessibility and empowerment and flexibility."); See also Laura Farrow, *Mediation Of Workplace Tiffs Is The Way of the Future*, The Practitioner, available at <http://mediates.com/drs-tiffs.html> (stating that mediation in the workplace "provides fast, creative, mutually satisfactory resolutions").

⁴⁴ See, Patrick Nichols, *Mediation Advocacy in Employment Litigation*, <http://www.adrmediate.com/docs/Nichols--Mediation%20Advocacy%20in%20Employment%20Cases.pdf> (explaining the high cost of litigating these cases, which can easily exceed \$70,000 just through the discovery phase alone, and analyzes the importance mediation plays in the process).

⁴⁵ See, e.g., note 35, *supra*.

The processing of an EEO complaint by the EEOC or state enforcement agencies may take more than a year to reach closure. Similarly, discrimination cases litigated in federal court may take another year or more to reach closure, longer if appealed through the federal system. The cost of processing the complaint increases at each all stages of both systems. The use of mediation at the earliest stages of each system will reduce the cost of proving and defending claims of discrimination.⁴⁶ In the context of race claims, mediation may also reduce the emotional cost placed on all parties involved in a sensitive and highly expositive dispute.

Shorten Time Frames For Resolving Race Disputes

A shortened time frame is beneficial to both parties not just in the expense of litigation, but also to alleviate the emotional turmoil and reduced productivity that the process causes. When company employees have to spend time responding to discovery requests and sitting through exhaustive depositions, this lost time can be emotionally draining and damage employee morale. It can also be counter-productive for the employee to continuously re-live the adverse employment event over and over, which could calcify the employee's animosity toward the employer. The longer the case goes the more likely it is that the employee will feel disrespected and ignored — a situation that only intensifies the employee's willingness to see the case through and resist settlement. Indeed, a shortened time frame is typically best for all involved.⁴⁷

B. Avoiding Win-Lose Outcomes

A majority of charging parties who pursue their race claim through the EEOC will ultimately receive a “no probable cause” finding of discrimination.⁴⁸ In other words, the evidence failed to support the claim of discrimination. For example, FY 2001, the EEOC issued more than twenty-thousand “no reasonable cause” findings. This represented 63.3 percent of race charges filed with the EEOC. The “no cause findings” translates into a loss for the employee or applicant and a win for the employer charged with a race discrimination claim. Often, a “no cause finding” does not address the underlying conflict which caused the charging party to initially file the claim. Moreover, the employer may not seek to address the underlying conflict because the employer may

⁴⁶ D. Aaron Lacy, *Alternative Dispute Resolution or Appropriate Dispute Resolution: Will ADR help or Hurt the EEO Complaint Process?*, 80 U. DET. MERCY L. REV. 31, 44 (Fall 2002). (States “...that the cost of processing formal complaints is lower than if EEO complaints are processed without using ADR”); Craig A. McEwen, *Managing Corporate Disputing; Overcoming Barriers to the Effective use of mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1(1998).

⁴⁷ R. Michael Kasperzak, Jr., *Using Mediation to Reduce Litigation*, Dispute Resolution Specialists, 1996, <http://www.mediates.com/drsusingmed.html> (“Since mediation can be completed so quickly, it will allow you to put the matter to rest within a few weeks and get back to the business at hand. In sharp comparison, the average court case can take anywhere from two to five years to be resolved. A mediation also allows you to avoid the endless hours spent in discovery, research and depositions.”).

⁴⁸ *Race-based charges FY 1992-FY2001*, EEOC, <http://www.eeoc.gov/stats/race.html>.

feel they have been vindicated by the “no cause finding”. This win-lose outcome can also result in the employee deciding to elevate the matter to the court-system to seek redress, thus prolonging the dispute.

Once an individual files a law suit in court, even before the ink has dried on the complaint, defense counsel will file a motion for a summary judgment. In employment law type cases only 15 percent of claims filed with the EEOC result in relief in court,⁴⁹ leaving the plaintiff with no remedy and few options.⁵⁰ Mediation normally does not result in a full settlement, nevertheless, complainants are more likely to receive some remedy, versus no remedy in federal court. In addition, there is no finding of discrimination against the employer in mediation so both parties may view a settlement during mediation as a win-win situation.

C. Resolving Underlying Racial Issues

When litigation starts, it is usually the first time that the employer has any knowledge about the employees’ concerns (unless the case has gone through an administrative process like the EEOC first). It is highly probable that the employees accused of discriminatory acts, when they are questioned by the employer, will spin the story such that it does not appear that they did anything wrong for fear of being disciplined themselves. Certainly nothing they did will remotely resemble racial discrimination! Inclined to believe their stellar employees over the one that has filed the lawsuit, the employer will typically deny all the allegations in the complaint and may not actually have the opportunity to hear the aggrieved employee’s full version of the facts until they are seated together at the mediation table.

Mediation permits the parties to discuss the underlying claims of race discrimination. Often, mediation is the first time the parties discuss their feelings and perspectives on the claims of race discrimination. This open dialogue may serve a valuable purpose by opening company management’s eyes to what could be perceived as racially discriminatory practices in the workplace that the company can then eradicate following mediation. It is also common for a mediated settlement agreement to include as a provision of resolution that certain managers attend diversity training to increase their sensitivity to issues that minority employees face.

D. Enhancing Parties Communication Skills To Discuss Racial Issues

Mediation can be used as an avenue to engage the parties to openly discuss issues of perceived workplace racism, actual workplace racism, or both. Often, employees feel that managers are favoring certain employees based on race. For example, white

⁴⁹ Michael Selmi, *Why Are Employment Cases So Hard to Win?* 61 LA. L REV., 555, 558 (2001).

⁵⁰ Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J., 937, 941 (2005), (Finding that “[f]orty years after enactment of Title VII, employment discrimination claimants tend to lose their cases handily in the federal courts.”); Also see *Id.* at 560–61.

employees may feel that management is favoring minorities because of affirmative action initiatives or measures taken to avoid disparate impact lawsuits.⁵¹ Similarly, minorities may feel that white management favors other white employees because of social relationships or nepotism, or racial preferences. These perceptions may be wrong and may in fact result from a breakdown in communication between employees and managers.⁵² Managers are often unequipped to facilitate a dialogue with employees to resolve conflict. Either the parties' communication breaks down or the parties do not know how to overcome their different backgrounds and different races. Ultimately, employees will file a race discrimination complaint to present their concerns or become disgruntled and unproductive. When used effectively, mediation allows the parties to discuss and resolve sensitive and sometimes highly volatile issues. Mediation benefits the parties because it forces them to develop communication skills that will help them air their differences and negotiate the resolution of future disputes without a third party. Moreover, the parties engage in problem solving which might engender a sense of achievement and commitment to any settlement reached by the parties.

E. Confidentiality

Normally, when cases settle, the parties sign a settlement agreement. Additionally, the mediation process itself is confidential in order to promote open discourse without fear that things said will be used against the other party in later litigation. This level of open communication helps to foster a more relaxed environment that is more conducive to resolution.

The benefit of the confidential process and agreement is that it allows the employer the opportunity to resolve a case without admitting liability and without having negative documents and data (especially information that suggests the employer has discriminatory practices) disclosed to the curious public at large or subjected to juror scrutiny. A typical confidentiality provision will require the parties to maintain the strictest confidence regarding terms of the agreement by neither discussing nor disclosing any of the agreement's terms.

Employers that want even more protection for their internal data and processes may even have a protective order put on the case to further prevent any disclosure of the information produced. The protective order serves the purpose of making sure any documents marked as confidential are not a public record. Thus, mediating race discrimination cases can clearly be a win for the employer by providing it with protection over its sensitive documents, policies, procedures, and processes. It can also be a win for the employee who may want to resolve their complaint in private, without the public, the

⁵¹ Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 306 (2003); Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

⁵² Howard Gadlin, *Addressing the Thornier Complexities of Racial Discrimination Complaints in the Workplace*, 15 DISP RESOL MAG. Spring 2009, 25–28. (describing how race discrimination complaints are often about a breakdown in communication in the workplace among employees).

employee's family, or the employee's friends knowing the details of their workplace dispute.

F. Reduce Retaliation Complaints

An employee or applicant who files a complaint of discrimination or raises issues of discrimination has engaged in protected activities. They may file a retaliation claim of discrimination if they perceive they are being treated adversely because they engaged in protected activity.⁵³

While it can be difficult for employees to prove race discrimination claims, it can be an easier task proving retaliation. This is because retaliation is a little less subjective than discrimination. Whether someone is treated differently based on the color of their skin can be difficult to decipher. However, if someone is fired immediately after complaining of possible race discrimination, proving that the termination was related to the complaint can be an easier task. Even harassment by co-workers of an employee that has complained of discrimination, regardless of whether the supervisors condoned such retaliation, can give rise to a solid cause of action for retaliation (regardless of the merits of the underlying discrimination allegation).⁵⁴ Thus, retaliation claims have been on the rise and often accompany discrimination charges in lawsuits.⁵⁵ By engaging in an early resolution process, retaliation claims, which an aggrieved employee has a much greater chance to win in court,⁵⁶ can be prevented or resolved before they go too far and end up costing the employer.

The longer a complaint lingers, especially a claim of race discrimination, the more likely that the complainant may perceive that the supervisor is treating them adversely because they filed a complaint. Indeed, the supervisor may feel the need to defend their

⁵³ See, EEOC Compliance Manual, Sec. 8: Retaliation, (1998). <http://eeoc.gov/policy/does/retal.html>.

⁵⁴ See, Howard Zimmerle, *Common Sense v. The EEOC: Co-Worker Ostracism and Shunning as Retaliation Under Title VII*, J. Corp. L. (2005), <http://www.allbusiness.com/legal/laws-government-regulations-employment/1011084-1.html> Journal of Corporation LawJournal of Corporation LawFriday, April 1 2005Friday, April 1 2005(addressing the issue of retaliation and supporting case law in depth).

⁵⁵ There were 26,663 retaliation based charges filed in 2007 up from 22,555 the previous year. The trend might be explained, in part, by employees filing both a discrimination charge and a retaliation claim; increased awareness by employees, or employers mishandling employee internal complaints of discrimination. *Job Bias Charges Rise 9% in 2007, EEOC Reports*, EEOC, <http://www.eeoc.gov/press/3-5-08.html>.

⁵⁶ According to EEOC data, retaliation charges in 2007 comprised thirty-six percent of the total charges filed. See, *Id.* The criteria for making retaliation claims, as established by the Supreme Court in the 2006 case of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), is simply to prove that an adverse action occurred because of the discrimination charge. The Supreme Court held that an "adverse action" is any action by an employer that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.*

position, they monitor the complainant closer than other employees. This could be viewed as a form of retaliation unless there is a clear business reason for the supervisor to additionally scrutinize the complaining employee. Mediation could be used to help the parties to reach an agreement and avoid retaliation claims arising from a lingering discrimination complaint.

G. Remedies

Remedies under Title VII and other Civil Rights Statutes are typically limited to traditional remedies such as back pay, reinstatement, etc.⁵⁷ Monetary remedies such as front pay and punitive damages, as well as reimbursement for costs and attorney fees, may also be available but are more difficult to obtain.⁵⁸

Mediation, however, allows and even encourages the parties to think outside the box to find creative solutions to resolve their disputes.⁵⁹ Courts and civil rights enforcement agencies lack authority to craft remedies designed around the needs and interests of the parties. Mediation helps the parties because it enables them to have a say in how the case resolves outside of the statutory or regulatory limitations that govern the courts and agencies such as the EEOC.

III. Conclusion:

By engaging in a prompt mediation process, the parties can resolve race discrimination disputes in a more efficient and cost effective manner. Additionally, they can also shed light on faulty internal policies and practices of offending employees that can ultimately help to eradicate racial discrimination and retaliation in the workplace.

⁵⁷ See generally MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW, §§ 5.65–5.70 (1988).

⁵⁸ Id.

⁵⁹ Michael W. Hawkins, Alternative Dispute Resolution: An Alternative for Resolving Employment Litigation and Disputes, 20 W.Y. L. Rev, 493, 494-95 (1993).