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# DO FORMAL MEDIATION PROGRAMS WORK IN THE SETTLEMENT OF EMPLOYEE-EMPLOYER DISPUTES?

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People spend an unbelievable amount of their time at work. Work relationships are often very intimate and personal. Because of this, many hostilities and frustrations arise from the workplace and the personal relationships that are formed there. Most people leave their jobs because of their supervisor or team leader. "Basically, it's a lack of trust, of communication, of relevant and timely feedback, of appreciation, of fair treatment and of information." These tribulations often create matters that can be mediated successfully. "Personal feelings of worth and personal satisfaction seem to be essential to maintain a productive workforce." Unhappy workers are not as successful as those that are content with their working environment. A workplace sees much more achievement in their workers if there is a mediation practice created. The nature of the workplace makes the style of mediation much more beneficial the typical adversarial position taking found in traditional litigation. Mediation is a very useful tool that can be implemented in many disputes that arise from the workplace environment; this paper will focus on the use of mediation in the workplace.

In the most basic terms mediation is "a process in which two or more people involved in a dispute come together to try and find a fair and workable solution to their problem."<sup>1</sup> This process is accomplished through the use of a mediator who is "a neutral third person who is trained in cooperative conflict resolution."<sup>2</sup> Mediation can be utilized in a variety of disputes. Mediation can be initiated "before a dispute, by agreeing to mediate in a contract; during the dispute, by agreeing to submit the problem to mediation; and during the dispute, when parties cannot communicate."<sup>3</sup>

## HISTORY OF MEDIATION

Beginning in 1898, mediation has played a role in labor-management disputes under the Erdman Act.<sup>4</sup> During World War II, mediation

was used in the War Labor Board and the U. S. Conciliation Service.<sup>5</sup> The 1947 Taft-Hartley Act formed the Federal Mediation and Conciliation Services (FMCS) for labor-management dispute resolution.<sup>6</sup> The FMCS "pioneered a number of innovations in the mediation process, developed standards and ethics of procedures, and provided training for persons who were willing to undergo the strenuous discipline necessary to become mediators."<sup>7</sup> The use of mediation during this time was to prevent striking and lockouts that occurred in many industrial conflicts.<sup>8</sup> The FMCS also hoped the safety, welfare, and wealth of the American worker would improve through mediation.<sup>9</sup>

The acceptance of mediation has grown because of the belief that individuals should take control of decision affecting their life. The use of mediation has also been motivated by the "growing dissatisfaction with authoritative, top-down decision makers and decision-making

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<sup>1</sup>Guerin, Lisa and Peter Lovenheim. *Mediate, Don't Litigate*. California: Nolo, 2004

<sup>2</sup> Id.

<sup>3</sup> Crowley, Thomas. *Settle it Out of Court*. New York: John Wiley & Sons, Inc., 1994

<sup>4</sup> Keltner, John. *The Management of Struggle*. New Jersey: Hampton Press, 1994

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

procedures.”<sup>10</sup> When mediation is used in the employment sector it helps employees and employers reach a satisfying solution to any issue that may arise in the workplace.

### THE MEDIATION PROCESS

In mediation both parties play a role in the decision making process. When each side is given the opportunity to tell their side of the story, they “feel as though they [have] participated in a fair process, regardless of the outcome.”<sup>11</sup> This mechanism can be used in companies to help them resolve differences between themselves and their employees.

Mediation is becoming more common in the workplace. A workplace mediation process can be implemented in any workplace, although most are found in moderate-to-large size organizations.<sup>12</sup> In many companies a mediation clause can be written into an employee contract to ensure that once a conflict arises it can be handled amicably and fairly using the mediation process.<sup>13</sup> Many companies are even adding mediation clauses in personnel manuals and employee handbooks.<sup>14</sup>

The goal of mediation is to work out a solution between parties that looks towards the future rather than the past. Mediation is successful since it helps improve communication between parties, gives both parties a better understanding of each other’s point of views, allows parties to meet face to face, and gives people a forum to speak their mind and be heard.<sup>15</sup> “Many workplace conflicts, like other types of disputes, are the result of failing to

communicate or understand others’ interests or needs.”<sup>16</sup>

### ARGUMENTS FOR MEDIATION

Mediation can be beneficial in the workplace since it can be used whenever a dispute arises during the course of a project or whatever the task is. This allows for a faster continuation of work once the dispute is resolved. Companies are faced with increasing costs of litigation stemming from employee dissatisfaction. Mediation, another form of dispute resolution, can be used to remedy this problem.

Mediation is not only beneficial to employers, it also benefits employees. Mediation is “a vehicle to achieve quick, creative win-win solutions, thereby helping the parties maintain relationships necessary for working together.”<sup>17</sup> Because mediation can also be used to obtain non-monetary compensation, such as an apology, the processes can result in a positive effect on the relationship between the employee and his or her employer once mediation has ceased.

When workplace issues arise often workers may feel vulnerable. Individuals often “build their self identity at their workplace.”<sup>18</sup> The overwhelming impact of an pending litigation can be eased when mediation is implemented.

The cost benefits of mediation are overwhelming. Mediation is a less expensive process and reaches it reaches a resolution much faster than typical litigation. “It is estimated that an average of 50 percent of advanced legal cases transferred to mediation are resolved in less than one day.”<sup>19</sup>

A recent study by the EEOC (Equal Employment Opportunity Commission) found that there are a number of reasons why

<sup>10</sup> Moore, Christopher. *The Mediation Process*. California: Jossey-Bass, 2003

<sup>11</sup> Goldberg, Stephen. “How Interest Based, Grievance Mediation Performs Over the Long Term.” *Dispute Resolution Journal of New York*, Nov. 2004-Jan. 2005, Vol. 59, Iss. 4, pg. 8-15

<sup>12</sup> Weinstein, Rebecca. *Mediation in the Workplace*, Westport, CT: Quorum Books, 2001

<sup>13</sup> <http://www.mediate.com/pfriendly.cfm?id=925>

<sup>14</sup> <http://www.mediate.com/pfriendly.cfm?id=925>

<sup>15</sup> Guerin, Lisa and Peter Lovenheim. *Mediate, Don’t Litigate*. California: Nolo, 2004

<sup>16</sup> Arthur, Jeffery, Bruce Blitman, Jeanne D. Maes, Robert A. Shearer. “Using Collaborative Modeling to Mediate Workplace Conflicts.” *Equal Opportunities International Patrinton:2003* Vol.22, Iss.5, pg. 25-30

<sup>17</sup> Id.

<sup>18</sup> <http://www.mediate.com/pfriendly.cfm?id=1093>

<sup>19</sup> Weinstein, Rebecca. *Mediation in the Workplace*, Westport, CT: Quorum Books, 2001

companies do not participate in their mediation program. Employers often reject the use of mediation because the employers perceive that the charge against them lacks merit, they believe that mediation will require them to submit to a monetary settlement, or they are hesitant on the quality of mediators available.<sup>20</sup>

Most often parties in an employment dispute will continue to work with one another after a mediation dispute. The mediation process will allow these parties to work together to determine a solution for their problem while also helping them learn how to overcome these problems in the future. For example, one company was able to stop using grievance mediation “because it was so successful that it taught [the parties] to be able to handle their problems themselves. Successful grievance mediation resulted in not needing a mediator anymore.”<sup>21</sup> Mediation is useful since it helps lay groundwork for positive interactions between both parties once their dispute is solved.

Since mediation is a private process, parties are able to keep their lawsuits out of the public eye. This can be very important to an employer who would not like negative press. Decisions, settlement offers and any allegations that employees make against their companies do not become public record in the mediation process.

Companies are able to keep trade secrets private in the mediation process. Confidentiality is necessary for successful mediation; there are both “legal and ethical protections” put in place for the mediation process.<sup>22</sup> Parties can even go as far as getting court protective orders to ensure that information is held confidential.

Additionally, participants in the mediation process are able to reach non-monetary needs

that may even be more important to them. For example, in the workplace, an employee may prefer a simple apology from a boss rather than back pay or other monetary compensation they may be entitled to. EEOC participant Laurice Royal, Esq., with John Hopkins Health System Corporation, noted that they “learned that settlement is not always about money. Sometimes there are non-economic ways to settle a case that may be important to the charging party and the respondent.”<sup>23</sup> Through mediation these types of request can be part of the mediated agreement.

Because mediation allows for settlement of non legal concerns it can be useful in the workplace. For example, it can be implemented to resolve coworker-to-coworker issues such as problems getting along. The mediation settlement can deal with any issue that may arise concerning the actual needs of employees.<sup>24</sup> Not all mediated disputes have to resolve legal problems within the workplace.

To determine whether cases fit properly with mediation, the EEOC, for example, has sent up protections to ensure that some dealing with the “protection [of] the public’s interest in procedural fairness” reach trial where legal precedent can be established.<sup>25</sup> The EEOC has created a classification system of issues to determine when a case is acceptable for their mediation process. “A” charges, those that relate to public policy concerns or those deal with important patten of practice/system issues, most often go to court and bypass the mediation process.<sup>26</sup>

Mediation is a more cost effective means of dispute resolution over litigation. Some of these programs may even be free for the employee if his or her company offers a in-house mediation program or if the process is sponsored by a government agency such as the Equal Employment Opportunity Commission.

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<sup>20</sup> Clark, Margaret. “While Some Employee see No Incentive For EEOC Mediation, Others Find Benefits.” *HRMagazine* 2004 Vol. 49, Iss. 1, pg. 36

<sup>21</sup> Goldberg, Stephen. “How Interest Based, Grievance Mediation Performs Over the Long Term.” *Dispute Resolution Journal of New York*. Nov. 2004-Jan. 2005, Vol. 59, Iss. 4, pg. 8-15

<sup>22</sup> Guerin, Lisa and Peter Lovenheim. *Mediate, Don’t Litigate*. California: Nolo, 2004

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<sup>23</sup> Id.

<sup>24</sup> Weinstein, Rebecca. *Mediation in the Workplace*, Westport, CT: Quorum Books, 2001.

<sup>25</sup> <http://www.eeoc.gov>

<sup>26</sup> Id.

The mediation process is much faster, as well. Problems can be taken care of right away allowing both parties to receive a quick resolution to their dispute. A study by the EEOC found that the average mediation they hold lasts from three to four hours.<sup>27</sup> This is much faster than the traditional court room proceeding. Problems can be taken care of right away allowing both parties to receive a quick resolution to their dispute. “Since mediation does normally not involve the examination of witnesses, this process provides less disruption of the workforce; workers will not need to take sides in the dispute, and interference with the harmony and productivity of the workplace will be avoided.”<sup>28</sup>

Often mediation sessions are free or of low cost to the employees. In many employment mediations, especially those that stem from interpersonal disputes, there is no lawyer present. If, however, there are legal rights at issue some legal advice may be warranted.

### **ARGUMENTS AGAINST THE USE OF MEDIATION**

Mediation may not be good for parties that are seeking a “vindication of [their] rights” since the mediator will not tell the party that they were wrong.<sup>29</sup> It also may be important for a party to set a legal precedent; if this is the case, mediation is not a good forum to resolve the conflict.<sup>30</sup> Mediators do not interpret or define the law so any decision they make will not affect future cases; mediators do not focus on who is right or wrong. If a party is claiming that “there is a bad law that [they] want overturned, or if [they] want to prove the truth of something publicly...[they] may sensibly chose to this through the courts rather than in mediation.”<sup>31</sup>

Further, if person feels that he or she can win a “million-dollar verdict against a big company or even a small company with a big bank account or plenty of insurance” mediation

will likely not provide this.<sup>32</sup> Since mediation often achieves settlement via compromise, monetary gains, especially those falling under punitive damages, will not be as high as a jury might reward.<sup>33</sup>

### **EFFECTIVENESS OF MEDIATION**

The use of mediation is becoming widespread. I think that this arena for dispute resolution can be very successful in many workplaces. Looking deeper into the process will allow companies and employees to see the possible success a mediation program can bring to their workplace.

### **Case Studies: REDRESS & EEOC**

**REDRESS Program.** The United State Post Offices uses a voluntary alternative dispute resolution program for its employees called REDRESS, Resolve Employment Disputes Reach Equitable Solutions Swiftly. This system is used during the USPO initial counseling stage for their equal employment opportunity (EEO) process, but is also used under REDRESS II as part of the formal complaint process.<sup>34</sup>

An EEO claim is filed when an employee believes that “he or she has been the subject of illegal discrimination on the basis of race, color, religion, sex, national origin, age, disability, or retaliation.”<sup>35</sup> There are, however, some claims involving violence, theft, or destruction of property that are not appropriate for REDRESS.<sup>36</sup> The REDRESS system of mediation has been a very successful conflict management program.

The REDRESS program was used after the settlement of a class action case against the USPS by some of its employees in Florida. These employees had complaints that the EEO process “was too slow, remote and ineffective in addressing workplace disputes.”<sup>37</sup> In the settlement the parties agreed to develop a

<sup>27</sup> [www.eeoc.gov](http://www.eeoc.gov)

<sup>28</sup> <http://www.mediate.com/pfriendly.cfm?id=1364>

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> <http://www.usps.com/redress/>

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

workplace mediation program to address employee concerns.<sup>38</sup> The pilot REDRESS program was initiated in Florida in 1994; it is now available to all USPS employees nationwide.<sup>39</sup>

The REDRESS system uses the transformative model of mediation, just one of the different forms of mediation. REDRESS has seen success in the transformative mediation process. Here, the program “strives to change the on-going interaction between the parties in a positive direction.”<sup>40</sup> This model is founded on the idea that the disputing parties themselves can decide how to reach an agreement.<sup>41</sup> These parties are empowered to find their own dispute resolution. The mediator’s role, in this form of mediation, is to support the parties in reaching their own resolution.<sup>42</sup> He or she takes a passive role and lets the parties determine the flow of the process.<sup>43</sup> The mediator will not take a role in the decision-making process; this task is for the parties.

In the REDRESS process, the parties met with a third party, neutral mediator from outside the postal service.<sup>44</sup> The mediator supports both parties in discussing and resolving their dispute but does not “direct the content of the mediation or take an active role in the decision-making process.”<sup>45</sup> The REDRESS system successfully encourages a party to “play a more active role than the mediator” during the mediation.<sup>46</sup> This program has been recognized as a leading alternative dispute resolution program in our nation.<sup>47</sup>

The REDRESS program is accessible to employees at the USPS. Once the REDRESS program is selected by an employee with an EEO complaint, mediation occurs with 2 to 3 weeks.<sup>48</sup> The mediations are free for the

employee and mediation is held on the clock so the employee does not have to take time away from work to partake in the procedure.<sup>49</sup> The mediations are also held on or near the employee’s place of work. If, after the mediation, a settlement has not been reached, the employee may still pursue his or her claim through the formal complaint process.<sup>50</sup> If there is an agreement, the parties enter into a final written agreement.<sup>51</sup>

**The EEOC program.** The Equal Employment Opportunity Commission has played a prominent role in the use of mediation to overcome worker discrimination suits. The EEOC was established through the Civil Rights Act of 1964 and since then has been readily used nationwide.<sup>52</sup> Its primary role is to enforce the laws prohibiting employment discrimination through the use of Alternative Dispute Resolution.<sup>53</sup> In 1991, the EEOC chartered their pilot mediation program in four of their field offices and by April 1999 their mediation was fully implemented throughout the USA. Their services are offered for free and are strictly voluntary to those that request their services.<sup>54</sup>

When the EEOC becomes aware of a violation the contact the employee and employer and see if there would like to participate in the mediation process, so long as the case meets the mediation requirements.<sup>55</sup> When determining whether a case is eligible to mediation, the EEOC looks at the “nature of the case, the relationship of the parties, the size and complexity of the case, and the relief sought by the charging party.”<sup>56</sup> Even without an offer by the EEOC, a party can request their services in a mediation procedure.<sup>57</sup> Using a facilitative mediation model, unlike the transformative model used through REDRESS, the EEOC takes an active role in managing the mediation process “but is careful to leave the substantive

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<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> <http://www.mediate.com/pfriendly.cfm?id=1067>

<sup>44</sup> <http://www.usps.com/redress/>

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

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<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> <http://www.mediate.com/pfriendly.cfm?id=685>

<sup>53</sup> Id.

<sup>54</sup> <http://www.mediate.com/pfriendly.cfm?id=1657>

<sup>55</sup> <http://www.eeoc.gov/mediate/>

<sup>56</sup> Id.

<sup>57</sup> Id.

decisions to the disputants.”<sup>58</sup> They selected highly trained mediators that are a combination of internal mediators employed by the EEOC and also external contract mediators.<sup>59</sup>

Their process has been extremely successful and beneficial. For example the EEOC were able to get a \$34 million dollar settlement from Mitsubishi on behalf of some of their female employees that filed a class action sexual harassment suit. They have seen great success in their voluntary mediation program. One survey conducted through the EEOC found that of parties involved in the process, 96% of employers and 91% of claimant would use the mediation process if it was offered to them again.<sup>60</sup>

Safeway, Inc., a grocery store chain, has used mediation through the EEOC in resolving some of their disputes. Donna Gwin, Safeway’s Director of Human Resources of the Eastern Division had this to say about the mediation process.

“Once the employer gets past the myth of “If we didn’t do anything wrong we shouldn’t go to mediation” and decides to participate, the real issues in the dispute become clear. Through mediation, we have had the opportunity to proactively resolve issues and avoid against potential charges in the future. We have seen the number of charges filed with the EEOC against use actually decline. We believe that our participating in mediation and listening to employees’ concerns has contributed to that decline.”<sup>61</sup>

The growth of the EEOC mediation program is astonishing. In 1997 there were 780 people involved in their mediation programs that recovered a total of 10.8 million dollars in settlements. In 2000 there were 7,209 people involved in their programs with settlement payments amounting to 108.4 million dollars.<sup>62</sup>

That increase demonstrates the success and benefit of the mediation process.

The speed at which the EEOC is able to resolve disputes has also been much faster than traditional dispute resolution. About 65 percent of the cases were resolved at an average of 97 days, which is “less than the time it takes the agency to resolve most charges” that are not mediated.<sup>63</sup> Of these disputes, in 2003, the EEOC reached a 69% settlement rate.<sup>64</sup>

The EEOC begins mediation very early on in the complaint process.<sup>65</sup> It begins before any legal discovery and before a lawsuit is even filed.<sup>66</sup> The EEOC starts this process early in the dispute resolution stage in order to avoid “hardening of positions that can occur during a lengthy investigation.”<sup>67</sup>

Currently the EEOC has been evolving even further. Once established, in 1999 they conduct training and outreach activities to educate people protected by the EEOC regarding their mediation program.<sup>68</sup> They have created a program in 2002 to include mediation at the conciliation stage once there has been a finding of discrimination.<sup>69</sup> To expand mediation, the EEOC has also jumpstarted a Universal Agreement to Mediate (UAM) program and implemented a pilot Referral Back program.

The UAM program is used to facilitate an employer’s agreement to mediate. The UAM is “an agreement between the EEOC and an employer to mediate all eligible charges filed against the employers, prior to the agency investigation or litigation.”<sup>70</sup> This program is used to expedite the mediation process and parties are able to get to mediation much quicker. Being that mediation is voluntary, and employee or employer may opt out of the program even if it is implemented. Nonetheless, a UAM can benefit a company by showing their “willingness to mediate on cases eligible for

<sup>58</sup> <http://www.mediate.com/pfriendly.cfm?id=1067>

<sup>59</sup> <http://www.eeoc.gov/mediate/>

<sup>60</sup> <http://www.eeoc.gov/mediate/>

<sup>61</sup> Id.

<sup>62</sup> Phillips, Barbara. *The Mediation Field Guide*. California: Jossey-Bass, 2001

<sup>63</sup> <http://www.mediate.com/pfriendly.cfm?id=456>

<sup>64</sup> <http://www.eeoc.gov/mediate/>

<sup>65</sup> <http://www.mediate.com/pfriendly.cfm?id=1657>

<sup>66</sup> Id.

<sup>67</sup> <http://www.eeoc.gov/mediate/>

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id.

mediation.”<sup>71</sup> In 2003, there were 400 UMAs with local employers and 16 UMAs with national or regional employers. By 2005, the EEOC has signed 807 local UAMs and 100 national or regional UAMs.<sup>72</sup> These increases clearly show an interest and success in this pilot program.

The Referral Back mediation pilot program is in the process of adopting an internal mediation program that would be used to resolve employment discrimination charges filed with the EEOC. “The Commission is exploring whether employer-provided dispute resolution programs that operate fairly and voluntarily, can serve as an effective means of resolving employment discrimination charges filed with EEOC.”<sup>73</sup> Under this system, a party who has filed a complaint with the EEOC can elect to have their charged referred to his or her employer’s program in order to resolve the dispute.<sup>74</sup> So far, this pilot project has been implemented in the EEOC District Offices in Philadelphia and Seattle.<sup>75</sup> This process, too, is voluntarily and subject to eligibility based on that if the EEOC’s mediation program.

### SUMMARY OF EVIDENCE

The success of both these mediation programs has been positive. The REDRESS program and the EEOC have seen a high degree of satisfaction in both their mediation programs.

REDRESS program has received positive feedback in regards to both the REDRESS process and the selection of mediators. Within the program there has been an 80% closure rate for meditation disputes.<sup>76</sup> Of those involved in the program, “almost 90% of the complainants and 93% of the respondents were somewhat satisfied or very satisfied with the fairness of the mediation process.”<sup>77</sup>

A report on the EEOC mediation program, also, found a high degree of satisfaction with the mediation process.<sup>78</sup> Of those that were satisfied with the program, “nine out of ten participants...indicated they would be willing to participate in EEOC’s mediation program again...regardless of the outcome of their mediation session.”<sup>79</sup> A further report, which analyzed the EEOC’s mediation sessions, found the following:

“The participants expressed strong satisfaction was EEOC’s ability to communicate information regarding its mediation program prior to the actual mediation and also after the mediator’s introduction at the session; the vast majority of participants agreed that their mediation was scheduled promptly; an overwhelming majority of the participants believe that they had a full opportunity to present their views; the participants express high satisfaction with the role and conduct of the mediators indicating that the mediators understood and helped to clarify their needs, and also assisted them in developing options for resolving disputes; the high level of satisfaction for the mediator’s performance was true for both EEOC staff mediators and for contract mediators; and the overall level of satisfaction with the program remained high regardless of such factors as the size of employer, basis or issue alleged in the underlying charge, or whether the parties were represented during the sessions.”<sup>80</sup>

Clearly, findings like these validate the success of mediation programs, such as the one conducted by the EEOC in solving workplace disputes.

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<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Bingham, Lisa. *Exploring the Role of Representation in Employment Mediation at the USPS*. 17 Ohio St. J. on Disp. Resol. 341 (2002).

<sup>77</sup> Id.

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<sup>78</sup> Green, Michael. *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation*. 105 Dick. L. Rev. 305 (Spring 2001).

<sup>79</sup> Id.

<sup>80</sup> Id.



## CONTINENCY APPROACH: WHEN IS MEDIATION SUCCESSFUL

### Mediation Process

A successful mediation process has three stages: the pre-mediation stage, the mediation stage, and the post-mediation stage.<sup>81</sup> Before mediation begins, it is important that all persons involved in the mediation process be contract and willing and ready to go to the mediation table. During the initial contact with clients, often done over the phone, a mediator will often try and find out some of issues the claim that will be discussed in mediation. He or she will also try and establish a rapport with the disputants. Further, in scheduling the mediation session, it is important for the mediator to select a location for the mediation that is not only safe and comfortable for the parties, but also one which is on neutral grounds.

During the mediation stage, there are a number of things that makes the mediation process successful. First off, the mediator will start off with an opening statement that lays out the ground rules for the mediation process, explains his or her role in the process as a neutral third party, and stresses the issue of confidentiality in mediation. At this point, the parties will be able to give their opening statements starting with the party that has brought the claim. After both parties have provided their opening statement the mediator will then gather information through clarifying questions. When parties reach impasse during the mediation process, the mediator will caucus with both sides independently to try and gather further information. He or she will then negotiation between the two parties until an agreement is reach or the parties request another joint mediation session.

Once an agreement is reached the mediator creates a written mediation settlement agreement. Post-mediation it is important for a mediator to follow up with parties to get their evaluation of the process.

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<sup>81</sup> Leonard, Sam. *Mediation: The Book. A Step-by-Step Guide for Dispute Resolvers*, Evanston, IL: Evanston Publishing, Inc, 1994

### What Makes a Successful Mediator?

**What it Takes to Be a Mediator..**There are certain qualifications to look for in selecting a mediator. The American Arbitration Association looks at the following in selecting their panel mediators: (1) Experience and Competence; (2) Neutrality; (3) Judicial Capacity and Creativity; (4) Reputation and Acceptability; (5) Commitment and Availability.<sup>82</sup> In this selection process communication skill, ability to move from positions to interests during the mediation process, ability to detoxify language, and the ability to reframe issues into workable problems which can be solved, becomes the essential tool for a successful mediator.<sup>83</sup> To be a valuable, a mediator needs to be a good listener, a good communicator, compassionate, a facilitator, have the ability to remain neutral, respect confidentiality, be structured, and exude confidence.<sup>84</sup>

The personal characteristics of a mediator are very important. Varying personal characteristics found in different mediators results in varying mediation styles. It is important to understand a mediators style to selection a successful mediator depending on the issue at hand in a employee-employer dispute.

There is diversity in the style of mediation depending on the mediator. First, there is the substance focused mediator versus the process focused mediator. A substance-focused mediator is an expert in the substantive area of the conflict whereas a process focused mediator in an expert in dispute settlement, no matter what the substantive issue is.<sup>85</sup> This mediator focuses on the process rather than the area of conflict.

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<sup>82</sup> Leonard, Sam. *Mediation: The Book. A Step-by-Step Guide for Dispute Resolvers*, Evanston, IL: Evanston Publishing, Inc, 1994

<sup>83</sup> Id.

<sup>84</sup> Stein, Mark. *Resolving Conflict Once and For All*. Louisville, KY: Harmony House, 1997.

<sup>85</sup> Leonard, Sam. *Mediation: The Book. A Step-by-Step Guide for Dispute Resolvers*, Evanston, IL: Evanston Publishing, Inc, 1994

Secondly, a mediator can be an interventionist versus one which is laissez-faire. The interventionist directs the mediation process and moves the process along, whereas a laissez-fair mediator allows the process to move at its own pace.<sup>86</sup> Thirdly, the mediation process can be mediator directed or client directed. Depending on the parties and issues present, the style of the mediator can play a large impact on the dispute resolution process.

**Choosing a Mediator** There are a variety of mediation programs that can be used in employee-employer disputes. Workplaces can use outside professional mediators or offer in-house mediation programs as well.<sup>87</sup> There are pros and cons to using these different types of mediators.

A workplace may offer an in-house mediation program to resolve disputes between co-workers or management and employees. This type of mediation is often referred to as peer mediation.<sup>88</sup> In these programs, mediators can be comprised of trained staff members from the organization, which can include a mix of employees and managers.<sup>89</sup> Peer mediation is successful since it involves mediators that have “personal and intimate understanding of underlying attitudes, systematic problems, cultural norms, and social expectations of their own communities.”<sup>90</sup>

Issues may arise, however, regarding a mediator’s impartiality if they are employees of the company. “An employee who has a serious dispute with the company may find this type of program especially dissatisfying.”<sup>91</sup> Companies may then turn to outside mediators who are often viewed as more impartial.

Professional mediators can also be used in the workplace. It is often beneficial to use these types of mediators when is a unique issue at hand that many require more expertise on the

part of the mediator.<sup>92</sup> Also being outside the organization, a professional mediator will likely be able to better find a general goal between the parties and strengthen communication both during and after the dispute.<sup>93</sup>

Many of the state and federal agencies also offer mediation services to their employees. There are also federal agencies that offer mediation services to private employees, such as the Equal Employment Opportunity Commission. Courts also may require employee-employer mediation before proceeding with a lawsuit.

Mediators can also be hired outside the organization. Given the environment that these disputes arise from, it may be beneficial for workplace mediations to hire a mediator that has some understand of employment law and business issues.

## CONCLUSION

Alternative dispute resolutions has gained increasing acceptance in the U.S. workplaces.<sup>94</sup> The Dunlop Commission has found two factors that relate to the success of ADR methods in resolving disputes. The Dunlop Commission, the Commission for the Future of Worker-Management Relations, was created to among other things, examine the application of labor law and the history of labor-management cooperation. They found that, first, ADR reaches to the low wages workers that have not customarily had the opportunity to pursue court cases because of time and money.<sup>95</sup> Courtroom resolution of employment disputes has not always served people equally well.<sup>96</sup> Secondly, the Commission found that litigation was often dominated by “ex-employees, rather than by employees who sought to redress complaints while continuing employment.”<sup>97</sup> When employees wanted to continue employment after a complaint was filed, it was often difficult to

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<sup>86</sup> Id.

<sup>87</sup> Weinstein, Rebecca. *Mediation in the Workplace*, Westport, CT: Quorum Books, 2001

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Guerin, Lisa and Peter Lovenheim. *Mediate, Don't Litigate*. California: Nolo, 2004

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<sup>92</sup> Weinstein, Rebecca. *Mediation in the Workplace*, Westport, CT: Quorum Books, 2001

<sup>93</sup> Id.

<sup>94</sup> <http://www.eeoc.gov/mediate/>

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

after a courtroom proceeding.<sup>98</sup> ADR, on the other hand., encourages employees to seek dispute resolution while continuing employment.

Mediation, as a form of ADR, has been successful nationwide in a variety of workplaces and industries. Mediation, because of its process, has become very successful in non-discharge cases “where the parties want to preserve the relationship with their employer.”<sup>99</sup>

It is important to remember that problems may arise if a workplace has requirements of mediation and do not allow the employees to file lawsuits. This type of forced mediation seems to conflict with mediations goal of voluntary action. When mediation is imposed on people by authority, such as employers, there is the risk that the “quality and potential” of the mediation process will be abridged.<sup>100</sup>

However, if implemented successfully, a mediation program can drastically benefit a workplace and its employees. The success of mediation over traditional litigation, as stated discussed in this paper, is remarkable. “The American Arbitration Association reports that 85 percent of its voluntary mediations nationwide result in settlement. If we can get our dispute to mediation, we’ll probably get it resolved.”<sup>101</sup>

Mediation can be used to resolve an issue quickly whereas litigation often takes much longer. During this extended time often bad feelings and discontent increase making it difficult to continue a positive relationship between parties once litigation has ceased. The mediation process, where the parties ultimately design and agree to the resolution of their case, it is often superior to a solution imposed on the parties through typical litigation.

A thriving business, no matter the size, needs employees that are happy with their working environment. A program, such as mediation, allows employees to have a direct effect on the outcome of a dispute they are

involved with. Typically, most people are happy when they have an effect on changes that take place in their own lives; most American citizens do not like to have decision placed on them. Mediation allows an employee to have an effect on business decision that shape their working lives.

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<sup>98</sup> Id.

<sup>99</sup> Id.

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