EMPLOYMENT MEDIATION IN THE TWENTY-FIRST CENTURY: CHALLENGES IN A CHANGING ENVIRONMENT

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In recent years, two major changes have been taking place in the job environment. These involve the nature of the workplace as well as the nature of workplace disputes over claimed violations of anti-discrimination laws. Together, these changes have had a profoundly negative impact on the ability of litigation' brought under Title VII of the Civil Rights Act of

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1. By the term “litigation” I mean both administrative and court proceedings.
1964, and similar statutes, to address job-connected complaints.

First, globalization and other trends have undermined the traditional model of long-term, often lifetime, employment at one firm. Previously, an employee would typically work his way up the career ladder until he retired, gold watch in hand. Now, mutual loyalties have loosened; the new paradigm is free agency. Apart from employment tenure, moreover, both job definition and workplace structure have been undergoing key transformations. Second, claims of discriminatory failure-to-hire have largely given way to claims arising from discharge, non-promotion, and other on-the-job complaints. To a great extent, discrimination has "gone underground:" in a growing number of cases, an objective person would have trouble distinguishing between unlawful bias and garden-variety unfair treatment. Illegality has, therefore, become more difficult to prove.

The literature contains a fair amount of discussion of each of these phenomena—changes in the workplace and in workplace-connected disputes—and their implications for employment litigation. But scholars have devoted less attention to their interaction and combined influence on such litigation. Two notable exceptions, Professors Susan Sturm and Katherine V.W. Stone, have advanced my thinking by their writings. And no piece of which I am aware has considered in depth the relationship between these new developments and mediation of employment complaints.

This article aims to fill that gap. Drawing on my experience as a

4. Perhaps one should distinguish between the generic "person" and members of groups that have historically suffered prejudice. Based on experience, the latter are more likely to perceive bias than members of the majority group. See infra text accompanying notes 227-30.
7. Professor Sturm, in particular, has tackled the complex, structural implications of these changes for workplace governance—externally, through legal regulation, as well as internally. In addition, Professor Tristin K. Green has recently published a piece taking an approach similar to that of Professors Sturm and Stone. See generally Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV. 91 (2003).
8. In using terms like "employment complaints," "employment law," and "employment mediation," I exclude labor law, labor-management relations, and other areas having to do with a unionized work force.
mediator, as well as relevant scholarship, I begin in Section I by enlarging upon the workplace changes I have already mentioned. Then I proceed to deal with the adverse effect of these changes on the ability of employees to obtain meaningful redress of grievances in administrative or judicial proceedings.

Against this backdrop, Section II then focuses on my primary concern: employment mediation. Contending that this increasingly common alternative (or adjunct) to litigation is almost always to be preferred to court resolution of employee claims, I temper that assertion with two caveats. One is that many of mediation's considerable benefits are lost or reduced as time goes by. Thus, it should occur as soon as possible after the controversy arises: ideally at the workplace level, while the employee still has her job. The other is that employers should offer mediation for a broad range of employee complaints, not confine it to allegations of breaches of legally protected rights. Above all, it ought not be limited to charges of unlawful discrimination based on race, gender, ethnicity, age, or other forbidden grounds.

Finally, in Section III, I treat best practices for such in-house mediation: how it can be structured and managed so as to maximize its potential to address—and, where needed, remedy—complaints by individual workers, while also improving the workplace generally.

I. CHANGES IN THE WORKPLACE AND WORKPLACE COMPLAINTS: HOW THEY UNDERMINE LITIGATION OF CLAIMS OF EMPLOYMENT DISCRIMINATION

A. Changes in the Workplace

Professor Stone writes that the "old psychological contract" between employers and employees, "with its promise of long-term job security, orderly promotional opportunities, longevity-linked pay and benefits, and long-term pension vesting, encouraged worker attachment to the firm." It also reflected, and perhaps encouraged, the companies' attachment to their workers.

For many employers, both paternalistic benevolence and shrewd self-
interest counseled good treatment of employees—the human capital in which they had so heavily invested. In some companies, workers and managers could, without too much of a stretch, envision the firm as a daytime family. A young man—of course, the prevailing model was male—could sign-on after graduation from high school or college. With the years would come friendships and alliances that might well outlast a marriage; "divorcing" one’s firm might seem, financially and emotionally, as drastic a move as divorcing one’s spouse.

By the end of the twentieth century, however, business conditions had significantly altered. Globalization has broadened the field of competition, blurring the distinction between internal and external markets, forcing companies to pay ever greater attention to the bottom line. In the face of ongoing technological change, qualities such as flexibility, adaptability, and capacity to lower short-term costs increasingly separate the “sheep from the goats” of industry. Fidelity to employees, however, has no similar effect on success.

In this environment, the lifetime employment paradigm has been replaced by “precarious employment.” Businesses hire growing numbers of “temps” and part-timers, who do not get benefits, and outsource erstwhile in-house tasks to various independent contractors. For many employees in this new universe, changing jobs has become a routine or, at least, not uncommon, feature of life. Job-hopping can be a benign phenomenon where the worker voluntarily quits in order to pursue career advancement. But where the worker is terminated, stress and anxiety can be expected, especially if she is older. Such feelings are only enhanced by the current economic downturn and consequent scarcity of substitute positions.

The old world of employment also offered considerable opportunities to men who had a strong back rather than intellectual talents; the present one, though, affords few. The United States, like other developed nations, focuses not on production and assembly but instead on "knowledge and service work." More than ever, a good brain and possession of skills, especially the skill of learning new skills, characterize the successful

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13. See Stone, supra note 6, at 549, 556, 561-62; Sturm, Race, Gender, supra note 5, at 640.
14. Stone, supra note 6, at 542.
15. See, e.g., Estlund, Changing Workplace, supra note 11, at 355-56; Stone, supra note 6, at 539-40.
16. Stone, supra note 6, at 561.
In addition, the structure of many firms, and of the jobs within these firms, has been changing. An increasing number of companies reject the traditional hierarchical model of top-down decisionmaking and orderly progression along “job ladders,” embracing instead what Professor Stone calls “microlevel job control.” This regime entails a “flattening of management positions” and a concomitant “shift in authority to cross-functional work teams.” The members of such teams cooperate with each other in exercising power with respect to matters previously confined to supervisors, such as pay, evaluation, promotion, and assignments. Accordingly, members wield considerable influence over the work life of their colleagues. Organization along these lines is thought to enhance the firm’s productivity and flexibility. The emerging self-governance paradigm predictably stresses the values of teamwork and consensus.

This transformation of the working environment has bred a “new psychological contract.” Instead of promising employment security, it offers “employability security.” This consists, among other things, of furnishing general skills training as well as networking opportunities. These make the worker more marketable both inside and outside the firm. Portable capital is vital, of course, to an employee who expects to switch positions and companies a number of times in the course of her career. Being afforded the means to acquire it may, therefore, exceed in importance the precise amount of one’s current salary.

All this being said, I emphasize that many businesses still follow traditional patterns. We should not overestimate the degree of change at the present time. What we have is evolution, not revolution, in the working world; some segments of the economy manifest it more than others. Yet neither should we underrate the significance of the post-modern firm’s development. Its features represent the wave of, at least, the foreseeable

17. Id. at 531.
18. Id. at 524; see also Sturm, Race, Gender, supra note 5, at 640-41 (describing the rise in popularity of flexible governance forms).
19. Stone, supra note 6, at 567; see also Green, supra note 7, at 102-03 (noting that by 1990, 47% of Fortune 500 firms had at least one self-directed team).
20. See, e.g., Sturm, Second Generation, supra note 5, at 460-61. The S.C. Johnson & Son, Inc. “self-directed work teams” are one example of this phenomenon. Sturm, Race, Gender, supra note 5, at 646-48.
21. See, e.g., Stone, supra note 6, at 608; Sturm, Race, Gender, supra note 5, at 662.
22. See, e.g., Sturm, Race, Gender, supra note 5, at 646.
23. See, e.g., Estlund, Changing Workplace, supra note 11, at 350-51; Sturm, Race, Gender, supra note 5, at 648.
24. Stone, supra note 6, at 524.
25. Id. at 569 (quoting ROSABETH MOSS KANTER, ON THE FRONTIERS OF MANAGEMENT 192 (1997)).
26. See id. at 524; Sturm, Race, Gender, supra note 5, at 642.
future. Moreover, these features interact with changes in the most common complaints made by employees and increasingly cast doubt on the ability of litigation to resolve such claims satisfactorily.

B. Changes in Workplace Complaints

Employee discontent arises from many different sources, not only (or even mainly) from biased employer behavior. Yet for a gripe to mature into a cause of action—and my focus at the moment is on litigation—it has to rest on a legal foundation. Typically, the worker who cannot get his employment dispute resolved in the workplace and, therefore, files an administrative charge or complaint in court must invoke one or more of the civil rights laws barring employer discrimination on grounds such as race, national origin, gender, or age. These include the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, as amended (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA), and similar state and local provisions.

As background, it is crucial to note a major cause of these statutes' centrality in litigation by employees. Apart from the ban on discrimination noted above, non-unionized workers have only some general regulatory laws, such as the Fair Labor Standards Act of 1938 and the Occupational Safety and Health Act of 1970, and a few special purpose laws—for example, the Employment Retirement Income Security Act of 1974 (ERISA)—to protect them.

"At-will" employment prevails in every state but Montana. Under this rule, of which most workers are unaware until trouble strikes, an employer may fire an employee for any reason or no reason so long as it

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31. See, e.g., N.Y. EXEC. LAW §§ 290-301 (McKinney 2001).
does not act on the basis of impermissible discrimination.\textsuperscript{39} Not many non-union employees have the clout to negotiate for greater security: tenure except for dismissal for cause or, at minimum, a stated term of years. Moreover, given the progressive deunionization of the work force\textsuperscript{40} (in 2000, collectively bargained contracts applied to just 13.5\% of workers),\textsuperscript{41} most employees hold their jobs solely at their employers' discretion.\textsuperscript{42} Finally, termination aside, employers have always had free reign over whom to hire and how to run their organizations, subject again to the caveats for illegal bias-driven conduct and terms in union-management contracts.

In the early post-Civil Rights era, the concern was getting minority applicants a foot in the door; hence, litigation primarily targeted discriminatory failure-to-hire.\textsuperscript{43} By the close of the twentieth century, the focus of litigation had switched from workplace entry to workplace exit as non-traditional employees—initially admitted, then booted out—increasingly complained of terminations allegedly based on discrimination.\textsuperscript{44} These employees have also protested non-promotion, lack of training, harassment by bosses or fellow workers, and other inequalities in the terms and conditions of employment. Commentators have dubbed such grievances "[s]econd-generation" complaints.\textsuperscript{45} In light of the rise in job insecurity aggravated by hard times, and reflected in the new psychological contract, one can expect that this trend will continue and even intensify.

The second generation workplace yields many fewer instances of deliberate and blatant discrimination.\textsuperscript{46} For example, except in certain


\textsuperscript{41} Elizabeth Neumeier, The Long and Winding Road: A Look at the Evolution of Conflict Resolution in the Workplace, ACRESOLUTION, Spring 2002, at 20, 22.

\textsuperscript{42} Over time, at-will regimes have developed a number of exceptions. See Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 Tex. L. Rev. 1655, 1655 (1996) [hereinafter Estlund, Wrongful Discharge]. The most prominent of these forbids discharge on grounds that violate an important public policy. See, e.g., McGarrity v. Berlin Metals, Inc., 774 N.E.2d 71 (Ind. Ct. App.) (holding that plaintiff may maintain tort action for wrongful discharge after dismissal for refusing to take actions that could subject him to personal liability), transfer denied, 783 N.E.2d 703 (Ind. 2002); E. Allan Farnsworth, Contracts § 7.17, at 557-58 (2d ed. 1990).

\textsuperscript{43} See Donohue & Siegelman, supra note 40, at 984-85.

\textsuperscript{44} See id.; Matt A. Mayer, The Use of Mediation in Employment Discrimination Cases, 1999 J. Dispute Resol. 153, 163.

\textsuperscript{45} Sturm, Second Generation, supra note 5, at 460 (internal quotations omitted).

blue-collar, sex-segregated industries, women and minorities rarely suffer total exclusion from the workplace.47 Turndowns of qualified employees from protected groups who seek promotion, in favor of less (or no more) qualified male Caucasians, often seem due to simple cronyism rather than overt bias.48 By the same token, we seldom encounter the “N-word” or other racial or ethnic slurs—and when we do, it is almost never at a mid-management or higher level.49 Even much milder, “politically incorrect” speech is becoming relatively rare.

Anecdotal evidence drawn from my own mediation practice largely confirms these observations. Notably, of approximately sixty employment cases I have handled in the past five years, only one involved discrimination in hiring. A young African-American attorney, call him Derek,50 seeking employment at a small law firm with no minority professional staff was ultimately rejected by the senior partner, Morris. The latter voiced suspicion at the fact that Derek had not received an offer from a larger firm, since “they love to hire tokens,” and made other unambiguously biased remarks. Predictably, perhaps, the guilty individual belonged to an older generation (Morris was in his mid-seventies). In some sense, even this incident seems more second-generation than first: until quite recently, the dearth of minority law school graduates virtually precluded such litigation.

To be sure, one still hears horror stories. Recently, for instance, a jury awarded $3.3 million to a black trucker in Colorado who had been subjected to a racially hostile environment that included graffiti with swastikas, rope tied into hangman’s nooses, and symbols of the Ku Klux Klan.51 In another case, a rare illustration of flagrant racism by a highly positioned professional, a Caucasian administrator called an Indian chemist under his supervision a “brown nigger.”52 Some forms of sexual harassment, moreover, feature not just demeaning words or gross displays, like pinup calendars or pornography, but also unwelcome, assaultive

47. See Donohue & Siegelman, supra note 40, at 984-85, 1014-15.
48. See generally McGinley, Cronyism, supra note 38 (arguing that cronyism should be treated as forbidden discrimination).
49. In general, one sees more blatant discriminatory conduct in the blue-collar work environment. Low-level supervisors may make racist or sexist remarks or, more often, condone such comments by the complainant’s fellow workers.
50. In recounting my cases, I have altered names and other potentially identifying information.
touching. Finally, it should be borne in mind that egregious cases yielding reported opinions underrepresent the actual number of such cases; the worst examples are more likely to settle early.

Yet prevailing forms of bias tend much more than in earlier days to be subtle, complex, and frequently unconscious, reflecting a largely unspoken organizational culture. No longer enduring wholesale exile from shop or office, women and other outgroup members now protest being "frozen... out of crucial social interactions." They also complain of receiving less attractive work assignments, poorer training, harsher assessments of their capabilities, hyper-scrutiny of their performance, and non-acknowledgment of their achievements.

Such below-the-radar forms of discrimination wreak special havoc in the new workplace, which puts a premium on acquisition of skills and relationships; the harm can be especially severe where groups of employees possess meaningful decisionmaking powers. In this

53. See, e.g., Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir.) (finding error in district court's grant of judgment as a matter of law for employer on sexual harassment claim when female waitresses endured repeated instances of physical aggression, inappropriate touching, and vulgar comments by male supervisors), reh'g denied, No. 01-60289, 2002 U.S. App. LEXIS 24504 (5th Cir. 2002); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (reversing district court's grant of summary judgment for employer in incident of sexual harassment in which co-workers grabbed a gay male employee in the crotch and stuck their fingers in his anus through his clothing), cert. denied, 123 S. Ct. 1573 (2003). See generally Rene, 305 F.3d at 1065-66 (citing fifteen cases with variety of sexual harassment behaviors).

54. Unlike the official reporters, however, services such as the Employment Discrimination Report, published by the Bureau of National Affairs, Inc., do recount some settlements of cases in litigation.

55. See Sturm, Second Generation, supra note 5, at 461.


57. See Martha Chamallas, Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences, 92 MICH. L. REV. 2370, 2372 (1994) ("Legal doctrine that does not address the impact of workplace structures, processes, and cultural norms on the lives of employees is incapable of responding to many of the 'second generation' issues arising in Title VII disputes.").

58. Sturm, Second Generation, supra note 5, at 468.

59. Id. at 470.

60. Sturm, Race, Gender, supra note 5, at 642.

61. African-American employees sued S.C. Johnson & Son, Inc., alleging that the previously mentioned self-directed work teams, see supra note 20, disadvantaged them with respect to promotion, pay, and working conditions because the system of decisionmaking relied on the collective judgments of primarily Caucasian colleagues. See Sturm, Race, Gender, supra note 5, at 649-50.
environment, if colleagues or immediate superiors regard a worker as not a genuine part of the team—because, for example, that person is female, foreign, dark-skinned, or “too old”—he or she will lose all sorts of tangible and intangible benefits that make labor more rewarding and turn a job into a career. Eventually, the worker may even be fired.

I have seen many illustrations of these kinds of problems in my practice. The reason, I believe, is that many non-cutting edge work settings, such as one’s local bank, now demonstrate some of the features I have described. Consider, for instance, the case of Bill. While not the most zealous employee (he constantly counted the days to his retirement), Bill had, nevertheless, performed quite competently for forty years as an Assistant Vice President in one of the country’s largest banks, XYZ. Recently, though, the company had changed while Bill had not.

From a stodgy dinosaur, rarely altering the way it delivered basic services at its branches, XYZ turned into an aggressive, “lean and mean” sales organization. Increasingly, XYZ stressed customer relations, teamwork, and competitiveness, values it never before touted at its sleepy neighborhood offices. Bill’s newly hired manager, Lynn, a younger woman, used terms alien to him like “huddle,” “team meeting,” and “brainstorming session” to describe activities in which employees now had to take part. This business model disadvantaged Bill, somewhat of a loner, by placing a premium on interpersonal skills he lacked; his performance evaluations, predictably, nose-dived. Lynn wrote that Bill was failing to meet expectations in “[t]eamwork, [c]ustomer [i]nteraction, and [l]eadership” and had not contributed ideas in a “positive, enthusiastic manner.” In short, she concluded, Bill was not a “real team player.” Eventually, the bank forced Bill to retire.

The point of this story is not that organizations have never before emphasized qualities like cooperation and sociability, nor that the somewhat curmudgeonly Bill had formerly been an ideal employee. Rather, the issue is one of degree: his personality defects simply mattered more in the new workplace. Also, to an unmeasurable extent, the very fact of being older had marginalized him. Bill’s uniformly younger cohorts as well as his boss felt they had little in common with him. Employees who

62. Other cases of mine have also featured workers criticized as non-team players. In one of these, again a complaint based on age, the young, new owner of a family firm—his father, the founder, had recently retired—faulted a long-term employee, a man in his sixties, for “slipping out” before an after-hours party for a co-worker, conduct the boss considered “bizarre.” The employee explained that his wife and four-year old son had been waiting for him and he had been compelled to leave because the boy was “acting up.” The employer also expressed annoyance that the employee had failed to attend a company outing at Yankee Stadium. A recent United States Court of Appeals decision upheld a grant of summary judgment against a discharged employee criticized for, among other things, not being “a team player.” Koski v. Standex Int’l Corp., 307 F.3d 672, 674 (7th Cir. 2002).
lunch together and share gossip during their breaks find it easier to bond in their work life. After the mediation, I wondered if the age gap between Bill and his colleagues had predisposed the latter to view him as an outsider: Who had excluded whom first? was a difficult question. Yet, regardless, the bottom line was the same: Bill no longer fit the XYZ profile and, therefore, he had to go.

"Subtle patterns of non-interaction or exclusion," such as those I have described, combine with the blurring of lines of authority in many companies to make it hard for outgroup members to acquire influential positions in the twenty-first century workplace. "[I]nformal and invisible power structures" have become more salient; but absent "orderly job ladders," an employee who wishes to complain about a lack of advancement in the new environment may be unsure what exactly constitutes promotion and whether she actually has been denied one—let alone because of bias.

In addition, the very success of the second generation in gaining white-collar and (sometimes) higher-echelon employment has led to complaints by minorities and women that they are getting unfairly negative performance reviews, based on overly subjective criteria. It is, indeed, easier to count the number of widgets an assembly-line worker produces than to assess an employee’s “output” of satisfied customers, or useful suggestions, or to weigh her contribution to a team effort. Thus, in handling claims of unlawful discharge, I frequently encounter nebulous defenses: the plaintiff evinced “personality problems,” made associates or management uncomfortable, was bad-tempered or excessively aloof. These boil down to management’s current catchall censure: the employee has poor interpersonal skills. Such hard-to-counter criticism is directed most often at workers of different cultural backgrounds—stereotypic “standoffish” Asians, “touchy” Caribbeans—or at women, who are held to higher standards of niceness. The application of “soft” criteria can easily

63. Sturm, Race, Gender, supra note 5, at 642.
64. See Stone, supra note 6, at 606-08.
65. Id. at 525-26.
66. Id.
67. Sturm, Second Generation, supra note 5, at 469.
68. See Green, supra note 7, at 103 ("[E]valuation of work performance is becoming more decentralized, subjective, and contextual."). See generally Sturm, Second Generation, supra note 5, at 484-89.
69. With respect to gender stereotypes:

[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. ... [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched [sic] the stereotype associated with their group. ... An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out
mask discrimination.

Having examined changes in the work environment and in job-related complaints, I turn now to the repercussions of these phenomena on the employee’s ability to obtain redress for adverse action that allegedly stems from unlawful bias. As we shall see, the complainant’s litigation path is increasingly strewn with obstacles.

C. The Impact of Change on the Efficacy of Employment Civil Rights Litigation

As suggested above, with reference to claims of denial of promotion, the worker in the second-generation world may routinely have trouble determining whether to attribute his problems to discrimination. The line between subtle or unconscious bias and mere bad management, miscommunication, insensitivity, or “equal opportunity” nastiness is often indiscernible. As a co-worker said of the white boss of one of my African-American complainants: “Barbara just wasn’t a nice person; that’s what it boils down to.” Current sources of workplace friction may also relate to economic and class issues beyond the purview of statutory bans.

Although the affected employee doubtless suffers regardless of how one characterizes the source of his or her difficulties, labels matter. If a complaint cannot be couched in terms of bias, the worker will usually have no remedy. Title VII and similar laws do not enact a “generalized code of workplace civility.” Further, even if the employee decides to claim discrimination (whether sincerely or in an effort to shoehorn her problems into a recognized legal category), she may find it hard to persuade a decisionmaker (judge, jury, or agency official) of the accuracy of her designation.

Prevailing on employment discrimination complaints is generally tough; more than ninety-five percent of them fall under the rubric of

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70. See e.g., Peterson v. Draper & Kramer Mortgage Corp., No. 00 C 3889, 2002 WL 1769987, at *5 (N.D. Ill. Aug. 1, 2002) (describing the senior vice-president accused of sexual harassment as “an equal opportunity yeller”). See generally Sturm, Second Generation, supra note 5, at 472 (“Under some circumstances, the boundaries between legitimate and illegitimate behavior will be quite difficult to draw.”).

71. Silver, supra note 46, at 491-92.

72. Cf. McGinley, Evolucion, supra note 3, at 445 (citing psychology research for proposition that, from perspective of bias victim, the question of whether bias is intentional is less important than the desire for fair treatment).

73. Stone, supra note 6, at 611.
“disparate treatment.” In order to make out a cause of action, the plaintiff must demonstrate that the employer treated the employee—because of his protected trait—worse than other workers who did not possess that characteristic; in other words, he must show an intent to discriminate. If, as is usual, he has no direct evidence of biased motivation, he must satisfy the so-called McDonnell Douglas schema. This requires the plaintiff to meet the preliminary burden of establishing a prima facie case of discrimination. That being done, the burden of production shifts to the employer to rebut the presumption of discrimination by articulating—not proving—"some legitimate, nondiscriminatory reason" for its conduct, a light burden virtually any employer can satisfy. The onus then shifts back to the plaintiff, who bears the ultimate burden of persuading the finder of fact that prohibited bias caused his discharge or other adverse job action—in other words, that the defendant’s explanation is pretextual.

74. Yelnosky, supra note 56, at 588.
75. The other category consists of “disparate impact” cases, which do not require proof of intentional discrimination. Disparate impact doctrine proscribes facially neutral employment practices that have a disproportionately harsh effect on employees in protected classes, unless those practices are shown to be justified by business necessity. See Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). See generally Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that the use of employment prerequisites that have an invidiously discriminatory impact, but are not related to job performance, can be prohibited even without a showing of intent).
77. At this stage, the plaintiff’s burden “is not onerous.” Burdine, 450 U.S. at 253. In order to meet it, the plaintiff must show: (1) membership in a protected class (e.g., a racial minority); (2) qualification for the position at issue; (3) an adverse employment action, such as failure-to-hire or termination; and (4) continuing need for an employee with the plaintiff’s qualifications, or replacement by another employee in circumstances creating an inference of discrimination. See id. at 253 n.6 (quoting McDonnell Douglas Corp., 411 U.S. at 802). Some courts phrase the fourth requirement more generally as follows: “the circumstances surrounding the action give rise to an inference of... discrimination.” Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir.), cert. denied, 534 U.S. 993 (2001).
79. See id.; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000) (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”). In hostile environment (e.g., sexual harassment) cases that do not culminate in a tangible employment action, the plaintiff must show: (1) she belonged to a protected group; (2) she was exposed to unwelcome harassment; (3) the harassment was premised on her protected status; (4) it was “sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive work environment”; (5) it was “both subjectively and objectively offensive”; and (6) the employer is liable for the harasser’s conduct. ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 1.05, at 29 (3d ed. Supp. 2002)
a daunting task.\textsuperscript{80}

In addition to doctrinal hurdles, workers alleging discrimination encounter a number of practical problems.\textsuperscript{81} For example, in my experience employers in general receive better, or at least more consistent, representation. Indeed, the would-be plaintiff may have trouble hiring any lawyer.\textsuperscript{82} Without one, and facing the defendant’s counsel, the worker stands virtually no chance of victory.\textsuperscript{83}

Most employees cannot afford, as can their opponents, to pay an attorney by the hour. Thus, the plaintiff must locate a lawyer willing (perhaps, with a small retainer) to take his case on a contingent fee basis and “front” the expenses of litigation. The lawyer, in turn, must rate the likelihood of success, a sizeable judgment, and statutory attorneys’ fees as high enough to justify the investment of her time and money. To be sure, some attorneys gamble on dubious claims, but ordinarily, those who do aim to dispose of the matter quickly, for nuisance value, leaving the client with only two-thirds of an already paltry sum.

If the employer resists settlement and the plaintiff’s lawyer decides not to incur the costs of thorough discovery, the suit will probably be dismissed. For discovery is, on the whole, more crucial to the complainant than the defendant. The latter usually employs most of the potential witnesses for both sides; it also possesses all or most of the relevant documents.\textsuperscript{84} Therefore, at the very least, the defendant can assess the


80. \textit{See, e.g.}, Estlund, \textit{Wrongful Discharge, supra} note 42, at 1670-71. The governing statutes also bar retaliation against a person who has “made a charge, testified, assisted, or participated . . . in an investigation, proceeding, or litigation” under these laws or has “opposed any practice made unlawful” by them. \textit{See, e.g.}, 29 U.S.C. § 623(d) (2000) (ADEA). To prove a prima facie case of retaliation, the plaintiff must demonstrate: (1) he engaged in activity protected by the statute; (2) he suffered an adverse employment action; and (3) a causal link exists between (1) and (2). \textit{See} MODJESKA, supra note 79, § 1.04, at 1-11 to 1-12 (3d ed. 2002); \textit{see, e.g.}, Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir.) (finding that the claim filed was not the cause of the employee’s dismissal), cert. denied, 534 U.S. 951 (2001). In my experience, plaintiffs often find it easier to prove a charge of retaliation than one of substantive discrimination. Significantly, to prevail on the former, a plaintiff need only show that he sincerely and reasonably believed that discrimination had occurred—he need not show that he was correct. \textit{See, e.g.}, Alexander v. Gerhardt Enters., Inc., 40 F.3d 187, 195-96 (7th Cir. 1994).

81. Much of this discussion draws on conversations that I have had over the years with plaintiffs, defendants, and their counsel.

82. \textit{See} Yelnosky, supra note 56, at 587. \textit{See generally} Estlund, \textit{Wrongful Discharge, supra} note 42, at 1673 (describing the difficulties that middle-income and poor plaintiffs have getting lawyers).

83. The employee who proceeds pro se is somewhat less disadvantaged at the agency level. \textit{But cf. infra} note 298 (noting that very few EEOC complainants receive a favorable determination).

84. Estlund, \textit{Wrongful Discharge, supra} note 42, at 1670.
strength of its position before much formal disclosure takes place.

The employer enjoys other strategic advantages, too. Supervisory employees will almost always back up the company. The same is true of the plaintiff’s co-workers: few employees still on the job will take the risk of supporting a colleague who is often long-since gone. Moreover, advised by counsel specialized in handling discrimination claims, as well as by Human Resources staff, many employers build an elaborate paper trail (for example, of an employee’s errors) for use in the increasingly common event of litigation. Most employees are less than perfect; savvy bosses can create a “plausible record” to cover unlawful motivation.85

Finally, employers—as defendants and corporate litigants—generally profit from delay, endemic in an age of teeming court and agency dockets.86 The individual plaintiff, by contrast, normally finds waiting stressful, at times so much so that he or she will settle for a pittance in order to avoid further frustration. This step may be very tempting to ex-employees who, out-of-work or underemployed, are feeling the immediate financial pinch of a lost salary and other benefits.

In short, the worker who would sue his employer, past or present, embarks on a fairly perilous venture. Brief reflection will reveal, moreover, that this assessment applies in spades to typical second-generation complaints.

As we have seen, these rarely yield a “smoking gun.” Hence, the employee must run the McDonnell Douglas course and hope that circumstantial evidence of biased motives will overcome the company’s usually reasonable-sounding explanation for its conduct. And where prejudice is unconscious, the employee will not be aided by evidence of lies or coverups on the employer’s part. In these circumstances, judges and jurors understandably find it hard to detect a boundary between unknowing and nonexistent discrimination—particularly as they, too, may harbor negative stereotypic views of persons in the plaintiff’s group.87

Further, to the extent that current complaints allege co-worker harassment (nowadays, often, the most severe type of discrimination),88 the defendant will escape liability unless the plaintiff can prove that management either knew or should have known of the offensive behavior
and, nevertheless, failed to take swift and effective measures to stop it. Such knowledge may be difficult to show when employees subtly exclude minorities, women, or others in disfavored classes, thereby denying them access to the networks and team participation so vital to success in the current workplace. This is especially true if the members of the majority do not realize what they are doing.

Some special hazards that second-generation plaintiffs face in prosecuting age discrimination claims also bear mention. ADEA complaints, for example, frequently follow in the wake of layoffs—all too common in the present economy. The “RIF’d” employee (RIF stands for “reduction in force”) will not ordinarily succeed in proving invidious intent in the context of a mass downsizing unless the employer heavy-handedly targets only older workers while retaining similarly situated younger workers, or otherwise revealing biased motivation.

In addition, allegedly ageist comments made at the job site are apt to be viewed as, at worst, ambiguous on the issue of intent. Questions concerning the retirement plans of a worker of 60 or observations that he “is beginning to slow down,” “is unwilling to change,” or “has not kept up with the times”—especially when stray—as opposed to incessant—do not necessarily imply prejudice against the old, as racial or misogynistic slurs clearly connote hostility toward people of color or women. Rather, they straddle a blurry line between judgments about an employee’s performance, which are permitted, and assumptions based on age, which are not. At a time when learning new skills is more important than ever

89. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).
90. The fact that nontraditional workers remain outside “crucial networks of interaction and advancement . . . [is] not necessarily due to intentional motivation.” Sturm, Race, Gender, supra note 5, at 669.
91. The Supreme Court has not decided whether disparate impact claims can be raised in an ADEA context. Three justices have intimated a negative view. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy, J., concurring, joined by Rehnquist, C.J., and Thomas, J.). The lower courts are divided on the issue. Compare Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir.) (holding that the ADEA does not allow for claims of disparate impact), cert. denied, 528 U.S. 811 (1999), with Lewis v. Aerospace Cnty. Credit Union, 114 F.3d 745 (8th Cir. 1997) (holding that disparate impact theory is viable under the ADEA), cert. denied, 523 U.S. 1062 (1998). Recently, the Court had an opportunity to resolve the issue but then chose to avoid it, dismissing its writ on the ground that certiorari had been improvidently granted. Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir.), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002).
92. I have culled the quoted statements from my cases.
94. See Bluight v. Consol. Edison Co. of NY, Inc., No. 00 CIV 3309, 2002 WL 188349, at *5 (S.D.N.Y. Feb. 6, 2002) (finding that defendant’s CEO did not evince age discrimination when he said that “the company needed ‘new, young thinking and
before, older workers may, in fact, become less useful to their employers (become "deskilled") as evolving technologies and other novelties strain their capacities to learn and adapt.

Given the problems of redressing discriminatory conduct in the second-generation workplace, critics of the present state of affairs have called for reforms. Meanwhile, however, aggrieved employees resort to administrative agencies and courts in record numbers to pursue their claims under current law.

D. Suggested Reforms, Continued Litigation

Some pro-plaintiff commentators urge repeal of the onerous requirement of proof of discriminatory intent in cases alleging disparate treatment. But regardless of its merits (as to which I take no position), this recommendation is highly unlikely to be adopted. Numerous decisions enshrine the prevailing law in this area. As for Congress, it responds to public opinion—which lacks the desire to weight the scales more heavily toward the employee. Indeed, if anything, the tide has turned in the opposite direction, with many people believing that we have gone too far in defending the rights of statutorily protected groups. Similarly, proposals to force—or even permit—employers to make more aggressive efforts to advance the prospects of women and minorities fly in the face of current judicial and popular sentiment hostile to broad affirmative action.

As an alternative to scrapping intent as an element of disparate-treatment claims, some scholars have urged an expanded definition of the concept to encompass unconscious discrimination. Professor Ann C. McGinley, for example, advocates that the requisite state of mind be found when the defendant has knowledge or reason to know that its conduct was

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95. See, e.g., McGinley, Cronyism, supra note 38, at 1058
96. Cf. Yelnosky, supra note 56, at 592-93 (rejecting the proposal). Discussion of that question is beyond the scope of this article.
98. See infra text accompanying notes 215-20.
100. See McGinley, Cronyism, supra note 38, at 1036-37, 1037 n.208 (citing the passage in 1996 of Proposition 209, the California Civil Rights Initiative, and similar provisions in other states, barring the use of preferences based on categories such as race, sex, or national origin).
biased, consciously or unconsciously. Although well-meant, this approach is extremely impractical: how would the plaintiff prove the existence of this mentality? It is often difficult enough to establish deliberate discrimination. To be sure, experts can testify that much prejudice nowadays does not rise to a conscious level; considerable research supports this conclusion. But how can one reliably show, except perhaps in cases of flagrant stereotyping, that the particular employer in question acted, in effect, on the basis of unintentional bias? In my view, such a reformulation of the intent requirement would do little for the plaintiffs who need help the most—those caught up in the ambiguities of typical second-generation disputes.

Different scholars go beyond doctrinal tinkering, arguing for a fundamental change in emphasis from the “search for bigots to the impact of workplace structures and processes on female and minority employees.” They offer provocative analyses of problems in the job environment—among other things, recommending solutions that supplement civil rights litigation.

Professor Sturm, for instance, contends: “[I]t becomes necessary to experiment with structural approaches to legal intervention that focus on systems of decision making and explicitly employ organizational incentives and non-legal actors in the project of creating lawful, inclusionary practices within institutions.” She provides several examples of firms that have restructured themselves in various ways, such as revamping their systems for hiring, promotion, and training, as did Home Depot, in order to eliminate former practices that gave an edge to white males. Professor Vicki Schultz, another scholarly critic of the status quo, makes yet more sweeping proposals. Dealing mainly with gender issues, against the backdrop of job insecurity in the emergent global marketplace, Schultz sets forth an ambitious agenda of “measures like job-creation programs, ... enhanced employee representation, and a reduced workweek for everyone.”

Much of this conceptual writing amounts to a general blueprint for

102. See supra text accompanying note 56.
103. See, e.g., McGinley, Evolucion, supra note 3, at 447 n.195 (discussing Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989)).
104. See also Stone, supra note 6, at 609-14 (suggesting other doctrinal reforms designed to provide relief for plaintiffs).
105. Yelnosky, supra note 56, at 590. See, e.g., Chamallas, supra note 57, at 2371-72; Schultz, supra note 11, at 1938. See generally Sturm, Second Generation, supra note 5.
106. Sturm, Race, Gender, supra note 5, at 675.
108. See Schultz, supra note 11, at 1885.
regulation of the twenty-first century workplace; more detailed discussion of it exceeds the scope of the present article. I wish to focus on improving the handling of employment disputes within the existing legal framework. I believe, however, that my recommendations, set out below, are consistent with the structural approach.

As I previously stated, the majority of plaintiffs who mount litigation against their employer confront rather bleak prospects. Many claims will fail to survive summary judgment or settle for mere nuisance value. The few suits that do make it to judgment after trial—approximately five percent or less of the total brought—yield little improvement in results for workers. A recent U.S. Equal Employment Opportunity Commission (EEOC) study revealed that plaintiffs represented by private attorneys, as opposed to agency lawyers, enjoyed a success rate of merely twenty-seven percent; on appeal, the figure was sixteen percent.

Despite these discouraging results, the number of job discrimination actions rose continuously throughout the seventies, eighties, and nineties. Such filings increased 2,000% in federal court in the past two decades, while the overall docket grew a relatively meager 125%. Agency filings have likewise been climbing: at the EEOC, 84,442 were

109. See generally McGinley, Credulous Courts, supra note 76.
110. Cf. Mayer, supra note 44, at 156-57 (stating opinion that many plaintiffs’ attorneys file employment discrimination lawsuits with a nuisance-value settlement in view).
113. See Donohue & Siegelman, supra note 40, at 983-84, 988-90 & tbl.2.
logged in FY 2002—up from 72,302 in FY 1992.1\textsuperscript{16} At the same time, state administrative charges have mounted.1\textsuperscript{17}

This pattern has prompted much speculation concerning its cause. Professor John J. Donohue, a close student of the matter, believes that the burgeoning of these lawsuits is not significantly due to factors like the growth in the number of lawyers or any rise in discrimination.1\textsuperscript{18} Instead, he attributes the 1970-1989 increase in large part to a parallel increase in unemployment.1\textsuperscript{19} Further, he cites the expansion in covered employees by legal changes such as the passage of the ADEA1\textsuperscript{20} in 1967 and the 1972 amendments to Title VII1\textsuperscript{21} as instigators of litigation.1\textsuperscript{22} The later enactment of the ADA1\textsuperscript{23} in 1990 and the Civil Rights Act of 1991 (CRA)1\textsuperscript{24}—which, for the first time, allowed Title VII1\textsuperscript{25} and ADA1\textsuperscript{26} plaintiffs to recover not only lost pay but also compensatory and punitive damages—probably had a similar effect.1\textsuperscript{27}

With respect to possible additional causes, Donohue theorizes: “Improvements in the workplace have spawned strife in the courtroom.”1\textsuperscript{28} Insofar as the anti-discrimination laws have fulfilled their aim of enhancing opportunities for women and minorities in the work force, better jobs have made it more “worthwhile to sue.”1\textsuperscript{29} Donohue’s thesis supports the point I made in connection with the story of Derek, the African-American would-be associate turned down by a white law firm:1\textsuperscript{30} only now, in the second

\begin{itemize}
\item \textsuperscript{117} See Penny Nathan Kahan & Lori L. Deem, \textit{Mediation as a Model for Resolving Employment Disputes in the New Millennium}, 1 EMPLOYEE RTS Q., Spring 2001, at 28, 28-29.
\item \textsuperscript{118} See Donohue & Siegelman, \textit{supra} note 40, at 1000-04.
\item \textsuperscript{119} See \textit{id.} at 990.
\item \textsuperscript{120} 29 U.S.C. §§ 621-634 (2000).
\item \textsuperscript{122} See Donohue & Siegelman, \textit{supra} note 40, at 990, 1000.
\item \textsuperscript{125} 2 U.S.C. § 1331(a)(1), (b)(1) (2000).
\item \textsuperscript{127} Such damages are subject to statutory caps ranging from $50,000 to $300,000, depending on the number of workers that the defendant employs. See 42 U.S.C. § 1981a(b)(3) (2000).
\item \textsuperscript{128} Donohue & Siegelman, \textit{supra} note 40, at 1015.
\item \textsuperscript{129} \textit{Id.} at 1007-08.
\item \textsuperscript{130} See \textit{supra} text accompanying note 50.
\end{itemize}
generation, have more than a handful of people of color possessed the credentials to apply for good professional positions as well as the incentive to try to obtain legal redress, if rejected or otherwise harmed by reason of employer bias.

Finally, I note my own speculation that outsized verdicts—very rare but much ballyhooed—have continued to attract a disproportionate number of plaintiffs. Yet attorneys, if not their clients, should know the less publicized fact that giant recoveries are vulnerable to substantial reductions on remittitur. I can merely add the conjecture that hope springs eternal, in the hearts of both lay persons and lawyers, and that, therefore, a poor prognosis does not deter as many lawsuits as rational analysis might predict.

Whatever the causes might be, however, the proliferation of employment discrimination actions has had some untoward consequences. Since these have manifested themselves in the mediation setting, I will discuss them in that connection. The rest of this article will treat the subject of employer-employee mediation: its considerable benefits, as compared to litigation, and aspects that could stand improvement.

II. SECOND-GENERATION EMPLOYMENT MEDIATION: CURRENT ISSUES AND FUTURE DIRECTIONS

A. The Increasing Popularity of Mediation

In recent years, mediation has been widely touted as an option superior to litigation. Its advertised virtues include, first, its problem-
solving orientation: making matters right for the future replaces fixation on whom to blame for past occurrences. In addition, it maximizes party autonomy, allowing the affected individuals—in a confidential environment—to fashion an agreement that tailors relief to their own situation and incorporates terms beyond what a court or agency could order. Such an accord is apt to be seen as fairer than one imposed by third persons. Mediation, thus, offers the possibility of integrative, “win-win” solutions that meet the interests and needs of both sides. Sometimes, too, it gives an opportunity for emotional catharsis, helps to preserve or repair relationships between the parties, and provides a broader education in conflict management.

Faster and simpler than litigation, mediation also yields both monetary and non-monetary savings. Monetary savings include reductions in costs connected with using attorneys, conducting discovery, and diverting parties and witnesses from their usual productive activity. Non-monetary savings are exemplified by reductions in the amounts of stress and anxiety that are typically produced by legal proceedings. Mediation can, in addition, pare backlogs in courts and agencies.

Most of these benefits could, theoretically, be achieved by unassisted negotiations. Realistically, though, the presence of a neutral who can make judicious use of the confidential caucus dramatically improves the bargaining process. For example, a mediator can provide a needed reality-check, helping the parties evaluate the strengths—and weaknesses—of their case. She can enhance the chances of settlement because she knows more about a party’s bottom line and, in general, his thoughts and concerns than does his opponent. Also, she is able to advance a participant’s suggestion as her own, thereby avoiding “reactive devaluation” and reflexive rejection by the other side. Frequently, too, she has the best judgment regarding those persons required to be at the table. She can, for example, involve family members or friends who possess a stake in the conflict, who have some degree of decisionmaking power, or are able to furnish needed support to the plaintiff, enhancing his or her capacity to make an informed and voluntary choice. Simply put,

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134. No mediator should think, however, that parties will be entirely candid, even in caucus, about the monetary amount at which they would agree to settle.


136. Admittedly, inclusion of certain family members or friends might appear to hinder the process, but allowing the parties to involve even difficult people usually works better than leaving them out. In the latter situation, the sponsoring party may feel aggrieved and the person excluded may snipe from the sidelines—undercutting the progress made during mediation.

Disp. Resol. 55, 56-57; Kahan & Deem, supra note 117, at 29-31; Yelnosky, supra note 56, at 598-604.
the mediator adds value to the negotiating process.

Good press about mediation has both caused and resulted from its increasing use. Along with other forms of alternative dispute resolution (ADR), such as open door policies, human resources and peer review, ombudspersons, and arbitration, mediation in employment cases has dramatically increased in the past decade. For one thing, the federal government’s use of ADR has grown substantially because of the passage of laws directing or encouraging its establishment. These include the Civil Justice Reform Act, the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998. The EEOC, on its part, has committed itself to ADR. For instance, its “Agency Program to Promote Equal Employment Opportunity” mandates that federal agencies provide ADR to their employees and attempt to resolve complaints as early as possible. Virtually all federal agencies now offer ADR.

The most widely touted initiative, in which I briefly participated, has been REDRESS, sponsored by the United States Postal Service (USPS); the name stands for “Resolve Employment Disputes, Reach Equitable Solutions Swiftly.” Created in 1994, in connection with a class action settlement, REDRESS is based on so-called transformative mediation.

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137. See Evans & Sloan, supra note 111, at 747-48; Gibbs, supra note 114, at 237.
138. See, e.g., Lisa B. Bingham et al., Exploring the Role of Representation in Employment Mediation at the USPS, 17 OHIO ST. J. ON DISP. RESOL. 341, 343 (2002); Lisa B. Bingham & David W. Pitts, Research Reports, Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project, 18 NEGOTIATION J. 135, 135 (2002); Robert E. Meade (Sr. Vice-Pres., Am. Arb. Ass’n), Remarks at Cutting Edge Issues & Trends in Workplace ADR Programs, a program at the Ass’n of the Bar of the City of N.Y., Nov. 21, 2002.
144. Stallworth et al., supra note 101, at 44, 83-84.
145. Bickerman, supra note 139, at B15.
146. See generally Lisa B. Bingham, REDRESS™ at the USPS—a Breakthrough Mediation Program, ACREOLUTION, Spring 2002, at 34 (describing REDRESS program and its results from first years in full operation); Bingham & Pitts, supra note 138, at 142-44; Cynthia J. Hallberlin, Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream, 18 HOFSTRA LAB. & EMP. L.J. 375 (2001) (transcribing speech given by an early architect of REDRESS program).
147. Hallberlin, supra note 146, at 376-77.
148. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION
This process focuses less on achieving agreement than on empowering the parties to rely on their own capacity to solve problems and acknowledge the other's concerns. Under its protocol, a worker who files an informal complaint of discrimination may choose to refer the matter to an outside (non-USPS) mediator; one is provided, on the job, within a scant two to three weeks. As will be seen, the program has proved successful in several respects. Further, the EEOC itself offers a mediation program, in which I participate pro bono; it handles equal opportunity cases not resolved by the federal agency when an administrative law judge, prior to hearing, believes that settlement talks might be fruitful.

Mediation of employment-related disputes has become prevalent in the private sector as well. "Increasingly more employers recognize that the use of mediation makes good business sense." A 1995 Government Accounting Office study reported that fifty-two percent of large private employers have ADR programs for non-union personnel; another study, also published in 1995, "found that 57% of... large manufacturing firms had instituted some form of ADR." Most often, these programs are mandatory and multi-step, with review by the human resources department, management panels, and mediation being the steps most frequently used.

Some mediation initiatives, moreover, involve the government in non-governmental employee conflicts. For example, programs run by the federal courts mediate employment-discrimination charges, in addition to other types of matters, pursuant to a judge's order. In my experience, sometimes the court merely ratifies what the parties request; at other times, it twists arms to obtain consent or mandates the process regardless of the participants' wishes. In certain areas, such as the Southern and Eastern Districts of New York, where I volunteer, neutrals agree to serve pro bono. The EEOC, where I also mediate, offers mediation on a strictly

(1994) (setting forth the theory and practice of this type of mediation).
149. See Bingham, supra note 146, at 34.
150. See infra notes 164, 166, 169-71, and accompanying text.
151. See, e.g., Evans & Sloan, supra note 111, at 747-48; Stone, supra note 6, at 559-60.
152. Stallworth et al., supra note 101, at 84.
153. Bingham et al., supra note 138, at 343 & nn.5-6.
154. See Gibbs, supra note 114, at 237. But cf. CPR INSTITUTE, supra note 111, at 9 ("What used to be called 'stepped' programs... have given way to a smorgasbord of processes available to employees, frequently in any sequence.").
155. See Ettingoff & Powell, supra note 133, at 1157 (noting that the Committee on Long Range Planning of the Judicial Conference of the United States has "encouraged the district courts to implement a variety of ADR techniques and resources to achieve a more just, speedy, and inexpensive determination of civil litigation."). Many states have also established voluntary or mandatory court mediation programs. See Kate Hollenbeck, The Sounds of Silence: Compelling Mediator Testimony in Olam v. Congress Mortgage Co., 20 CONFLICT RESOL. Q. 5, 5 (2002).
156. See R. S.D.&E.D.N.Y. 83.11(f)(1) (applying to E.D.N.Y. only), 83.12(f) (applying
consensual basis to some complainants and respondents in non-federal agency cases. It does so very early on, before the employer files a response. The program relies on both staff and (theoretically) compensated contract mediators. Chronically under-funded, however, the program tends to run out of money before the end of the fiscal year, thus forcing the agency to recruit neutrals willing to work for free.

Finally, the relevant underlying statutes encourage the use of ADR in employment discrimination cases. So, too, did the proposed National Employment Dispute Resolution Act of 2001 (NEDRA). Among other things, NEDRA would have obligated all federal agencies, courts, and businesses receiving $200,000 or more in federal funds, to “establish an internal dispute resolution program or system that provides, as a voluntary option, employee-disputant access to external third-party certified mediators” to address complaints of discrimination. At the behest of the employee, the employer would have had to participate in the process and furnish and pay for the mediator.

As one who devotes substantial time to mediation, I, predictably, concur with those who expound its virtues. For the reasons previously given, I think that this process is, in the main, superior to litigation as a means of dealing with people’s conflicts. I also believe the employment arena presents no exception to the rule. On the contrary, job disagreements lend themselves especially well to that approach. Such studies as exist support the view that mediation, in both agency and workplace

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160. H.R. 820, 107th Cong. (2001). See generally Stallworth et al., supra note 101, at 36-7, 85-87 (discussing and endorsing NEDRA). According to THOMAS: Legislative Information on the Internet, at http://thomas.loc.gov/, the bill was referred to, but never reported out of, the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce.


162. See id. §§ 3(d), 6(b)(2).

163. For treatment of some criticisms of ADR, see infra text accompanying notes 248-50.

164. See, e.g., Hallberlin, supra note 146, at 377-78 (summarizing study of REDRESS by Hallberlin and Professor Lisa B. Bingham); Yelnosky, supra note 56, at 597-98 (describing EEOC pilot program study).
contexts, not only contributes to settling disputes,\textsuperscript{166} but also generally satisfies the parties.\textsuperscript{167}

My own experience supports this optimistic conclusion, which extends, as well, to matters in court. A final resolution occurs in approximately three-quarters of the employment cases that I handle.\textsuperscript{168} More importantly, many participants express contentment with the process—sometimes even without obtaining money or other tangible rewards.

For instance, Joan, an African-American employee, who felt very hurt at what she construed as favoritism by her Caucasian former supervisor toward a white Latina colleague, decided at the close of the session to drop her EEOC charge despite the lack of a quid pro quo. Joan stated that she had gotten what she desired merely by receiving the opportunity to confront and question her boss about the events that had so disturbed her. Other complainants have spontaneously hugged or kissed me at the end, in gratitude that the mediation had terminated their ordeal and allowed them to move on with their lives. Significantly, these were not necessarily cases in which the employee had received substantial monetary relief.

From the vantage of the respondent, systemic effects like cost savings\textsuperscript{169} and docket reduction\textsuperscript{170} likely amount to the major reason for engaging in mediation. The human side typically weighs less heavily with them than with complainants, but there are even employees who evince little interest in anything but the bottom line. Some employers’ agents,

\begin{enumerate}
\item See, e.g., Gibbs, supra note 114, at 237 (surveying programs of major companies); Yelnosky, supra note 56, at 597-98 (referencing a GAO study of companies’ in-house mediation).
\item See Hallberlin, supra note 146, at 379 (finding that 80% of REDRESS cases were dropped, withdrawn, or settled).
\item See, e.g., id. at 380; Gibbs, supra note 114, at 238 (praising mandatory programs); L. Camille Hébert, Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study, 14 OHIO ST. J. ON DISP. RESOL. 415, 432 (1999); Yelnosky, supra note 56, at 602-03. I am not aware of any published evaluations of mediation of employment disputes once they have gone as far as court.
\item The rate is considerably lower, however, in one subset of my cases: those involving federal agency employees. For a number of systemic reasons (e.g., mediocre lawyering by many of the agency attorneys and pervasive indifference to resolution since only settlements, and not judgments, are paid out of an agency’s budget), these tend to be difficult to settle.
\item Stephanie Morse-Shamosh, First Vice President and Program Facilitator in PaineWebber’s Issue Resolution Office, says: “[I]f we keep one case a year out of the court... the program has paid for itself.” Focus On Early Dispute Resolution Programs, THE METROPOLITAN CORPORATE COUNSEL, Oct. 2000, at 3 [hereinafter Early Dispute Resolution] (on file with the author). See generally Bingham & Pitts, supra note 138, at 142-44 (noting that cost savings are possible through programs like REDRESS).
\item See Hallberlin, supra note 146, at 380 (recounting that, by the end of REDRESS’s first year, informal complaints had gone down 8%; by the end of the second, formal ones had decreased 30%).
\end{enumerate}
however, also express gratification about the improvement in personal relations that the process tends to generate.\footnote{171}

Joan’s boss, Joe, for example, who thought that he and Joan had enjoyed excellent on-the-job rapport, was extremely upset by her racial discrimination charge; by his account, he had paid the Latina co-worker more attention because of some problems she was having and not for any other reason. After lengthy discussion with Joe, Joan told me in caucus that she no longer believed he had acted out of bias. With her permission, I proceeded to orchestrate a conversation in joint session in which she said she hadn’t wanted to accuse him of prejudice, but “after all these bad things happened, [she] couldn’t come up with any explanation other than race.” When Joe learned that Joan’s feelings had undergone change, he looked as though a hundred-pound weight had fallen from his shoulders. I am convinced that Joe’s relief stemmed from the parties’ new-found insight into each other, and not from any pragmatic concern for his employer’s (New York City’s) legal liability.

In sum, mediation of job disputes is becoming increasingly popular and, for the most part, deservedly so; I, therefore, support it. Yet my experience strongly suggests adoption of a more nuanced stance than simple endorsement.

\section{Why Early, Broad-Gauged Mediation Is Best}

Specifically, I conclude, first, that because major benefits of mediation tend to erode with the passage of time and, in particular, after the onset of litigation, it should take place as soon as possible after the conflict in question arises\footnote{172}—preferably, at the workplace level.\footnote{173} The success of

\footnote{171. See id. at 380-81 (finding that more than two-thirds of REDRESS participants believed that mediation would have a long-range effect on relationship with the opposing party). The architect of REDRESS states: “I needed more than ‘deals.’ I was looking for improved relationships.” Id. at 378.}

\footnote{172. Other experienced students of the field and mediators are, generally, in accord. See, e.g., Evans & Sloan, supra note 111, at 767; Stallworth et al., supra note 101, at 37; Yelnosky, supra note 56, at 599. But cf. Mayer, supra note 44, at 160-61 (cautioning that early EEOC mediation may preempt any meaningful discovery).}

\footnote{173. I do not, however, suggest that parties should have to mediate complaints if a more informal process, like conversation with a supervisor or a human resources officer, solves the problem to the satisfaction of the participants—that is the point of “stepped” programs. See supra text accompanying note 154. Ms. Morse-Shamosh, PaineWebber’s Program Facilitator, indicates that the majority of workplace complaints in her company are resolved before mediation, the third step in the ADR program. The earlier two involve handling through either the Open Door policy or the Issue Resolution Office; unlike mediation, these are both internal processes. See Early Dispute Resolution, supra note 169, at 2; Meade, supra note 138; see also CPR INSTITUTE, supra note 111, app. G at 457-61.}
REDRESS\(^{174}\) and similar programs in non-governmental employment settings,\(^{175}\) which seek to extinguish early flickers of discontent before these burst into flame, shows that this view is well-founded.

Second, I conclude, mediation should be made available for all types of employment-related controversies—not just for those involving claimed violations of legal rights and, most critically, not just for complaints of unlawful discrimination.\(^{176}\) As will be shown,\(^{177}\) for a number of reasons, programs geared to the latter alone may actually disserve the interests of both employers and workers.

These recommendations of early and broad-gauged mediation are complementary. Later mediations will often occur in connection with court or agency proceedings.\(^{178}\) Administrative bodies like the EEOC and similar state\(^{179}\) and local\(^{180}\) outfits will only handle disputes that fall within their stated jurisdiction: charges of discrimination. Judicial referrals to ADR programs will cover solely complaints that, on their face, make out a cause of action. Since most employees, as we have noted, have no legally cognizable basis for suing their employer except under the civil rights laws, court-related mediation will also tend to center on allegations of bias.\(^{181}\)

Of course, parties in disagreement can hire a private mediator at any

\(^{174}\) See supra text accompanying note 149 (emphasizing that mediation takes place within two to three weeks of complaint).

\(^{175}\) See supra text accompanying notes 151-54.

\(^{176}\) See Melissa Janis, Is Your Alternative Dispute Resolution Program a Flea-dip?: How to Prevent Your Employment ADR Efforts from Going to the Dogs, N.Y. St. B. ASS’N LAB. & EMP. NEWSL., Spring 2002, at 10, 12. Most workplace ADR applies, at a minimum, to charges of infringement of equal employment opportunity laws.

\(^{177}\) See infra text accompanying notes 223-36.

\(^{178}\) “Later” is almost always synonymous with “in litigation.” Depending on whether the state in which a complaint arises has a state or local law proscribing employment discrimination, the aggrieved worker must file her charge with the EEOC either 180 or 300 days after the unlawful act occurred. See MODJESKA, supra note 79, §§ 6.02, 6.03, at 6-3 to 6-8 (3d ed. 2002). In order to have the right to sue in federal court, the plaintiff must exhaust her administrative remedies. See id. § 6.10, at 6-37 to 6-37 (3d ed. 2002). A civil action must be filed no later than 90 days from receipt of a right-to-sue notice from the EEOC. Ordinarily, a right-to-sue notice must issue when the EEOC fails to act within 180 days after the filing of a charge. See id. § 6.10, at 6-38 (3d ed. 2002) (detailing circumstances in which a right-to-sue notice must issue).

\(^{179}\) For example, the New York State Division of Human Rights, for which I briefly mediated. See also Baar & Zody, supra note 133 (discussing Utah Anti-Discrimination Division’s mediation program).

\(^{180}\) For example, the New York City Commission on Human Rights.

\(^{181}\) Statutory charges of discrimination are sometimes coupled with common law tort claims (e.g., intentional infliction of emotional distress) arising from same operative facts. These may be even harder to prove than discrimination. See, e.g., Howell v. N.Y. Post Co., Inc., 612 N.E.2d 699, 702 (N.Y. 1993) (“[O]f the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous . . . .”). They tend, therefore, to be secondary in importance.
time and negotiate any matter they wish—regardless of whether the issues raised implicate legally protected rights. But irrespective of whether or not discussions are sponsored by a public body, mediation undertaken after the commencement of litigation can hardly proceed without reference to it; people bargain in the shadow of the law.  

Certainly, in my own experience, litigants (ordinarily represented by counsel, at least by the time they file in court) focus heavily on claims and defenses in their talks. As we will see, postponing the process and, in effect, limiting its ambit sacrifices many of mediation's potential benefits.

Some major employers do, happily, offer workplace dispute resolution of extensive jurisdictional scope; these include PaineWebber, Credit Suisse First Boston (CSFB), and McGraw Hill, to name a few. In the words of Elizabeth W. Millard, Director and Counsel of CSFB: “Our program covers everything as well as everyone.” Such global schemes even apply to ex-employees, an especially salutary feature since many second-generation complaints involve workers who have been fired. Unfortunately though, other companies and institutions—among them, the United States Customs Service (USCS) and the USPS, which sponsors REDRESS—confine their programs to claims of infringement of anti-discrimination laws. In light of the fact that the USPS is “the second largest employer in the country,” and that the USCS also employs a significant number of people, these limitations have a broad effect.

Still other employers, for instance, Alcoa fall midway along the spectrum: they do not facially exclude complaints unrelated to bias, but they do restrict coverage to assertions of violations of law. In a variant

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183. See CPR INSTITUTE, supra note 111, at 15-17.
184. Id. app. F at 91; see also id. app. G at 464 (explaining that PaineWebber’s program covers “almost any dispute”).
185. See, e.g., *PAINEWEBBER FORUM FOR ALTERNATE ISSUE RESOLUTION, F.A.I.R. QUESTIONS & ANSWERS 7* (2000) (proprietary company handbook). All internal company documents, cited in footnotes, that are not published in external sources are on file with the author.
187. See Bingham, supra note 146, at 34.
190. See CPR INSTITUTE, supra note 111, at 15.
of this model, some companies permit workers to raise any issue in early stages of a "stepped" process, while later stages, including mediation and arbitration, cover only allegations involving legally protected rights. In an "at-will" world, however, the distinction between limitations to legal claims and limitations to claims concerning equal employment opportunity rights makes little difference, as both types of complaints are based largely on discrimination.

1. Early Mediation

There is widespread agreement with respect to my first conclusion about mediation: "earlier is better"—at least, in the ordinary run of cases. Several reasons supporting this view have application across the board; some, though, have particular force in employment disputes.

For one thing, expenses rise and savings diminish when people embark on litigation: above all, when they go to court. From a settlement perspective, outlays for lawyers and other trappings of an adversarial proceeding simply divert to third persons monies that might otherwise go toward resolving the matter. In addition to expending funds, parties incur opportunity costs when they must deflect time and effort from productive work to activities such as helping counsel with discovery and testifying at a deposition, hearing, or trial.

Given the economics of employment litigation, discussed earlier, plaintiffs usually do not incur significant costs during litigation; however, the plaintiff's attorney does. So, too, do defendants, who typically pay outside counsel hourly rates in the hundreds of dollars and must defray disbursements as well. Furthermore, if the employee prevails at trial, the employer will incur liability for his or her attorneys' fees; these can sometimes amount to hundreds of thousands of dollars. A late settlement

191. See id. at 15-16 (giving Anheuser-Busch, Halliburton, and Johnson & Johnson as examples of this approach). Typically, firms exclude certain categories of legal claims, such as those involving ERISA and unemployment and worker's compensation claims. See id. at 15 n.4.
192. See supra text accompanying note 172.
193. See Stallworth et al., supra note 101, at 37 (reporting an estimated cost of more than $96,000 to defend an individual, non-class-action, discrimination lawsuit). One study found that, on average, the cost of "a seriously contested employment discrimination case is $130,000." Ross, supra note 112, at 183. In New York City, I believe, $150,000 would amount to a more realistic figure.
195. See, e.g., Disabilities: Minnesota, 38 Fair Emp. Prac. Newsl. (BNA) 962 (Dec. 5, 2002) (citing "more than $100,000 in attorneys' fees" awarded in case of disability discrimination); Retaliation: Seventh Circuit Affirms $400,000 Verdict for Female Pilot Fired After Complaint Letter, 38 Fair Emp. Prac. Newsl. (BNA) 957 (Sept. 26, 2002) (noting that $200,000 in attorneys' fees were awarded in case of retaliation for complaining
will also likely reflect the fact that substantial fees have been incurred to that point by counsel for the plaintiff. True, workplace mediations may also require that the company absorb the cost of counsel, to the extent that complainants desire representation. But that amount should be relatively trivial compared with post-trial attorneys' fees, even when the latter are heavily discounted to adjust both for the plaintiff's risk of losing and the time value of money.

Finally, note that from the perspective of an agency or court, any conflict that settles before becoming a "case" (and, as we have seen, mediation generally promotes resolution) is one less item on the docket. Conversely, even if a suit gets settled during litigation, it will have taken some chunk of the system's resources as well as the parties'.

In addition to enhancing tangible expenses, delay exacts a human toll. The slow-moving adversarial process often causes tremendous stress for the persons involved—in employment disputes, disproportionately for the complainant. He or she is an individual; the opponent is a business entity. Yet even a company operates through human agents, some of whom also experience frustration, anxiety, and trauma.

Like other commentators, I have found that employment disputes are virtually always fraught with emotion. When asked to describe his aims for the mediation process, one of my plaintiffs replied: "To regain my emotional wholeness." While few actually articulate this wish, many others undoubtedly feel that the events which triggered their complaint have dealt grave blows to their self-confidence, trust in others, and optimistic outlook on life. Work, after all, occupies a central part of our existence. Most of us spend more waking hours on the job than at home during the week, and much of our sense of identity and worth is bound up about sex discrimination); Sex Discrimination: Male Worker Gets Damages for Denial of Child Care Leave, 38 Fair Emp. Prac. Newsl. (BNA) 956 (Sept. 12, 2002) (describing award of a $626,000 fee in sex discrimination case). In multi-plaintiff cases, awards can run into the millions of dollars. See, e.g., Sex Discrimination: Court Approves $47 Million Consent Decree Settling Sex Bias Allegations at Rent-A-Center, 38 Fair Emp. Prac. Newsl. (BNA) 958 (Oct. 10, 2002) (documenting that $10.5 million in attorneys' fees were awarded in sex discrimination class action); In Brief: Grocery Chain Pays $10.5 Million, 37 Fair Emp. Prac. Newsl. (BNA) 914 (Jan. 18, 2001) (reporting that nearly $2.4 million in attorneys' fees were awarded to group of employees in a race discrimination case).

196. See infra text accompanying note 269.
197. See supra text accompanying notes 115-17.
198. In referring to "parties" and "defendants," I intend, where applicable, to encompass involved or affected individuals who work for the company—even though the firm is the sole actual defendant. By contrast to the federal statutes, some state and local anti-discrimination laws provide for liability of agents under certain circumstances. See Tomka v. Seiler Corp., 66 F.3d 1295, 1314-17 (2d Cir. 1995).
199. See, e.g., Kahan & Deem, supra note 117, at 29.
Frequently, too, such negative emotions increase over time. For those involved in litigation, time definitely does not heal all wounds. The snail’s-pace trek through an alien, hostile, combative environment heightens feelings of pain, anger, and victimization. Further, if, as is often true, the employee has been discharged, she may be suffering economically for at least a part of this period. Even assuming that she secures new employment, the plaintiff may have lost ground in terms of salary, health insurance, pension rights, and other benefits, which she may never regain entirely. These circumstances only enhance bitterness and stress.

One of my cases furnishes a poignant illustration of how time spent litigating instead of recovering can cast a pall over life. Jerry, a middle-aged white man with a strong work ethic, was hired by a major utility company upon his graduation from high school. He started at the bottom of the ladder, but received promotions over the years. By his mid-thirties, Jerry was earning a good salary and supporting his wife and children comfortably. Then he made an error in judgment. Several of his friends (Italian-American, as is he) had fallen behind in paying their bills and their service had been cut off; he turned it back on, thereby violating firm policy. Jerry received no quid pro quo and, when an investigation commenced, he admitted his misdeeds right away. The company, nonetheless, fired him. There was evidence that others guilty of worse misconduct had been retained and that certain members of management considered persons of Italian extraction to be untrustworthy and “crime prone.” Jerry, therefore, charged the utility with having discriminated against him on the basis of national origin.

Following his discharge, Jerry’s personal life imploded. It took him over nine months to find a job and several years to reestablish his career, in another part of the country, and earn money comparable to what he had made before. During this period, Jerry was forced to declare bankruptcy and live off the charity of his elderly father. These circumstances engendered profound humiliation. In addition, his wife divorced him and took their children back to New York. Jerry suffered a heart attack and began to experience stomach ulcers.

When I met him, over a decade had elapsed—most of it spent in ultimately fruitless proceedings before the state human rights division. While the agency did find probable cause to believe that bias played a role in his firing, it procured him no relief. So Jerry found himself in court,

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200. See Estlund, Changing Workplace, supra note 11, at 338.
201. The defendant moved for an “equitable order” dismissing the complaint, on the ground that Jerry had declined what it deemed a generous settlement offer of $75,000. While denying the motion, the agency apparently did nothing to move the case forward; for some reason, no hearing was ever held. Eventually, the EEOC sent Jerry a notice of right to
ordered to participate in settlement talks, no nearer to his goals of
restitution and vindication than on the day of his termination, and fearing
that this new development simply augured more delay.

In caucus conversations, Jerry made plain that he blamed the
defendant not only for his financial woes—which by then were long gone,
though etched in acid in his memory—but also for the deterioration in both
his health and marital relations. Jerry could not understand how hard it
would be to prove that the company’s actions “caused” the latter, for
purposes of damages. It was equally clear, however, that what he regarded
as the law’s false promise had further entrenched his feelings of bitterness
and worsened his emotional state. Even mediation, resulting in a six-figure
monetary settlement, could not put Jerry, still a tragic Humpty Dumpty,
together again. He wrote me the following:

I must inform you how disappointed I am in our system. It took
10 years to “fail” to right a wrong—the whole purpose of our
system’s existence. It concerns me that delays and
ineffectiveness in our system must cripple many. . . . As we
discussed, you never get back the whole cake—but this is just a
crumb and not even a slice. This settlement does not come close
to re-establishing the stability and security I worked 16 years for
and that was wrongfully taken away.

Nonetheless, late as it came, mediation got a positive review: it succeeded
in bringing “a human side to a bureaucratic and cold proceeding.”

It is unlikely that any amount of dollars would have reconciled Jerry
to his discharge. Yet, suppose that mediation, under the auspices of the
firm, had taken place right after, or even before, his firing. Perhaps he
could have convinced his employer that termination, whether or not
discriminatory, was overly harsh, and he would have been retained or
reinstated—possibly with a transfer to a different department—with duties
that did not lend themselves to the kind of temptation to which he
succumbed. Alternatively, he might have negotiated one or more of the
following terms: severance pay to tide him over his months of
unemployment; continued benefits, such as insurance; retroactive
resignation in lieu of dismissal; a neutral, if not favorable, reference; and
use of the firm’s training or outplacement programs (of special value in the
new workplace). In this scenario, would Jerry’s marriage and health have
lasted? We cannot know. But early intervention would surely have
betttered his chances of moving on with life in a less damaged physical and
psychological state.

In addition to playing havoc with body and soul, litigation, and the
concomitant passage of years without resolution of the triggering dispute,
also tends to make parties “dig in.” Having already incurred so many tangible or intangible costs, they may be, at best, ambivalent about letting go of the conflict. Even employers, who usually have less of an emotional investment than employees, may postpone settlement—thus, sending good money after bad. Also, given the amount of time spent mired in the past, one or both sides may find it hard to acquiesce in the mediator’s plea to shift their focus to the future.

Jerry, for example, endured agony during the mediation session. He often seemed to reject not just a specific offer, but rather the whole notion of settling; it was almost as though he could not conceive of living without the lawsuit. Other plaintiffs I have encountered assert that they want to go forward with the case in order to “expose” the employer’s misdeeds; unrealistically, for the most part, they believe that the media will subject the defendant to bad publicity. Still others insist they will feel a sense of vindication, win or lose, by simply telling their tale to a jury. I sometimes address this topic by exploring the likelihood of summary judgment, which would deny them that opportunity. I also ask them to question whether they will, in fact, gain any satisfaction from a negative verdict. I know of more than one such plaintiff who lost at trial and was devastated.

Notwithstanding that a good mediator usually can overcome blanket resistance to settlement, the chance of achieving a creative, integrative solution fades rapidly with time in employment cases. As mentioned earlier, nowadays these often involve dismissals of the employee. Even when he is not discharged, simmering resentment over grievances like non-promotion or harassment may cause him to reach such a level of frustration that he quits.

While legally available, reinstatement ceases to be a practical option after months, or years, have elapsed since the employee was on the job.

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202. Magistrate Judge Edward M. Chen of the U.S. District Court for the Northern District of California has commented that “[e]mployment cases, as a class, are more difficult to settle than almost any other that appear on the federal docket.” He then proceeds to explain: “Because the issues are highly personal and because parties are often unwilling to give up any ground, the cases are often very difficult to resolve even when they should.” Judges Counsel Attorneys to Settle Cases, Deal With Confidentiality, Privacy Concerns, 18 Empl. Discrim. Rep. (BNA) 384, at 384 (Mar. 27, 2000).

203. Even where the worker leaves the job without being fired, he may be able to establish a case of “constructive discharge.” In order to do so, the plaintiff must make the following showing:

[T]he employer, for discriminatory reasons, and with the intent of forcing the plaintiff to quit, has either (1) confronted the plaintiff with a choice of resigning or being fired, (2) rendered the plaintiff’s working conditions so difficult or unpleasant that a reasonable person in the plaintiff’s position would feel compelled to resign, or (3) induced the plaintiff’s resignation by misrepresenting a material fact.

MODJESKA, supra note 79, § 1.03, at 1-4 to 1-5 (3d ed. 2002) (footnotes omitted).
Rarely does the defendant offer, or the plaintiff seek, reinstatement in such circumstances. My practice starkly illustrates this point. Approximately ninety-five percent of the employees of private firms whom I have encountered no longer worked for the defendant-employer. This statistic contrasts with a mere twenty-five percent of the government worker-plaintiffs, who enjoy civil service protection from unjustified firing instead of serving at management’s will. None of these plaintiffs, in either the public or private sector, was rehired; few, I recall, even wanted to be.

Reinstatement aside, “old” cases generally offer little scope for inventive bargaining. Negotiation generally focuses on purely distributive damages issues.

To be sure, some modest non-monetary forms of relief crop up upon occasion—for example: sanitizing a bad record, providing a reference (if the complainant still requires one), and expressing “regret” for what occurred. An actual apology smacks too much of a confession of “guilt” for most defendants or their lawyers to stomach, even when the employer quite clearly did something unfair, if not illegal.

Sometimes, too, the mediator can help the parties deal creatively with dollars. For instance, the agreement between Derek and the law firm that failed to hire him stipulated that a portion of the money would go to a charity of Derek’s choice in the name of Morris, the senior partner. Other cases have culminated in structured settlements of various kinds, taking account of the participants’ needs with respect to taxation and other matters. In addition, when making a mediator’s proposal of a compromise solution, I try to light on a sum that has particular meaning for at least one party. As an illustration, where an employee was denied a promotion, I picked an otherwise “ballpark” number that equated to the marginal amount she would have earned had she gotten the promotion and then quit two years later—as in fact she did—to become a full-time mother. Contrary to what lawyers frequently say to the mediator, it is never “just about money;” psychology counts.

Nonetheless it remains true that early mediation holds considerably more promise of specific, not purely monetary, relief. To some degree, this phenomenon is due to another harmful effect of litigation and delay: their

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204. See Baar & Zody, supra note 133, at 32; Yelnosky, supra note 56, at 602 n.116.

205. Since 1996, however, virtually all damages in employment cases must be included in gross income and are subject to taxation; allocation of monetary sums in settlement agreements generally cannot avoid this consequence. See generally Laura Sager & Stephen Cohen, How the Income Tax Undermines Civil Rights Law, 73 S. CAL. L. REV. 1075 (2000). Most tax bargaining, therefore, focuses on whether the defendant will give the plaintiff a “W-2” or “1099” form. As the former involves withholding by the employer, plaintiffs would rather use the latter. In my experience, most defendants will agree to “1099” all or part of the money.
tendency to lessen mediation's ability to salvage or repair relationships.  

Association between the employer and the ex-employee has ordinarily long since ended by the time litigation ensues; mutual commitment has been replaced by mutual distrust. In such an atmosphere, parties often will not risk agreeing to terms that, unlike an immediate payment, take time to fulfill or entail some subjectivity in judging performance. Thus, for example, even where the plaintiff is still unemployed, I have had trouble "selling" outplacement or training programs run by the firm. Doubting the employer's good faith, the employee usually prefers to walk away with cash in hand; and although the company can furnish "in kind" benefits relatively cheaply, it may well be disinclined to renew contact with the plaintiff. Indeed in some cases, workplace mediation alone, very soon after a problem's onset, can salvage parties' personal connections since "[o]ften, when an employee is suffering disappointment, anxiety, and emotional stress from a work-related incident, the employer's failure to take prompt action is perceived as further evidence of a non-caring attitude."

Despite the many considerations favoring early mediation, lawyers may recommend postponement until discovery has been completed. This position has some validity. Litigants need enough knowledge to evaluate their case with reasonable confidence; discovery, however, not only increases delay and expense, it also tends to harden positions. That is particularly true with respect to party depositions. Fortunately, the choice need not be all or nothing. Where it seems advisable, counsel may engage in a limited pre-mediation exchange of basic information and documents. In addition, during the mediation process, the mediator will often encourage informal disclosure. If it becomes clear that more elaborate discovery is required, the mediator can always suspend negotiations for this purpose. Having already entered the picture, he or she has the ability to hold the participants' feet to the fire so that talks resume within a reasonable time, without a total loss of settlement momentum.

But perhaps most to the point, routine on-the-job mediation, available, as I recommend, for any and all workplace disputes, will likely implicate few incipient causes of action. At this stage, too, the relevant facts should be easily accessible. Handled early, the controversy need not mushroom in complexity. Lastly, to the extent that litigation concerns do contraindicate

206. See Mayer, supra note 44, at 163.
207. The mediator should, nevertheless, make an attempt to repair the relationship. Even where the employee no longer is working for the employer, the parties may benefit from such efforts. See infra note 211.
208. See Evans & Sloan, supra note 111, at 768.
209. In federal court, the parties must make early disclosure of certain basic information without awaiting a discovery request. See Fed. R. Civ. P. 26(a)(1).
210. Occasionally, brokering discovery agreements takes almost as much of the mediator's time and effort as settling the underlying substantive claims.
prompt mediation, these must be weighed against the advantages of curing
the problem as soon as possible. I believe that most employees would
rather have a bird in the hand than two in the bush: that is, a quick and
specific remedy, such as an immediate transfer, shift change, or upgraded
evaluation, rather than the hope of money damages sometime in the
indefinite future.

This being said, I want to make clear my view that even late
mediations are, ordinarily, better than none. The settlements that they often
produce can remove the stress of litigation and yield psychological closure.
At times, the parties may come to regard each other in a friendlier light, in
retrospect, thus replenishing the energy wasted for so long on negative
feelings.

Still, I conclude where I began: the passage of time, with its
accompanying switch in focus from human problems to legal issues,
squanders much of mediation’s potential value. That is especially true
because employment claims must usually be articulated in terms of
invidious discrimination, an accusation that “raises the temperature” of the
dispute and “puts the moral reputation of the employer and its agents on the
line.”

2. Broad-Gauged Mediation

I have argued that mediation not only ought to be promptly held, but
also should be plenary in scope, encompassing virtually all employment-
related issues instead of dealing solely with claims of violations of legal
rights—which, in general, boil down to complaints of unlawful bias. As
previously noted, my contention presupposes access to workplace
mediation since courts and human rights agencies can only deal with the
matter on their dockets: that is, a charge of discrimination. While some
employers do offer broad-gauged schemes of the type I favor, others
(notably, the mammoth USPS) limit theirs to allegations of denial of equal
employment opportunity.

Put simply, such a restriction is less than optimal; worse, it may be
counterproductive. A variety of reasons support my conclusion. First,
consider that employment discrimination claims are meeting with an
increasingly skeptical, if not downright cynical, response. Surveys

211. One of my cases affords a heart-warming illustration of this phenomenon. Sarah, a
college administrator, had been dismissed a few months after a breast cancer diagnosis. She
responded by filing a discrimination complaint on the basis of disability. So constructive
was the dialogue between the parties in mediation that the defendant proposed as one of the
settlement terms an annual fund-raising “run for the cure,” which it would sponsor in
Sarah’s name. Needless to say, Sarah accepted the offer with alacrity.

212. Estlund, Wrongful Discharge, supra note 42, at 1680.
conducted by federal circuit court task forces on gender, racial, and ethnic bias report that a significant number of district judges believe these cases occupy an unwarranted amount of judicial time and, in the main, lack any merit. Indeed, if one equates merit with provability, these naysayers may be correct. As noted earlier, second-generation discrimination is often subtle or even unconscious and, hence, frequently resists efforts to demonstrate unlawful intent.

This disaffection plays out, moreover, against a backdrop of growing hostility to what many people regard as a generally excessive solicitude for minorities. With respect to race, for example, the deepest fault line in our society, Howard Gadlin, an ombudsperson at the National Institutes of Health, writes:

> These days, most whites believe, racism is the exception. While there is some acknowledgement of institutional racism, most whites seem to believe at the same time that there is a preference for people of color; it is they who have the advantage when it comes to admission to schools or applications for employment.

Like views have been expressed about other protected groups. The attitudes in question, blatant or latent, have surfaced in judicial opinions and laws rejecting affirmative action in various settings, as well as in academic writings and the popular media.

Although I do not share the perspective described by Gadlin, I do agree that it is widespread. As a kind of "background noise," it probably

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213. See Yelnosky, supra note 56, at 593 n.64. In discussions with both lawyers and lay persons in recent years, I have heard many more expressions of a jaundiced view of such complaints than I did formerly.

214. See Silver, supra note 46, at 532.

215. Howard Gadlin, Conflict Resolution, Cultural Differences, and the Culture of Racism, 10 NEGOTIATION J. 33, 40 (1994); see McGinley, Cronyism, supra note 38, at 1029.

216. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that all racial classifications, including those designed to help minority contractors, must be subjected to strict scrutiny); Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996) (holding that state university's law school admissions program violated equal protection because it discriminated in favor of minority applicants), cert. denied, 518 U.S. 1033 (1996). As this article went to press, the Supreme Court upheld minority admissions procedures at the University of Michigan in the abstract. The precise formulae used to advance minority applicants, however, failed strict scrutiny review. Gratz v. Bollinger, 539 U.S. ___ (2003).

217. See, e.g., California Civil Rights Initiative (Proposition 209), CAL. CONST. art. I, § 31 (forbidding use of any preference based on race, sex, color, ethnicity, or national origin).


219. See PATRICIA J. WILLIAMS, THE ROOSTER'S EGG 42-56 (1995) (relating examples of the attitude that minorities are given too much preferential treatment in America, as expressed by popular radio personalities such as Howard Stern).

220. See, e.g., Silver, supra note 46, at 490-91.
contributes to negative, albeit unconscious, feelings about particular employees' claims, making it hard for judges and jurors to "hear" and credit plaintiffs' narratives and draw inferences against the defendant. Such underground bias—or simple absence of understanding, where similar life experience is lacking—may lead to failures to recognize valid, though hard to prove, grievances. Further, to the extent that adverse job actions seem, even to the sensitive observer, not to be due to discrimination, future complainants will confront yet tougher obstacles. To paraphrase United States Supreme Court Justice Robert H. Jackson: "It must prejudice the occasional meritorious [discrimination complaint] . . . to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

Otherwise put, an overall lack of success in suits, from whatever cause, will only reinforce the notion that most plaintiffs are merely disgruntled employees—not the victims of employer prejudice.

My present concern, though, is less with the litigation problems of job discrimination claims than with the counterproductive effects that "racializing and genderizing everything" and, by extension, viewing every conflict involving a member of a protected class through the lens of forbidden bias, can have on the workplace. Companies designing internal ADR programs should take these effects into account when making the initial, critical choice whether to target solely allegations of prejudice or, as I urge, establish a process that deals comprehensively with employment-connected disputes.

What, then, are the potentially bad results of too narrow a focus on race or other statutory classifications? For one thing, some firms may treat employees who fall under these rubrics with kid gloves, accepting performance or behavior not countenanced in other employees. The perceived need for "strategic" tolerance, whether or not reasonably based, will alienate some employers from those groups which most need, and deserve, to have their careers fostered. To be sure, the laws themselves may tend to produce this type of reaction. But while the structure of an

221. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result, discussing prisoners' petitions for habeas corpus); see Mayer, supra note 44, at 156 (noting impatience with complainants who "cry wolf").


223. Employers may restrict their hiring of employees in protected classes, in order to forestall litigation by workers who might later become disaffected or be dismissed. See Donohue & Siegelman, supra note 40, at 1027; Estlund, Wrongful Discharge, supra note 42, at 1680 (endorsing the Donohue & Siegelman argument).

224. See Estlund, Wrongful Discharge, supra note 42, at 1657 ("The operation of antidiscrimination law against an at-will background may tend to set in motion counterproductive incentives and tensions among employers and different groups of
in-house program cannot eliminate all undesirable employer conduct influenced by fears of liability, it can, at least, avoid enhancing preoccupation with such concerns.

More sweepingly, as workers with grievances are encouraged to see themselves as victims of discrimination and their complaints (even in very marginal cases) as group-related rather than the result of "garden-variety unfairness," workforce cohesion and the working environment will deteriorate. Ironically, prospective plaintiffs may suffer most from efforts to fit all job disputes into the Procrustean bed of discrimination. Accentuating divisive categories like ethnicity, disability, race, and religion may boomerang, causing resentment in co-workers as well as employers.

Majority workers quite often regard their protected colleagues as oversensitive individuals who demand and receive "special treatment" undeservedly. Listening to plaintiffs in mediation, I have noticed that some are, indeed, more thin-skinned in certain ways than their cohorts. For example, African-Americans tend to be touchy if asked to perform what they perceive as menial chores, such as washing a supervisor's car at the job site. But how much sensitivity is too much? Fellow workers may not understand where the complainant "is coming from," in terms of past experience with bias—how little empathy is too little? A New York Times survey exposed a Rashomon-like gap between blacks' and whites' opinions regarding workplace race relations: of the African-Americans polled, twenty-four percent responded that relations were generally bad; of the Caucasians, a mere six percent agreed. In the same vein, I daresay majority employees detect "special treatment" of minorities considerably more than do the latter.

But whatever the objective reality (if it could even be determined), I

employees.

225. Id. at 1679.
226. Cf. Schultz, supra note 11, at 1885-86 (suggesting that, in the face of discrimination, feminists must move beyond identity politics).
227. See Estlund, Wrongful Discharge, supra note 42, at 1679.
228. In one mediation in which I was involved, the complainant took umbrage at her employer's request that she open all of the office doors when she arrived at work in the morning. At her own instance, this employee had been given a schedule that had her arriving hours earlier than others.
229. See, e.g., Stallworth et al., supra note 101, at 41 (noting that often discrimination claim is based on plaintiff's broader perception of being discriminated against, as well as on present controversy).
return to the same conclusion: "naming, blaming, and claiming" bias\textsuperscript{231} at every turn will not improve the workplace climate. Let me be clear: I do not imply that anyone should turn a blind eye to discrimination. Employers must take serious measures to prevent and cure it, and workers must remain free to allege it. My argument is simply that employees ought not be forced to claim discrimination—or nothing.

Apart from the deleterious effects already mentioned, such a policy denies those workers faced with non-bias related issues their best forum for a resolution. To quote a recent publication of the Center for Public Resources Institute for Dispute Resolution (CPR): "The fact that these [workplace] conflicts raise non-legal problems makes them no less important to the employee, and thus no less serious as management concerns."\textsuperscript{232}

Focusing solely on discrimination can also pit protected groups against each other. I have had a number of cases in which, for example, African-American women contended that bosses treated Latinas better, or African-American men complained that white females were given promotions ahead of them. In one instance, a woman from India alleged that the company's salary structure favored whites, Latinas, and blacks. Instead of promoting divisive inter-group comparisons, why not let employees aggrieved by a hostile environment, lack of advancement, or low pay make these claims directly? If mediation talks reveal that some workers are, in fact, being disadvantaged on a class basis, management has the obligation to right the wrong for all affected employees, not just the charging party. Thus, opening the door to every type of workplace issue does not preclude dealing forcefully with any bias actually encountered.

Attaching the label "discrimination" to all workplace disagreements can, in addition, impede resolution. In a perhaps ironic tribute to the success of civil rights laws in teaching that prejudice is truly wrong, individual defendants are frequently outraged at being accused of conduct so condemned by society. In one case, supervisors named by the plaintiff in her Title VII complaint were so incensed by the allegations of race-based harassment that they categorically refused to attend talks with her. Since employees usually enter mediation with strong negative feelings, which will need to be alleviated or redirected in order to achieve settlement, adding employer anger to the stew just exacerbates the problem.

The most difficult emotional dynamic, in my experience, arises in mediations involving small companies, many of them family-owned. Typically, the "boss" herself appears at the mediation proceedings. This individual tends to regard the worker's complaint as a personal affront.

\textsuperscript{231} Gadlin, supra note 222.

\textsuperscript{232} CPR INSTITUTE, supra note 111, at 27.
She frequently knows the plaintiff well, views him as difficult, and believes that she went beyond the call of duty to accommodate him before finally firing him. His "ingratitude" makes the defendant feel betrayed or, worse still, the victim of an attempt to extort her hard-earned money. In contrast to Megamerger, Inc., the small firm will not have deep pockets or copious paper documentation supporting its position. The controversy may, thus, boil down to a credibility contest ("He says, she says"), which often further embitters the parties by eliciting mutual charges of lying.

In this context, injecting the issue of discrimination into an already volatile dispute virtually ensures that resentment on both sides will pose a formidable barrier to settlement. In a common reaction to the mediator's reminder of litigation costs, the defendant will insist that while she is happy to pay her own lawyer, she refuses to give anything to the plaintiff: "Millions for defense, but not one cent for tribute!" Simply stated, bias allegations can turn an easily resolvable conflict into an intractable quagmire.

Yet another downside to a system that rewards interpreting run-of-the-mill workplace squabbles as instances of discrimination is its tendency to lead workers to ignore ways in which their own performance or conduct may have led to their predicament. As one company lawyer harshly, but aptly, characterized a plaintiff: "She's a woman with job problems who basically said: 'It must be because I'm Asian.'" Too ready recourse to allegations of race, religion, ethnicity, disability, gender, or age discrimination compounds the human predilection to blame others for personal failings. In the end, a complainant who does so will probably both have lost her suit, if she went to court, and more important, let slip a valuable opportunity to learn from the experience, however bitter. An employee who fails to face her performance issues is one who will likely neither improve nor advance.

By the same token, a narrow focus on defending against a charge of unlawful discrimination often diverts the employer from addressing actions by its management that—although probably legal—were, nevertheless, ill-advised. This blinkered approach not only impedes constructive change but also may convince the plaintiff that the defendant's sole concern is shielding itself from liability rather than doing the right thing. I have found

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233. A frequent defense refrain is "No good deed goes unpunished."

234. Small companies may resist instituting what they regard as overly bureaucratic processes like a progressive disciplinary system, with documentation at every stage. Ordinarily, though, they become more willing to do so after having learned the hard way—by being sued.

235. See supra text accompanying note 212.

that even in cases with little or no evidence of bias, more often than not the employer contributed to the employee’s problem or, at least, did not make sufficient effort to resolve it.

Recall, for example, Jerry’s debacle. By terminating him for an admittedly misguided attempt to restore his friends’ electricity service—after sixteen otherwise-stainless years on the job—his employer overreacted, as even its own lawyer conceded in caucus. Another one of my mediations involved Dahlia, a nurse of Indian national origin. Just after her return from a lengthy sick leave, her hospital employer reassigned this elderly, nervous woman from familiar duty on the pediatric ward to the emergency room. While the hospital did nothing illegal, it surely acted unwisely: Dahlia, predictably, could not handle this new, stressful job. Worse still, the employer refused, for no good reason, to give her back her former job, at which she excelled. She finally regained it, following many unhappy months, through a settlement brokered in mediation.

Furthermore, in several cases I have handled, employers had fired the employees on their first day back from a sickness or maternity leave—thus, fairly inviting the latter to regard the dismissal as based upon impermissible grounds, such as pregnancy or disability, even if, in fact, it was not. In many instances, moreover, employers have tolerated heavy-handed, inept, or downright nasty managers.

Finally, to the extent a complaint of discrimination amounts to a conscious end-run around the strictures of at-will employment, the plaintiff assumes the false position of making a claim that she strongly suspects is specious. Joan, for example, stated during the mediation that she “no longer” believed her former supervisor had acted as he did because she was black. Later, however, she frankly admitted to me in caucus that she had “had to” allege prejudice in order to get her grievance heard. Another incident involved a complainant who, also in caucus, revealed that she thought the real obstacle to her advancement was not her sex but rather the fact that she had served under eight managers in thirteen years. These two cases are hardly unique.

I surmise that a fair number of employees—at least at the time they file their charges—harbor doubts about the truth of their complaint of discrimination. Whatever employers might think, moreover, I suspect that few plaintiffs feel comfortable consciously making dishonest claims.

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237. See Family and Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of Titles 2, 5, 29, and 40 U.S.C.). This law generally requires that workers be given up to twelve weeks of unpaid leave in a twelve-month period to care for themselves or a close relative during an illness. On return from FMLA leave, the employee is entitled to be placed in the same position she previously held or in an equivalent one. 29 U.S.C. § 2614(a) (2000); 5 C.F.R. § 630.1208 (2002). In the particular circumstances, the transfer did not violate Dahlia’s FMLA rights.
Regardless of their beliefs at the outset, during the course of litigation the employees usually succeed in convincing themselves of the veracity of their account and suppressing alternative reasons for their problems, such as personality conflicts, inadequate performance, or unsatisfactory workplace conditions.\textsuperscript{238}

Fooling oneself, though, is only marginally better than trying to fool others. And whether or not the employee has actually acted in bad faith, employers greet with great skepticism allegations, not atypical, of three or more different types of statutory violation. The most I have seen, numerically, is five;\textsuperscript{239} the most unlikely, substantively, was a claim based on the worker’s gender, Lutheran religion, and grandparents’ Latvian national origin! Scattershot charges ordinarily add up to less than the sum of their parts. While some “intersectional”\textsuperscript{240} complaints make sense,\textsuperscript{241} the fact remains that many do not. If there is any credible portion, like sex bias, in the case just mentioned, it gets diluted, lost in the crowd, or tainted by association.

Some of the arguments same I propound have influenced others, Professor Cynthia L. Estlund for one, to urge replacement of the prevailing at-will environment with a regime barring dismissal except for cause,

\begin{footnotesize}
\textsuperscript{238} A stark example of this phenomenon that I encountered in mediation involved two employees dismissed for facilitating theft of company property (copper wire) by a third person, the brother of one of them. Both African-Americans, the plaintiffs contended that they did not commit the offense and would not have been terminated had they been white; they pointed to certain racist remarks made over the years by their supervisor. Observed in the act in a “sting” operation staffed by black security officers, they were clearly guilty—as, indeed, an arbitrator and the EEOC had already found. Not surprisingly, the latter had obtained evidence that the employer discharged people of all races whom they reasonably suspected of stealing. The workers, nonetheless, appeared sincerely outraged at their treatment and, at times, were even tearful. I was amazed that they could seemingly feel so victimized. They may have reasoned: “It’s a rich company,” or “Everyone takes a bit of wire.” In their eyes, the salient wrong was likely the way they were treated on the job.

\textsuperscript{239} Such blunderbuss charges occasionally appear in reported cases. See, e.g., Ray v. Trans States Airlines, Inc., No. 4:01-CV-93 (CEJ), 2002 U.S. Dist. LEXIS 22658 (E.D. Mo. Oct. 10, 2002) (granting summary judgment to employer where employee alleged harassment based on race, religion, gender, national origin, and color). For a federal judge’s reaction to complaints like these, see Michael Bologna, Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment, 19 Empl. Discrim. Rep. (BNA) 595 (Dec. 4, 2002) (quoting Judge Ruben Castillo, federal district court judge in the N.D. Ill., who criticized plaintiffs’ lawyers “for filing wide-ranging claims alleging discrimination on multiple levels—a strategy akin to ‘throwing a plate of spaghetti at the wall to see what sticks.’”).


\textsuperscript{241} In de facto segregated job environments—e.g., elderly, female, Catholic, Latina employees doing piece work in a garment factory, supervised by a young, Protestant, Caucasian male—I have encountered plausible allegations of bias based on the totality of the workers’ traits.
\end{footnotesize}
absent a knowing and voluntary waiver of the worker’s rights. Such a change would drastically alter the present law, which ordinarily lets the employer escape liability even after firing an employee for an illegitimate reason—for instance, in order to permit the boss to supplant him with a less qualified crony—so long as this reason does not amount to statutorily forbidden bias.

Such a reform would have the advantage of elevating the level of candor in employment litigation. The employee would no longer need to turn a forthright allegation of unfair discharge into a marginal, and likely unprovable, charge of discriminatory firing. Of course, nothing would prevent a complainant from mounting an accusation of bias when he has the grounds to do so. This proposed change might, in addition, alleviate tensions between members of protected groups and their fellow workers, who—except through unionization—have no recourse against unjustified termination.

Yet enacting “just cause” legislation would also entail some disadvantages: for instance, making it much harder, as in the case of unionized workplaces, to get rid of non-performers. We are, however, most unlikely to see the demise of at-will employment any time soon—if, indeed, ever. And even if we were, this reform would not help workers to the extent that they have grievances other than unfair termination. I will, therefore, continue to discuss dispute resolution in the context of the current laws governing employment, turning now to a detailed examination of workplace-based mediation.

III. MEDIATION IN THE WORKPLACE: POTENTIAL OBJECTIONS AND BEST PRACTICES

Thus far, I have contended that mediation of employment conflicts is generally salutary and, as compared with litigation, definitely preferable. In addition, I have argued for early mediation, which largely translates into mediation on the job, extending to all, or virtually all, employment-related controversies, not just to alleged discrimination. Promptness and unlimited

242. See Estlund, Wrongful Discharge, supra note 42, at 1657.
243. See id. at 1671 (“When liability depends on proof of a particular bad reason for discharge, ‘no reason’ or even a demonstrably false or fabricated reason is good enough for the employer to escape liability.”); McGinley, Cronyism, supra note 38, at 1022. But cf. Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 587 (1st Cir. 1999) (“[A] court, at the summary judgment stage, may [not] accept uncritically an employer’s articulation of cronynism as an explanation for its actions.”).
244. See Estlund, Wrongful Discharge, supra note 42, at 1657.
245. Discussion of the merits of just-cause versus at-will systems is beyond the scope of this article.
246. Cf. Mayer, supra note 44, at 170 (observing that establishment of a universal just-cause standard and elimination of laws forbidding discrimination are not practical).
access, therefore, constitute two fundamental best practices in this area.

It has been suggested, however, that restricting an ADR program’s stated jurisdiction to complaints of discrimination need not narrow the scope of the actual proceeding. For example, respecting REDRESS, CPR notes that even though a postal worker initiates the process by getting in touch with an equal opportunity specialist, “in practice the claims addressed under the program are not [so] limited.” This accords with my own experience. Indeed, in all of my non-workplace mediations, I try to deal with the parties’ concerns as problems rather than causes of action. Occasionally, this “pure” mediation approach works very well—resulting in productive dialogue and some degree of both empowerment and recognition.

Yet, as I have previously remarked, once the parties resort to the EEOC or the courts (especially the latter), it is much harder to get them to take a broad, integrative, non-legalistic, and interest-based approach to their differences rather than a narrow, distributive position. I also strongly believe in the value, pragmatic and moral, of “truth in charging.” Thus, while I support mediation in any guise, I continue to believe that access to it should not be conditioned on the filing of a discrimination complaint, nor should its content even nominally be constrained by pressure to adhere to an equal employment opportunity agenda.

Best practices for employer-sponsored mediation can most usefully be considered by reference to two fundamental objections to ADR. I view the topics as interwoven, since one can persuasively respond to the criticisms by structuring mediation programs in ways that satisfactorily address both of them. These global dissents from ADR, and the responses to them, occupy a considerable number of pages in the professional literature; I need not rehash them in depth here. First, some critics believe that the

247. CPR INSTITUTE, supra note 111, at 18. According to a USCS representative: “Often what presents as a discrimination complaint is not really that.” Remarks at In-House ADR Open House, a program at the Ass’n of the Bar of the City of N.Y., May 23, 2001 [hereinafter ADR Open House] (unpaginated). Yet, the Customs program, like REDRESS at the USPS, still purports to cover only equal employment opportunity complaints. See, e.g., Jerome T. Barrett & Hugh D. Jascourt, ADR in the Federal Government, ACRESOLUTION, Winter 2003, at 26, 27 (“[M]any employees use the EEOC procedure to seek relief even if their case has nothing to do with EEO rights or protections.”); Lauren B. Edelman et al., Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 LAW & SOC’Y REV. 497, 511 (1993) (noting that complaint handlers in employer ADR programs often recast “allegations of rights violations . . . as typical managerial problems”.

The informality of ADR "disadvantages 'weaker' parties" (often, women and members of minorities), whereas the "formality of adversarial adjudication deters prejudice" and serves to even the balance of power. The second argument is that ADR "deflects energy away from collective action" and "promotes law without justice."" With respect to the first contention, I agree that, in certain settings and in certain classes of cases, the disparity of power between the disputants will be so great as to militate against mediation. For example, domestic violence situations inherently pose so serious a danger of exploitation of the victimized party (usually a woman) that many mediation programs exclude these wholly from their purview. Furthermore, as a mediator, I would decline or withdraw from individual matters where I perceived that a participant was laboring under a disability, such as mental retardation or severe emotional illness, that might impede him from understanding or protecting his interests. This reservation would naturally apply whether or not the conflict arose in a workplace context.

Focusing on employment mediations generally, I believe that they do entail some power imbalance in favor of defendants. By statutory definition, the employer must have a minimum of fifteen employees under Title VII and the ADA or twenty under the ADEA; most corporate defendants are many times larger. The plaintiff is usually a single person. Also, the company frequently profits from being a "repeat player" in mediation and from its ability to hire superior legal assistance. That being said, I see no reason to assume that most such mediations suffer from

250. Delgado et al., supra note 248, at 1391.
252. That is the policy of Safe Horizon, which runs the Manhattan and Brooklyn Mediation Center programs where I volunteer as a mediator. See Irvine, supra note 251, at 27-28 (advocating that complaints of sexual harassment not be handled in mediation).
253. ADA Mediation Guidelines, 2 CARDOZO ONLINE J. CONFLICT RESOL., § I(D)(4) (2001) ("If, despite support, a party lacks capacity to participate in the mediation, mediation should not proceed unless a surrogate participates in the process to represent the interests of the party and make the mediation decisions in place of the party."). See supra note 252.
257. See Gary LaFree & Christine Rack, The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 LAW & SOC'Y REV. 767, 768-69 (1996).
258. See supra text accompanying note 82.
crippling inequalities.\textsuperscript{259} I say “assume” because of the dearth of empirical studies focusing on the existence or effects of the power differential in employment cases.\textsuperscript{260} The average worker hardly stands in the same position in relation to her firm as the average victim of spousal violence stands in relation to her abuser.

And to the extent that there are inequalities with adverse impacts, one must ask: “Compared to what?” Many critics of ADR indulge in the fantasy of “litigation romanticism,”\textsuperscript{261} failing to consider the ways in which formal adversarial proceedings, in courts or agencies, handicap the weaker party—often, to a much greater degree. However unfairly she may have been treated, the employee, as we have noted, often lacks a viable discrimination claim that will survive legal scrutiny. Even if she does have such a claim, and even with adequate representation, the plaintiff’s side may well be outgunned by a stronger defendant with the resources to cause delay and inflate expenses. In addition, the employee may have pressing financial needs. Getting a swift, if typically non-monetary, remedy for workplace problems while still on the job may present a more welcome alternative to the complainant than rolling the litigation dice in hopes of obtaining sizable damages years later. The supposed benefits of litigation count for little if the plaintiff cannot stay the course. Accordingly, “[i]n an imperfect world, mediation with its own imperfections begins to look better.”\textsuperscript{262}

But most important, companies that wish to adopt best practices can, and should, design their mediation programs so as to level the playing field quite substantially. For one thing, firms may choose to subsidize the neutral’s fees and administrative costs. Many do, in whole\textsuperscript{263} or in part.\textsuperscript{264} That is certainly appropriate, especially with regard to those employees not

\textsuperscript{259} In light of the expense of litigation, many employers feel pressured to settle for nuisance value. See Mayer, supra note 44, at 156; see also Silver, supra note 46, at 542-43 (noting that employers who have not discriminated may make concessions to employees in mediated settlements). But cf. Yelnosky, supra note 56, at 603 (finding that high respondent satisfaction rates in EEOC mediations “suggest employers were not unduly pressured to settle baseless charges.”).

\textsuperscript{260} One article that reports findings on operation of dispute resolution mechanisms for female workers does not, however, deal with mediation. See generally Patricia A. Gwartney-Gibbs & Denise H. Lach, Research Report: Workplace Dispute Resolution and Gender Inequality, 7 NEGOTIATION J. 187 (1991).

\textsuperscript{261} Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 GEO. L.J. 2663, 2669 (1995).

\textsuperscript{262} Gunning, supra note 133, at 67.

\textsuperscript{263} See CPR INSTITUTE, supra note 111, at 20 (giving PaineWebber, Johnson & Johnson, and Masco Corp. as examples of companies that cover all mediation expenses); id. app. G at 264 (highlighting Masco Corp.’s policy of paying all mediation expenses).

\textsuperscript{264} See id. at 19 (giving as examples Halliburton and General Electric Co., where company pays all but $50).
receiving high salaries.\textsuperscript{265}

An even more salient equalizer would be counsel for the complainant.\textsuperscript{266} Thus, the company should allow the employee to have an attorney represent him in the mediation session and any related negotiations.\textsuperscript{267} Yet that minimalist approach does not help the employee who wants, but cannot afford, a lawyer. At this early stage, counsel would likely reject a contingent fee arrangement; if the matter is promptly settled, the client will typically obtain little or no money.\textsuperscript{268} To address this problem, some employers offer legal assistance plans that pay for all or most of the worker's legal expenses in mediation,\textsuperscript{269} but most companies require employees to pay their own legal costs.\textsuperscript{270} In an interesting wrinkle, the General Electric Company conditions its offer of monetary aid on the mediation's success.\textsuperscript{271} Depending on one's enthusiasm for achieving settlements, one might view this strategy as a useful incentive or as a form of undue pressure. Finally, there are firms that give half a loaf of equalization: while declining to finance employees' counsel, they do not bring their own lawyer to the table unless the complainant is represented.\textsuperscript{272}

Since power imbalance is surely greatest in cases of lopsided

\textsuperscript{265} At CSFB, employees earning at least $250,000 pay more than the $150 filing fee paid by other employees. See id. at 19; cf. id. at 20 (describing how mediator's fees and costs are shared by the parties at Texaco, but the employee is not liable for more than a day's base pay).

\textsuperscript{266} See generally Lamont Stallworth, Behind the Eight Ball: The Unrepresented Claimant and Employment Dispute Resolution, ACRESOLUTION, Spring 2002, at 26.

\textsuperscript{267} See CPR INSTITUTE, supra note 111, app. G at 262 (excerpting Johnson & Johnson's company manual showing that plaintiff's lawyer is allowed to be present). See generally Society of Professionals in Dispute Resolution (SPIDR) (now Association for Conflict Resolution), Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights § III (Jan. 24, 1998) [hereinafter Guidelines for Voluntary Mediation] (“Disputants should have right to choose to be accompanied in mediation by the advisor of their choice.”), at http://www.acresolution.org/research.nsf/key/guideadleretal (last visited May 12, 2003).

\textsuperscript{268} See CPR INSTITUTE, supra note 111, at 27 (“[D]isputes involving incumbent employees usually focus on workplace relationships and other noneconomic issues . . . .”). Conceivably, counsel might enter the case in the hope that it will not settle in mediation but rather will grow into a fee-generating lawsuit. If counsel permits such a motivation to sabotage the mediation, he will have breached his ethical duty to the client—whose interests may very well lie in settling early. See MODEL RULES OF PROF'L CONDUCT 1.7(b) (1983) (“[A] lawyer shall not represent a client if the representation . . . may be materially limited . . . by the personal interest of the lawyer [unless] . . . the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each client . . . [and the] client gives informed consent.”)

\textsuperscript{269} See CPR INSTITUTE, supra note 111, at 20-21 (offering Shell, Halliburton, and Philip Morris as examples.).

\textsuperscript{270} See id. at 20.

\textsuperscript{271} See id. at 21.

\textsuperscript{272} See id. at 20 n.5.
representation,273 I prefer the "both or neither" approach to counsel to a system that tolerates unilateral legal support. This type of asymmetry also creates difficulties for the mediator. If he attempts to compensate for the inequality by assisting the employee, he risks the loss, real or perceived, of his neutrality.274 Despite disclaimers, the worker will tend to see the neutral as her own attorney; and if the mediator is not careful, so will the employer. Further, any evaluative statements by the mediator may exert an undue influence on the complainant. But if he does not make such statements, the employee may fail to comprehend her options, harbor unrealistic opinions respecting the merits of her claim, or view the process as unfair.275

The best practice, however, would be for the firm to provide the whole loaf (or most of it) and subsidize mediation counsel for employees, at least up to a reasonable amount. While large companies will generally find these costs easier to bear than small ones, even the latter might deem it advisable to take this approach when they compare the relatively modest outlay required for mediation with the expenses of litigation.

Significantly, the adverse effects of a power imbalance are not the only considerations. Although an employer might intuitively hesitate to foster worker representation, the CPR study states that program administrators feel no such reluctance.276 They believe: "[T]he involvement of competent plaintiff's counsel often makes proceedings more efficient, increases employee sophistication in assessing options, makes administrative matters . . . easier, and results in greater employee satisfaction."277 I agree. Even if the complaint does not implicate legal rights, a lawyer can furnish invaluable aid in attaining resolution. Indeed, the more a worker feels that having counsel has placed her on an equal plane with her employer, protecting her interests from invasion, the greater the chance of a durable settlement.

Another desirable, leveling feature of many company mediation plans is the use of outside neutrals, provided by organizations like the American Arbitration Association, JAMS/Endispute, or CPR.278 Evaluators of the

273. See Stallworth, supra note 266, at 28. The United States District Courts for the Southern and Eastern Districts of New York both have programs pursuant to which pro bono counsel may represent pro se litigants in mediation. They enter for purposes of settlement only and, thus, have no duty to stay with the case if negotiations lead to impasse. See supra note 156.
274. See Stallworth, supra note 266, at 28.
275. See id. at 28-29; cf. Guidelines for Voluntary Mediation, supra note 267, at § IV ("Availability of counsel is the single most important protection against uninformed abandonment of meritorious claims and unwarranted prosecution of meritless claims.").
276. See CPR INSTITUTE, supra note 111, at 21.
277. Id.
278. Companies with programs using external mediators include Shell, Texaco, and GE Capital. See id. at 378 (Shell); id. at 418 (Texaco); RESOLVE: EMPLOYEE ISSUE RESOLUTION
well-regarded REDRESS program found that external mediators ranked higher than internal ones, in terms of both settlement rates and party contentment. These results are unsurprising; even if in-house mediators can be fair, outside ones are more likely to seem so to the worker. Companies further enhance the appearance and the reality of fair process when they permit the employee to participate in choosing the mediator. Such latitude makes good sense; especially if the employer pays the mediation outfit’s fees, the employee might otherwise fear that the mediator will not be impartial. Major corporations with this approach include Texaco, GE Capital, and United Parcel Service (UPS). Also, whatever the source of their roster, employers should ensure that it embraces people of diverse backgrounds.

Adoption of these best practices ought to go far to defuse the power-imbalance concern in employer-employee mediation. This apprehension operates at the micro-level, that of the individual case. As mentioned previously, however, ADR critics have frequently cited a second, macro-level concern; they claim that these dispute resolution methods act to privatize justice, thereby failing to enforce accountability to public norms.

With respect to employment disputes specifically, some contend that

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279. See Bingham & Pitts, supra note 138, at 137-39; Stallworth et al., supra note 101, at 84 (finding that the use of outside mediators “eliminates a structural bias—real or perceived—that can undermine the credibility of a mediation program.”).

280. Wariness of participating in a voluntary program on account of fear of bias can affect the employer as well. Significantly, employers have displayed increasing reluctance to participate in EEOC mediations—especially with internal mediators. See Swendiman, supra note 157, at 405-06; see also Silberman et al., supra note 139, at 1556-57 (noting that in the EEOC pilot program, Apr. 1, 1993-Mar. 31, 1994, only 39% of employers accepted mediation—as compared with 87% of charging parties); Swendiman, supra note 157, at 399 (recording that in Oct. 1999, 36% of employers and 81% of charging parties agreed to mediate); Dominguez Reports Drop, supra note 158, at 473 (reporting that in FY 2002, 30% of employers and 83% of charging parties agreed to mediate).


282. See RESOLVE, supra note 278, at 18.

283. See CPR INSTITUTE, supra note 111, app. G at 446. UPS also specifies: “[Y]ou [the employee] have the right to participate in the selection of the mediator from a list provided by an outside mediation organization of your choice.” Id. (emphasis added). If the employer insists on using the same mediation provider or providers all the time, there is a risk that individual mediators furnished by that organization will be, or seem to be, biased in favor of the employer. Hence, the UPS approach, allowing the worker to choose the company furnishing the mediator in her case, has much to commend it.

284. See Gadlin, supra note 215, at 44; Gunning, supra note 133, at 88-90; cf. Yelnosky, supra note 56, at 608 (suggesting that racial, ethnic, or gender identity groups take part in workplace mediation, if the complainant so desires).

285. See supra text accompanying note 250.

mediation—by training its sights on personal interests and satisfaction—leaves the surrounding discriminatory environment the same or, at best, makes minor corrections of limited impact, such as transferring the employee to a different department. 287 According to Professor Sturm, ADR "rarely generates information or addresses practices that extend beyond the participants in the immediate dispute . . . ." 288 Further, with the sessions themselves being confidential, and with employers routinely insisting on confidentiality clauses in settlement agreements, mediation fails to create precedents, thereby preventing desirable "public stigmatization of discriminating employers." 289

This critique has some merit. Litigation will be needed at times: in-house ADR regimes may not be able to respond to widespread, serious problems, especially if management is intransigent. 290 While parties can theoretically negotiate systemic solutions, as well as money, reinstatement, references, or other terms geared solely to the employee's requirements, I have mainly found employers unwilling to agree to broader remedies (for example, diversity training) at the behest of a lone complainant. 291 Surely, too, certain cases ought to go through trial and appeal so as to create significant law to guide and bind interested persons in the future. By analogy, one would not have wanted Brown v. Board of Education 292 to be resolved by a mediated settlement addressing only the issues of the named plaintiffs.

That being said, some companies will not have mediation programs; even in the firms that do, fewer than all disputes will settle. 293 I cannot envision a time when courts will have to beg for work, especially in the employment area. Also, the EEOC, as well as private parties (ordinarily through class actions), will, presumably, continue to bring lawsuits challenging a "pattern and practice" of illegal conduct. 294 It is primarily in these settings that systemic change can occur, whether by judicial decree alone or wide-ranging settlement terms embodied in a consent decree.

287. Cf. Gwartney-Gibbs & Lach, supra note 260, at 193 (noting that women use lateral transfers to move away from disputes, which puts them at a disadvantage with regard to job-specific training and expertise).
288. Sturm, Race, Gender, supra note 5, at 656-57.
289. Mayer, supra note 44, at 164.
290. See Sturm, Second Generation, supra note 5, at 543-44.
291. But cf. Yelnosky, supra note 56, at 602 (finding that 22% of mediated settlements at the EEOC included agreements by employer to change workplace rules and practices).
292. 347 U.S. 483 (1954) (holding that laws requiring or permitting racial segregation in public schools violate the Equal Protection Clause).
293. See Yelnosky, supra note 56, at 605.
294. See MODJESKA, supra note 79, § 6.14, at 6-58 (3d ed. 2002). The EEOC usually files 300 to 400 cases per year, with class actions comprising about one-quarter to one-third of the total. But in the first nine months of FY 2002, the agency had filed only 150 suits—among them, 52 class actions. See Internal Review, supra note 112, at 204.
Notably, REDRESS came into being as part of a class action settlement, as did Home Depot's new and improved hiring, promotion, and training plan which, incidentally, resulted from a mediation ordered by the court on the eve of trial. Mediation can, therefore, play a useful part in resolving big cases as well as small ones. At times, too, the EEOC can achieve reform through internal proceedings by jawboning the targeted employer in its conciliation process.

Moreover, in taxing ADR with its limitations, we must once again recall that the proper comparator is litigation, not some hypothetical, idealized state of affairs. One should start from the baseline that, in general, advocacy for workers tends to be "individualistic, compensatory, and focused on after-the-fact enforcement of rule violations." With or without mediation, the vast majority of disparate treatment actions that survive dismissal will end in settlement, not in judgment, and non-mediated agreements are no less likely than mediated ones to contain a confidentiality clause. Thus, if mediation results in privatized justice, litigation does as well—only much later, and at greater expense to all.

The "macro" critique of mediation assumes a discriminatory job environment. This cannot always be the case, unless we presume that all workplace conflicts involving persons in protected classes (or, at least, racial minorities) arise in whole or in part from unconscious discrimination. And even if we did so, litigating unprovable bias will not lead to the plaintiff's victory. Will it lead, nonetheless, to reforms? Smart employers, including those that prevail in court, will learn that certain changes may be required in order to minimize the risk of future suits, as well as discrimination itself, and will, therefore, effectuate them. But since litigation usually hardens people's attitudes, other defendants taken to court by employees might become less inclined to remedy institutional problems on their own.

In addition, the establishment of an in-house mediation program and, more broadly, the steps leading up to and following it can also generate information with respect to workplace issues. Another best—indeed, vital—practice is for sponsors of such programs to establish procedures to ensure that the firm learns what types of situations are generating trouble and then to address these promptly and fully. Regardless of whether the triggering event reflects discrimination or some other disturbing condition,

295. See Hallberlin, supra note 146, at 376-77.
296. See supra text accompanying note 107.
297. See Sturm, Second Generation, supra note 5, at 511.
298. Some critics have claimed, however, that the EEOC is a "toothless tiger." Id. at 550. The paucity of "reasonable cause" findings arguably lends some support to this view. See Mayer, supra note 44, at 159 (remarking that reasonable cause is found in only 5% of claims in which any finding is made).
299. Sturm, Second Generation, supra note 5, at 546.
management must respond to it by doing more than just placating the actual complainant.

First, the company representative directly involved in the mediation has to extract from the case at hand general lessons concerning proper and improper managerial conduct. Among other things, the discussions occurring during the session may cause that person to scrutinize the firm’s, or his or her own, decisionmaking process and notice hitherto unseen flaws.\textsuperscript{300} The representative must, in turn, keep higher executives, with power to effect more global changes, “in the loop” regarding the kinds of circumstances giving rise to worker grievances. Although the rule of confidentiality would typically prevent disclosure of what took place in the mediation, supervisory personnel will know beforehand the employee’s charges and the data gleaned from the initial inquiry. In the words of the program facilitator of PaineWebber’s Issue Resolution Office: “Whenever any form of discrimination is brought to our attention, we have a duty to investigate.”\textsuperscript{301} This obligation ought to extend to non-trivial complaints unrelated to bias as well.

The firm can also design its program such that a limited number of people with “need to know” status, who did not attend mediation sessions, will be informed of facts required to carry out a settlement agreement or to correct workplace problems that go beyond the specific complaint. The former is necessary to the worker’s own well-being. The latter, a suggestion I offer with some diffidence, impacts the overall health of the company. As the PaineWebber facilitator notes: “I routinely do a trend analysis to see whether there are patterns that should trigger further investigation. . . . I would find a way to make sure that we address any significant problem.”\textsuperscript{302}

The employer’s reservation of a right to expand the circle of confidentiality in order to further the interests of its whole work force should not ordinarily entail a significant compromise of the complainant’s privacy. Even absent such a provision, some complainants might be willing to waive confidentiality to the extent that doing so would enable the employer to rectify undesirable conditions. Alternatively, in a large company, the manager attending the mediation may be able, where necessary, to report information culled from it in a way that conceals the participants’ identities.

Employers, moreover, have to be taught to move beyond merely responding to worker complaints. They must learn to take the initiative to uncover workplace issues that, as yet, have not surfaced through accusations. The CPR study states that “[d]ispute management is

\textsuperscript{300} See Stallworth et al., \textit{supra} note 101, at 39.
\textsuperscript{301} \textit{Early Dispute Resolution, supra} note 169, at 3.
\textsuperscript{302} \textit{Id.}
fundamentally a managerial, not legal, task—yet managers remain reactive."303 All of the systems they describe "rely solely on the employee to identify problems and bring them to management."304 This is plainly far from ideal. Happily, though, some companies have gotten the message that they must take a proactive stance,305 others will do the same, over time, if only to protect themselves from suit.306

As a number of scholars in the field have noted, recent decisions of the United States Supreme Court have lent desirable impetus to increased employer self-regulation.307 In 1998, two decisions concerning charges of hostile-environment harassment, Burlington Industries, Inc. v. Ellerth308 and Faragher v. City of Boca Raton,309 created an "affirmative defense to liability or damages" in cases that do not involve a so-called tangible employment action like termination or demotion. The defense was described as comprising "two necessary elements: (a) that the employer 'exercised reasonable care to prevent and correct promptly any sexually harassing behavior,' and (b) that the plaintiff employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."310

Shortly thereafter, the Court adopted a similar approach with respect to punitive damages.311 In Kolstad v. American Dental Association,312 involving actions by managerial agents, the Court hedged an employer's liability for such damages by establishing an affirmative defense that these actions were contrary to good-faith efforts by the employer "to detect and deter" discrimination.313

303. CPR INSTITUTE, supra note 111, at 45.
304. Id. at 46 (footnote omitted); cf. Sturm, Race, Gender, supra note 5, at 676 (noting that courts' focus on after-the-fact responses to particular harassment claims does not conduce to organizational self-assessment).
305. For example, the Comprehensive Early Warning System used by GE Card Services analyzes litigation trends to "create business awareness of potential litigation risks and correct problematic business practices to prevent litigation and/or mitigate its potential exposure." ADR Open House, supra note 247.
306. Some firms seek the advice of sophisticated employment counsel to help them to comply with the law and improve their employment practices. See Sturm, Second Generation, supra note 5, at 528-30.
307. See, e.g., Stone, supra note 6, at 612; Sturm, Second Generation, supra note 5, at 481-82.
310. MODJESKA, supra note 79, § 1.05, at 38-39 (3d ed. Supp. 2002) (footnotes omitted); see also Silberman et al., supra note 139, at 1553 (citing language in Meritor Savings Bank v. Vinson, 477 U.S. 71 (1986), supporting "the view that companies with effective internal grievance procedures will have a stronger position in court.").
311. See Sturm, Second Generation, supra note 5, at 554 & n.349.
313. Id. at 546.
Given these developments, the time is ripe for corporate self-interest to ally with corporate good citizenship to yield a more wholesome working atmosphere founded on adoption of effective employment dispute resolution processes.\textsuperscript{314} Mediation, in particular, accords well with the less hierarchical, team-based, consensus-building, and cooperative model increasingly embraced by progressive firms.\textsuperscript{315} That reality should only serve to accelerate the trend toward its use in the modern workplace.

IV. CODA

In the post-9/11, economically and physically perilous world, Americans are suffering tremendous stress. Whether one’s work contributes to or allays that stress has great impact, now more than ever, on the quality of one’s life. I believe the approach to workplace dispute resolution set out in this article can, as many employers have already realized, not only shield them from litigation by employees past and present, but also make the job environment happier for all.

Once again, let me be clear on a major point: by recommending that mediation of employment conflicts not be tethered to the peg of unlawful discrimination, I in no way mean to suggest that the working world is free from bias. Nor do I wish to sweep such bias under the rug. When an employee in good faith believes his employer has treated him discriminatorily, he should say so, laying out his grounds for suspicion. And if the company, informally, through mediation, or some other type of ADR, does not satisfactorily resolve the matter, then the employee may file a charge with the EEOC (or equivalent state or local agency) and, if need be, go to court.

Nothing, of course, can ensure that employers receive only plausible claims of bias; the employee may frame his complaint as he sees fits. But dispensing with the need to affix the label “discrimination” to conduct perceived as wrong or unfair in order to be heard by a neutral party should—over time—diminish the temptation to make protected categories the centerpiece of every grievance and, thereby, reduce the harmful consequences of this practice.

Professor Estlund writes of the “mediating role of the workplace.”\textsuperscript{316} Her terminology refers not to actual mediation but rather to the role which the modern diverse workplace can play in overcoming group divisions. As

\begin{itemize}
  \item \textsuperscript{314} According to the Program Facilitator of PaineWebber’s Issue Resolution Office: “We have been told by federal and state civil rights agencies that having F.A.I.R. [Forum for Alternate Issue Resolution] gives them a better perspective on us as a good and fair employer.” \textit{Early Dispute Resolution}, \textit{supra} note 169, at 3.
  \item \textsuperscript{315} \textit{See} Kahan & Deem, \textit{supra} note 117, at 31-32.
  \item \textsuperscript{316} Estlund, \textit{Changing Workplace}, \textit{supra} note 11, at 337.
\end{itemize}
she points out, it represents the "single most important site of cooperative, interaction and sociability among adult citizens outside the family." 317 Yet in all too many places, that sentiment is more aspirational than descriptive.

This article reflects the belief that if employers deal with workers' problems humanely and sensibly while these are still "acorns," and not yet "oaks," many more jobs will provide the harmonious setting that Professor Estlund envisions, racially and otherwise. Mediation of employment disputes, structured along the lines I have outlined, offers much promise as a route toward achieving that worthy end.

317. Id. at 344.