A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act

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I. INTRODUCTION

Over the years, the United States Equal Employment Opportunity Commission (EEOC or Commission) has vigorously enforced the laws prohibiting employment discrimination by emphasizing different facets of the Commission's mission. Since the Civil Rights Act of 1964, which established the EEOC and authorized the use of alternative dispute resolution (ADR) in the form of conciliation, enthusiasm for ADR has waxed and waned, depending on the policy choices of particular Commissions.[1] Recent statutory mandates endorse ADR as consistent with the practical necessity of processing an ever-increasing case load in a time of diminishing resources.

ADR furthers the mission of the EEOC—to ensure equality of opportunity by vigorously enforcing federal laws prohibiting employment discrimination through investigation, conciliation, litigation, coordination, education, and technical assistance. The Commission's guiding principle has been that EEOC sponsored or sanctioned ADR must strengthen its enforcement program by allowing the EEOC to use its limited resources to maximize impact. By facilitating resolution where agreement is possible, ADR can free up Commission resources for greater emphasis on identifying discrimination in the workplace and perform more expeditious and thorough investigations in those

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[1] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. and the United States Code); Civil Rights Act of 1964, § 705 (codified at 42 U.S.C. § 2000e-4) (creating "a Commission to be known as the Equal Employment Opportunity Commission"); Civil Rights Act of 1964, § 706 (codified at 42 U.S.C. § 2000e-5) (urging "conference, conciliation, and persuasion for elimination of unlawful practices"); COMMISSIONERS R. GAULL SILBERMAN & PAUL STEVEN MILLER, CHAIRPERSONS, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC ALTERNATIVE DISPUTE RESOLUTION ACT POLICY STATEMENT (1995). *See also* TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION, U.S. EQUAL EMP. OPPORTUNITY COMM'N, REPORT TO CHAIRMAN GILBERT F. CASELLAS (Mar. 1995).

cases that are not resolved through alternative processes. These improvements in the agency's enforcement efforts, in turn, encourage victims to come forward, make the prospect of filing a charge less daunting, and enhance the Commission's credibility as a law enforcement agency, thus supporting the Commission's overarching mission to eradicate discrimination in the workplace.

II. MEDIATION PROVIDES A JUST ALTERNATIVE TO LITIGATION

There needs to be an alternative to the long, drawn-out, expensive and frustrating process that often ensues from an employment discrimination dispute involving the Americans with Disabilities Act (ADA).[2] Certainly litigation in federal court is a critical component to implementing this vital civil rights statute, and mediation is not appropriate for every kind of disability employment rights case. However, mediation is not second-class justice either, and in many instances, with procedural safeguards to ensure fairness, mediation can provide better justice than a lawsuit. The ADA, in fact, explicitly encourages parties to utilize ADR as a means of resolving ADA disputes.[3]

The sad reality is that federal litigation does not always provide a satisfactory avenue of redress for disabled workers. This is due to the high cost of lawyers needed for litigation; the role of judges who are still stuck in the medical model of disability; and the increasing number of cases that are lost based upon a narrow, restricted definition of disability. Such a definition prevents a court from examining the issue of whether the underlying accommodation is reasonable or creates an undue hardship.[4] ADR, and mediation specifically, can provide justice for many who would otherwise be without recourse. While mediation is

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[2] 42 U.S.C §§ 12101–12213 (1994).

[3] § 12212 ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution; including settlement negotiations . . . mediation . . . and arbitration; is encouraged to resolve disputes arising under this chapter.").

[4] *See, e.g.*, Clemente v. Executive Airlines, Inc., 213 F.3d 25 (1st Cir. 2000) (finding that a flight attendant with ear injury and hearing loss did not have a disability, and thus the court did not reach the issue of whether she was unlawfully denied a reasonable accommodation of flying only in planes with pressurized cabins); Taylor v. Nimock's Oil Co., 214 F.3d 957 (8th Cir. 2000) (finding that a head cashier who had a heart attack did not have a disability, and therefore not reaching the issue of whether she was unlawfully denied reasonable accommodation of a transfer to a cashier job); Sanders v. Arneson Prods., Inc., 91 F.3d 1351 (9th Cir. 1996) (determining that a plaintiff who had cancer surgery followed by a psychological condition was not disabled, and thus not reaching the issue of whether request for more leave was a reasonable accommodation; in her dissent, Judge Rymer found that there was an insufficient record to conclude that the plaintiff had no disability, and that there were triable issues regarding whether extending leave was a reasonable accommodation or posed an undue hardship).

particularly well-suited in the ADA context, it also provides an appropriate alternative for other types of employment civil rights disputes generally, including claims based on race, national origin, gender, religion and age.

A. *What is Mediation in the ADA Context?*

Mediation is an informal, expeditious, and cost-effective process in which a trained, third-party neutral assists or facilitates the parties in reaching a negotiated resolution of a charge of discrimination.[5] The mediator does not decide who is right or who is wrong.[6] The mediator has no authority to impose a decision on the parties.[7] Thus, it is a very different process from arbitration or litigation before a judge. Instead, "the mediator helps the parties to jointly explore and reconcile their differences," to think creatively in resolving their disputes, and to reach a solution that is acceptable to all parties.[8]

Mediation differs in theory and practice from simply "negotiating settlements." Mediation is:

> a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties *themselves* reach what they consider to be a workable solution.[9]

A key distinction between mediation and other settlement techniques is that there is no determination of guilt or innocence.

Mediation does not mean that an employer must resolve a bogus claim or that an aggrieved worker must give up his or her rights. Rather, mediation is a way for the parties to come together and mutually explore creative solutions to resolve disputes. For these reasons, mediation is more likely to result in a

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[5] U.S. EQUAL EMP. OPPORTUNITY COMM'N, FACTS ABOUT MEDIATION, http://www.eeoc.gov/mediate/facts.html (last modified Feb. 11, 1999) [hereinafter FACTS ABOUT MEDIATION].

[6] *Id.;* U.S. EQUAL EMP. OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS ABOUT MEDIATION, *at* http://www.eeoc.gov/ mediate/qanda.html (last modified Feb. 11, 1999) [hereinafter QUESTIONS AND ANSWERS ABOUT MEDIATION].

[7] FACTS ABOUT MEDIATION, *supra* note 5.

[8] QUESTIONS AND ANSWERS ABOUT MEDIATION, *supra* note 6.

[9] Colquitt Meacham, *The Use of Mediation to Resolve Employment Discrimination Complaints,* 28 BOSTON BAR J. 21, 22 (May/June 1984) (citing Cormick, *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective,* RESOLVE (Winter 1982)).

satisfactory outcome.[10]

Mediation, as a process in which the parties control the outcome, avoids reliance on the vagaries, expense, and unpredictability of a court and jury judgement. Thus, the result is often a faster and more cost-effective method of resolving employment disputes. The vast majority of mediations of ADA employment disputes, more often than not, are completed in a one-day session.

B. *ADA is a Contextual Statute*

Because of the contextual framework that is at the core of the ADA, mediation is a particularly well suited process for resolving disability employment disputes. The ADA's contextual definitions of disability,[11] reasonable accommodation,[12] and undue hardship[13] lie at the heart of the statute's ability to respond to disability discrimination on an individualized basis. The flexibility embraced by the ADA is necessary in order to take into account the wide range of different disabilities, the uniqueness of jobs that have their own essential functions, and the different financial resources of employers to pay for accommodations. Disabilities are manifested in different ways, and may require different accommodations depending on the degree of limitation and the job in question. It is precisely this lack of a simplistic "one size fits all" approach embodied in the ADA that makes mediation a particularly effective tool for ADA disputes.

Mediation, because it is a party-driven process, and not a judge-mandated process, can achieve more creative, targeted, and satisfying resolutions. Litigation often does not provide such flexibility. Litigation creates a winner and a loser; mediation seeks to create a win-win situation. This flexibility is

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[10] An overwhelming majority of EEOC mediation participants, 91% of charging parties and 96% of respondents, would be willing to participate in the EEOC's mediation program again if they were a party to an EEOC charge, regardless of the outcome of their mediation session. E. PATRICK MCDERMOTT ET AL., U.S. EQUAL EMP. OPPORTUNITY COMM'N, ORDER NO. 9/09007632/2, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM, (Sept. 20, 2000), *at* http://www.eeoc.gov/mediate/report/chapter6.html#VI.D

[11] 42 U.S.C. § 12102(2) (1994) (defining "disability" to mean "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment").

[12] § 12111(9) (defining "reasonable accommodation" as possibly including "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules . . . provision of qualified readers or interpreters, and similar accommodations for individuals with disabilities").

[13] § 12111(10)(A) (defining "undue hardship" to mean "an action requiring significant difficulty or expense").

particularly useful for resolving issues arising under the ADA given its contextual approach to addressing discrimination.

Moreover, mediation is a particularly appropriate process for resolving disputes regarding requests for reasonable accommodations that take place within the context of an ongoing employment relationship. Unlike litigation, mediation allows the parties to collaboratively and creatively reach a mutually satisfactory and effective solution to an accommodation dispute while at the same time preserving the working relationship. As the resolution is crafted and agreed upon by the parties themselves, there is a greater likelihood that it will resolve the problem and allow the disabled employee to succeed at the job.

C. *Principles that Support the Fairness of Process*

Because of the uniqueness of disability issues and the accommodation needs of many disabled people, safeguards need to be implemented to ensure a fair mediation process. To begin, however, there are several key principles that are at the core of any employment mediation program regardless of whether the individual is disabled or the substantive charge is grounded in the ADA.

First and foremost, fairness to aggrieved workers and employers must be the hallmark of any mediation program. The process must be fair both in perception and in reality. Fairness requires that parties be supplied with accurate information concerning the process. If an unrepresented party feels that they need representation, they should be entitled to have it or be free otherwise not to go forward with the mediation.

Second, the process must be voluntary. Voluntariness ensures that the parties knowingly and willingly enter into both the proceeding and any resulting agreement. Either party should have the opportunity, prior to executing the settlement agreement, to opt out of the process for any reason, including use of the federal judicial system. While participation in the mediation should be voluntary at all stages until an agreement is reached, that voluntary agreement should constitute a final disposition of the charge and be enforceable by the EEOC. Parties should also be free to settle as long as the proposed agreement is lawful and enforceable and all are aware of their rights.

Third, neutral facilitators are crucial to arriving at a fair agreement and will help maintain the integrity and effectiveness of the mediation. The facilitators must be impartial and honest and act in good faith. Mediators must be schooled in both mediation skills and the substantive anti-discrimination law at issue.

Finally, the mediation process must be confidential. Parties will be candid and forthcoming only if they believe that their statements will not otherwise be used against them in a later proceeding.

D. *Unique Issues to Preserve Fairness for Workers with Disabilities*

Beyond these basic principles of fairness for mediations generally, mediations involving the ADA depend on recognizing and addressing the unique and complex issues facing disabled people. The needs of the disabled individual must be specifically considered to ensure that he or she is able to effectively, meaningfully, and fairly participate in the process.

Organizations that provide mediation services, including the EEOC and employers, are legally required to make their services accessible to people with disabilities.[14] In addition, mediations involving individuals with certain types of mental or psychiatric disabilities may raise the issue of whether an individual has the capacity to effectively participate and represent his or her interests.

There are steps that mediation providers can take to better ensure compliance with the ADA and foster the development of a fair and effective mediation process for all parties, including those with disabilities.[15] The following paragraphs illustrate such steps.

1. *Accessibility of the Mediation Process*

Mediation providers must ensure that the mediation process is accessible to persons with disabilities. This obligation applies not only to parties, but also to their representatives, mediators, staff, volunteers, and other mediation participants. To ensure accessibility, mediators must be attentive to, and address, disability-related factors that may impact the parties' ability to participate, including physical and/or communication barriers.

Mediation providers should advise mediators and the involved parties that accommodations will be provided if needed to facilitate accessibility to the mediation process. Mediation providers should also have in place policies and procedures concerning accommodation requests.

Making the mediation session accessible may include such measures as conducting the session in an accessible facility; providing written materials in alternative formats such as Braille or large print; providing a sign language interpreter or reader; or assisting a person with a cognitive impairment in filling

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[14] 42 U.S.C. §§ 12181–12189 (1994) (mandating that public accommodations are accessible to disabled persons).

[15] *See, e.g.*, ADA MEDIATION GUIDELINES, *at* CARDOZO ONLINE J. CONFLICT RESOL. (2000), http://www.cardozo.yu.edu/cojcr/guidelines.html. The ADA meditation guidelines were developed by a group of mediation practitioners, trainers, and administrators as practice guidelines to address the unique issues arising from mediating ADA issues involving people with disabilities. *Id.*

out paperwork and understanding the intake process. The cost associated with taking these measures should be borne by the mediation provider just like any other public accommodation.[16]

2. *Confidentiality of Medical Information*

Mediators and mediation providers should always maintain confidentiality with respect to the health and disability-related information that is disclosed for the purpose of providing reasonable accommodation or in the course of the mediation, unless a party authorizes the disclosure of such confidential information.[17]

3. *Diversity of Mediator Panels*

Mediation programs should endeavor to have a diverse panel of mediators. Such diversity recruiting efforts should include seeking out qualified mediators who have disabilities. Disability rights advocates, vocational rehabilitation counselors, and job coaches all may have the necessary experience with disability issues to be trained as mediators. It may also be appropriate to allow family members, attorneys, or union representatives to participate in mediation sessions as representatives of persons with disabilities.

4. *Mediation Training and Etiquette*

Mediator training should also be fully accessible to all participants, including those with disabilities. Training programs for mediators should include disability access and etiquette issues.[18] For example, neither the mediation provider nor the mediator should direct questions and comments to the personal assistant of the person with a disability. In addition, the personal assistant should not speak on behalf of the person with the disability unless she or he is also the individual's representative or the individual has requested the personal assistant to do so.

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[16] §§ 12181–12189 (requiring "public accommodations" to provide accesability).

[17] *See* FACTS ABOUT MEDIATION, *supra* note 5 ("[M]ediation is a confidential process. The sessions are not tape-recorded or transcribed. Notes taken during the mediation are discarded."). *See also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (July 27, 2000), *at* http://www.eeoc.gov/docs/guidance-inquiries.html.

[18] There are numerous free resources available on disability etiquette and interacting with disabled persons. *See, e.g.*, JUDY COHEN, DISABILITY ETIQUETTE: TIPS ON INTERACTING WITH PEOPLE WITH DISABILITIES (1998).

III. THE EEOC MEDIATION PROGRAM

Since 1994, the EEOC has been successfully using mediation to resolve employment discrimination charges filed before it, including those pertaining to ADA charges.[19] Mediation complements the EEOC's administrative enforcement efforts by facilitating early resolution where agreement is possible. By reaching resolution in some cases through mediation, more of the commission's scarce resources are available for investigations, conciliations, and litigation. The EEOC mediation program is firmly rooted in the principles outlined above.[20] General information about the EEOC mediation program can be found on the EEOC website at www.eeoc.gov.[21]

A. *The Results Achieved in EEOC ADA Mediation*

The EEOC mediated 7,544 charges during fiscal year (FY) 1999, resulting in $58.6 million in monetary benefits.[22] During FY 2000, the EEOC mediated

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[19] U.S. EQUAL EMP. OPPORTUNITY COMM'N, HISTORY OF EEOC MEDIATION PROGRAM, *at* http://www.eeoc.gov/mediate/history.html (last modified Feb. 11, 1999). Detailed data analysis of the EEOC's mediation program prior to FY 1999 is not available. However, during FY 1997, the EEOC successfully mediated 830 charges and recovered $10.8 million in monetary benefits for 780 charging parties. In the following year, FY 1998, the mediation program doubled and the agency successfully mediated 1,631 charges and recovered $17 million in monetary benefits for approximately 1,600 charging parties. *See also* CRAIG A. MCEWEN, U.S. EQUAL EMP. OPPORTUNITY COMM'N, CONTRACT NO. 2/0011/0168, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S PILOT MEDIATION PROGRAM (Mar. 1994).

[20] *See supra* Part II.C (listing those principles as being fairness, voluntariness, neutrality, and confidentiality).

[21] *See generally* FACTS ABOUT MEDIATION, *supra* note 5.

[22] *See* U.S. Equal Emp. Opportunity Comm'n Office, Mediation Workload Report, Oct. 1, 1998–Sept. 30, 1999, Title VII (on file with the Ohio State Law Journal) [hereinafter FY 99 Title VII Mediations Held]; U.S. Equal Emp. Opportunity Comm'n Office, Mediation Workload Report, Oct. 1, 1998–Sept. 30, 1999, ADEA (on file with the Ohio State Law Journal) [hereinafter FY 99 ADEA Mediations Held]; U.S. Equal Emp. Opportunity Comm'n Office, Mediation Workload Report, Oct. 1, 1998–Sept. 30, 1999, ADA (on file with the Ohio State Law Journal) [hereinafter FY 99 ADA Mediations Held]; U.S. Equal Emp. Opportunity Comm'n, National Database Automatic Reporting Facility, Title VII Mediation Closures: Closed in FY 1999 (on file with the Ohio State Law Journal) [hereinafter FY 99 Title VII Mediation Closures]; U.S. Equal Emp. Opportunity Comm'n, National Database Automatic Reporting Facility, ADEA Mediation Closures: Closed in FY 1999 (on file with the Ohio State Law Journal) [hereinafter FY 99 ADEA Mediation Closures]; U.S. Equal Emp. Opportunity Comm'n, National Database Automatic Reporting Facility, ADA Mediation Closures: Closed in FY 1999 (on file with the Ohio State Law Journal) [hereinafter FY 99 ADA Mediation Closures]. The number of EEOC mediations held in FY 99 was calculated by adding the

11,451 charges, resulting in $109.9 million in monetary benefits.[23] Generally, the EEOC successfully resolves 65% of the charges it mediates.[24] EEOC's mediation program has been quite successful in resolving charges filed under the ADA. Approximately 20% of all ADA charges at the EEOC are resolved through mediation.[25] During FY 1999, the EEOC mediated 1,819 ADA charges, and had a success rate of 63%, and during FY 2000 the EEOC mediated 2,646 charges, and had a success rate of 65%.[26]

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number of mediations that were resolved in a category (ADA, VII, or ADEA) to the number of mediations that resulted in an impasse within that category. The totals for the three categories were then aggregated to compute the total number of mediations held for the fiscal year. *See, e.g.,* FY 99 Title VII Mediations Held, *supra* (noting that 2,975 Title VII mediations were resolved in FY 99, and 1,646 Title VII mediations resulted in an impasse, accounting for the 4,621 Title VII charges meditated for the fiscal year).

[23] *See* U.S. Equal Emp. Opportunity Comm'n Office, Mediation Workload Report, Oct. 1, 1999–Sept. 30, 2000, Title VII (on file with the Ohio State Law Journal) [hereinafter FY 00 Title VII Mediations Held]; U.S. Equal Emp. Opportunity Comm'n Office, Mediation Workload Report, Oct. 1, 1999–Sept. 30, 2000, ADEA (on file with the Ohio State Law Journal) [hereinafter FY 00 ADEA Mediations Held]; U.S. Equal Emp. Opportunity Comm'n Office, Mediation Workload Report, Oct. 1, 1999–Sept. 30, 2000, ADA (on file with the Ohio State Law Journal) [hereinafter FY 00 ADA Mediations Held]; U.S. Equal Emp. Opportunity Comm'n, National Database Automatic Reporting Facility, Title VII Mediation Closures: Closed in FY 2000 (on file with the Ohio State Law Journal) [hereinafter FY 00 Title VII Mediation Closures]; U.S. Equal Emp. Opportunity Comm'n, National Database Automatic Reporting Facility, ADEA Mediation Closures: Closed in FY 2000 (on file with the Ohio State Law Journal) [hereinafter FY 00 ADEA Mediation Closures]; U.S. Equal Emp. Opportunity Comm'n, National Database Automatic Reporting Facility, ADA Mediation Closures: Closed in FY 2000 (on file with the Ohio State Law Journal) [hereinafter FY 00 ADA Mediation Closures]. The number of EEOC mediations held in FY 00 was calculated by adding the number of mediations that were resolved in a category (ADA, VII, or ADEA) to the number of mediations that resulted in an impasse within that category. The totals for the three categories were then aggregated to compute the total number of mediations held for the fiscal year. *See, e.g.,* FY 00 Title VII Mediations Held, *supra* (noting that 4,568 Title VII mediations were resolved in FY 00, and 2,430 Title VII mediations resulted in an impasse, accounting for the 6,998 Title VII charges meditated for the fiscal year).

[24] *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Mediation Program Scores High Marks in Major Survey of Participants; Over 90% of Employers and Employees Who Used EEOC Mediation Would Do So Again, (Sept. 26, 2000), *at* http://www.eeoc.gov/press/9-26-00.html [hereinafter EEOC Mediation Program Scores High Marks]

[25] During FY 1999, the EEOC resolved a total of 1,144 ADA charges through its administrative proceedings, resulting in $12.2 million in monetary benefits. FY 99 ADA Mediations Held, *supra* note 22; FY 99 ADA Mediation Closures, *supra* note 22. During FY 2000, the EEOC resolved a total of 1,719 ADA charges through its administrative proceedings, resulting in $26.3 million in monetary benefits. FY 00 ADA Mediations Held, *supra* note 23; FY 00 ADA Mediation Closures, *supra* note 23.

[26] *See* FY 99 ADA Mediations Held, *supra* note 22; FY 00 ADA Mediations Held, *supra*

In FY 1999, more than 24% of the cases mediated in EEOC's overall ADR program involved the ADA, and of those 24%, over 35% involved the issue of reasonable accommodation, 8% involved hiring, over 47% involved discharge, over 13% involved the issue of harassment, and over 15% of the mediations involved the terms and conditions of employment.[27] Since the inception of the EEOC mediation program, ADA mediations have resulted in monetary benefits totaling over $38.6 million, almost 23% of the total amount of monetary benefits collected through EEOC mediation.[28] Often ADA charges involve non-monetary relief, and more than 46% of ADA charges that were resolved through mediation involved a non-monetary benefit, such as reasonable accommodation, rehire, policy change, or training.[29]

In FY 2000, more than 23% of the cases mediated in the EEOC's overall ADR program involved the ADA, and of those 23%, over 38% involved the issue of reasonable accommodation, over 6% involved the issue of hiring, over 53% involved the issue of discharge, over 14% involved the issue of harassment, and over 14% involved the issue of terms and conditions of employment.

During FY 1999, EEOC ADA mediations resulted in $12.2 million of monetary benefits,[30] a figure that increased to over $26.3 million in FY 2000,[31] accounting for approximately 24% of the total amount of monetary benefits collected through EEOC mediation in FY 2000. And 48.6% of ADA charges that were resolved through mediation involved a non-monetary benefit in FY 2000.[32]

When mediated, the average processing time for ADA complaints is nearly cut in half, as compared to the time it would take the EEOC to administratively address the complaint. This time frame includes the time from the charging party

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note 23. *See also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, A REPORT ON THE TENTH ANNIVERSARY OF THE AMERICANS WITH DISABILITIES ACT (ADA) (July 26, 2000), *at* http://www.eeoc.gov/ada/statusreport.html [hereinafter A REPORT ON THE TENTH ANNIVERSARY OF THE ADA].

[27] Unless otherwise noted, for the data in this paragraph and the next, see Appendix, *infra* pp. 24–29. The EEOC compiled the data in the appendix from a January 29, 2001, Charge Data Systems report.

[28] *See* FY 99 ADA Mediation Closures, *supra* note 22; FY 00 ADA Mediation Closures, *supra* note 23. *See* FY 99 ADA Mediation Closures, *supra* note 22; FY 00 ADA Mediation Closures, *supra* note 23; FY 99 Title VII Mediation Closures, *supra* note 22; FY 00 Title VII Mediation Closures, *supra* note 23; FY 99 ADEA Mediation Closures, *supra* note 22; FY 00 ADEA Mediation Closures, *supra* note 23.

[29] *See* FY 99 ADA Mediation Closures, *supra* note 22 (noting that 528 of the 1,105 ADA charges successfully mediated in FY 99 were resolved with a non-monetary benefit).

[30] FY 99 ADA Mediation Closures, *supra* note 22.

[31] FY 00 ADA Mediation Closures, *supra* note 23.

[32] *See* FY 00 ADA Mediation Closures, *supra* note 23 (noting that 812 of the 1,669 ADA charges successfully mediated in FY 00 were resolved with a non-monetary benefit).

walking in the door of the EEOC to the time of resolution or impasse. On average, ADA charges take 286 days to reach a determination in the EEOC's administrative process.[33] Where mediated ADA charges took on average 151 days to reach final resolution.[34]

Moreover, as previously stated, data from an independent study of the EEOC mediation program found that 91% of charging parties and 96% of responding parties would use mediation again.[35]

Unfortunately, employers are still hesitant to submit to voluntary mediation as a means for resolving disputes filed with the EEOC. Only 31% of employers opted into the EEOC's mediation program when offered, as compared to an 83% acceptance rate for charging parties in FY 2000.[36] For ADA charges, employers accepted mediation 31% of the time and charging parties 85% of the time in FY 2000.[37] Oftentimes, parties are more likely to agree to mediate a charge and to reach a successful resolution if there is still an active employment relationship between the employer and the employee.[38]

The EEOC does not collect detailed data regarding the reasons why a particular mediation fails. Thus, it is difficult to develop a profile of the type of charge more likely to be resolved by mediation.[39] A more detailed set of data by the EEOC would be helpful in understanding the reasons for mediation failures. By identifying the profiles of charges that have a greater likelihood of mediation failure and success, the agency could potentially address some issues which may cause a mediation to be more likely to fail, and focus its limited resources on charges that are more likely to be resolved in mediation

It is also important to note that in the area of ADA charges, the average monetary benefits provided through a mediated settlement was $11,000,

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[33] U.S. EQUAL EMP. OPPORTUNITY COMM'N, OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS, HIGHLIGHTS OF EEOC ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT, A PRELIMINARY STATUS REPORT, JULY 26, 1992 THROUGH MARCH 31, 2000, http://www.eeoc.gov/ada/status-prelim.html (last modified July 13, 2000) [hereinafter HIGHLIGHTS OF EEOC ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT].

[34] *Id.*

[35] *EEOC Mediation Program Scores High Marks, supra* note 24.

[36] *See* FY 00 ADA Mediations Held, *supra* note 23; FY 00 Title VII Mediations Held, *supra* note 23; FY 00 ADEA Mediations Held, *supra* note 23.

[37] FY 00 ADA Mediations Held, *supra* note 23.

[38] However, more research and analysis needs to be done in order to better determine the factors that are likely to lead to a successful ADA mediation.

[39] The EEOC classifies the reasons for mediation failure in four categories: impasse, charging party fails to appear, respondent fails to appear, and other. The reason for the vast number of mediation failures is either impasse or other. *See* U.S. Equal Emp. Opportunity Comm'n, Reasons for Failure, (2001) (unpublished table compiled from a Jan. 29, 2001, Charge Data Systems report).

compared to $29,391 for ADA charges that were resolved through other means.[40] The significant difference in monetary relief reflects the fact that in mediation, as opposed to traditional means, the parties tend to craft more creative, non-monetary forms of relief, rather than simply valuing damages in terms of dollars.[41] In addition, this difference may reflect that the charges are being resolved faster through mediation, thereby decreasing the monetary liability. However, more research and analysis needs to be done by the EEOC to better understand this disparity.

IV. ADA MEDIATION RESOLUTIONS

An examination of a few mediated resolutions that have been achieved through the EEOC's mediation program reflect how ADR can be used to effectively resolve ADA disputes. In 1997, the EEOC's Milwaukee District Office resolved a class disability claim affecting twenty-seven individuals who had complained that a pre-placement health-screening questionnaire violated the ADA by requiring them to disclose medical conditions.[42] In the settlement, the company agreed to stop using the questionnaire, offered the twenty-seven individuals an opportunity to be reconsidered for employment under a modified application process, paid $950,000 to the individuals, augmented an internal training program, and enhanced procedures to ensure compliance with the ADA.[43]

The Washington, D.C., Field Office also successfully resolved a case for a charging party who alleged that after his employer learned of his disability—cancer—he was fired.[44] As a result of the mediation, the charging party was reinstated to his former position with back pay. He was also given a reasonable accommodation of time off to attend any future chemotherapy treatments.

A mediation resolved by the EEOC's San Francisco District Office involved a charging party who had a serious health condition of congestive heart failure and was on a medical leave of absence.[45] She filed a charge concerning her employer's alleged failure to reasonably accommodate her when she attempted to

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[40] *See* A REPORT ON THE TENTH ANNIVERSARY OF THE ADA, *supra* note 26.

[41] Better EEOC data collection is needed to capture a more complete picture of non-monetary forms of relief, such as reasonable accommodations, that are agreed to as a part of mediated settlements.

[42] *See* HIGHLIGHTS OF EEOC ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT, *supra* note 33.

[43] *Id.*

[44] *See* A REPORT ON THE TENTH ANNIVERSARY OF THE ADA, *supra* note 26.

[45] *See* HIGHLIGHTS OF EEOC ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT, *supra* note 33.

return to work.[46] The charging party, who was no longer interested in returning to work for the employer, settled her charge for long-term disability benefits and $65,000.[47]

V. CONCLUSION

Today, the EEOC stands at a historic crossroads with its mediation program. This program is quickly becoming an important and effective weapon in our fight to eradicate discrimination in the workplace and mediation is proving exceptionally useful with respect to resolving the unique issues presented by ADA claims involving individuals with disabilities. It is critical, however, that we do not lose sight that additional protections need to be added to ensure that individuals with disabilities are given equal access to the mediation process and are provided with the accommodations and support that they need to participate in a fair, effective, and meaningful way. In addition, it is important that sufficient funds be allocated to support EEOC mediation.

At the tenth anniversary of the ADA, an apocryphal story illustrates that there are still continuing challenges facing the historic statute, ADR, and the EEOC. Around the time of one of the past anniversaries of the ADA, a CNN reporter, who was doing a story on the statute, arranged an interview with a disability advocate. She tells the advocate that she will ask him to describe the state of disability rights in America, *but,* he has to answer the question with only *one* word.

"In only one word, why?" he asks. "Well." she says, "This is CNN. We have to cover the entire world, and we don't have a lot of time to spend on this story."

The lights and camera go on and she asks, "So, what is the state of disability rights in America?" The advocate thinks and responds, *"Good."*

The lights and camera go off, but before the reporter walks away, she asks the advocate, "If you had two words, how would you respond?" The advocate thinks a moment and says, *"Not good!"*

Now, if this author had three words to answer that question, he would respond, *"Not good enough!"*

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[46] *Id.*

[47] *Id.*

APPENDIX

EEOC Charge Receipts*

FY 1999	Total	Percent
Title VII	48,814	63%
ADEA	11,584	15%
ADA	17,136	22%
Total	77,534	

FY 2000	Total	Percent
Title VII	50,567	63%
ADEA	13,541	17%
ADA	15,935	20%
Total	80,043	

* Note: ADA totals include any charge received under ADA statute (including concurrent Title VII and ADEA charges); ADEA totals include any charge received under ADEA, except those concurrently filed under ADA; Title VII totals include any charge received under Title VII, except those concurrently filed under ADEA or ADA.

* per 01/29/2001 Charge Data Systems (CDS) report

ADA Mediation Resolutions with Benefits

	FY 1999		FY 2000	
Benefit Type	**Total Charges**	**Total Dollars**	**Total Charges**	**Total Dollars**
Restored Pay	162	$1,407,833	251	$2,473,515
Fringe Benefits	102	$704,957	180	$2,291,455
Other Actual	567	$6,147,821	835	$13,904,055
Compensatory Damages	90	$1,208,772	184	$2,540,636
Punitive Damages	1	$3,750	6	$48,943
Attorneys Fees	0		62	$265,844
Total Actual Monetary	**819**	**$9,473,132**	**1,335**	**$21,524,447**
New Hire	14	$279,776	16	$395,557
Promotion	10	$25,554	14	$147,444
Reinstatement/Recall	73	$1,596,353	112	$2,500,739
Other Projected	80	$907,402	124	$1,767,520
Total Projected Monetary	**169**	**$2,809,085**	**251**	**$4,811,260**
Total Monetary Benefits	**910**	**$12,282,217**	**1,445**	**$26,335,707**
Policy Change	22		18	
Training Apprentice	21		36	
Religious Accommodation	2		0	
Seniority	9		10	
Job Referral	42		64	
Union Membership	0		2	
Other Non-Monetary	505		783	
Post Anti-Discrimination Notice	5		5	
Total Non-Monetary Benefits	**528**		**811**	
Total Benefits	**1,108**	**$12,282,217**	**1,668**	**$26,335,707**

* Note: A single charge may have multiple benefit types, therefore the sum of the column will not equal the total number of charges.

ADA Mediation Closures

ISSUES	FY 1999		FY 2000	
	Total Charges	% of Total	Total Charges	% of Total
Advertising	0	0.0%	1	0.1%
Benefits	29	2.5%	37	2.2%
Benefits—Retirement/Pension	5	0.4%	13	0.8%
Benefits—Insurance	8	0.7%	20	1.2%
Demotion	42	3.7%	60	3.5%
Discharge	548	47.9%	913	53.1%
Discipline	80	7.0%	137	8.0%
Exclusion	2	0.2%	2	0.1%
Harassment	150	13.1%	247	14.4%
Hiring	91	8.0%	116	6.7%
Intimidation	31	2.7%	52	3.0%
Job Classification	5	0.4%	7	0.4%
Layoff	42	3.7%	69	4.0%
Maternity	1	0.1%	0	0.0%
Other	84	7.3%	107	6.2%
Promotion	39	3.4%	77	4.5%
Prohibited Medical Inquiry	8	0.7%	6	0.3%
Qualifications	2	0.2%	7	0.4%
Recall	11	1.0%	11	0.6%
References Unfavorable	4	0.3%	7	0.4%
Referral	3	0.3%	3	0.2%
Reinstatement	39	3.4%	37	2.2%
Retirement Unvoluntary	4	0.3%	6	0.3%
Reasonable Accommodation	404	35.3%	658	38.3%
Segregated Facilities	2	0.2%	0	0.0%
Seniority	5	0.4%	3	0.2%
Sexual Harassment	29	2.5%	30	1.7%
Suspension	26	2.3%	38	2.2%
Terms of Employment	181	15.8%	248	14.4%
Testing	1	0.1%	4	0.2%
Training	10	0.9%	15	0.9%
Union Representation	3	0.3%	6	0.3%
Wages	58	5.1%	70	4.1%
Total Charges	**1,144**		**1,720**	

* Note: A single charge may have multiple issues, therefore the sum of the column will not equal the total number of charges.

Charging Party Declines	FY 1999			FY 2000		
	VII	ADEA	ADA	VII	ADEA	ADA
Concerned Fairness	22	6	8	41	7	10
Concerned Confidentiality	2	1	1	1	0	6
Without Legal Representation	14	3	7	15	3	6
Prefers Investigation	512	132	190	1,079	258	369
Insist on Outside Mediator	2	1	0	2	0	0
Insist on Inside Mediator	11	3	3	6	1	2
Other	1,377	376	526	998	250	295
No Response	1,227	283	407	1,034	255	319

Respondent Declines	FY 1999			FY 2000		
	VII	ADEA	ADA	VII	ADEA	ADA
Concerned Fairness	17	3	9	20	5	9
Concerned Confidentiality	1	3	3	7	0	1
Without Legal Representation	21	5	7	3	4	1
Prefers Investigation	3,084	824	1,385	7,234	1,978	2,719
Insist on Outside Mediator	10	2	0	7	1	1
Insist on Inside Mediator	63	11	22	96	15	37
Won't Reconsider Decision	1,044	269	387	2,040	469	631
Other	4,731	1,338	1,897	3,472	923	1,259
No Response	2,053	569	760	3,140	888	1,239

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* per 01/29/2001 CDS report

Mediations—FY 1999

	Offered to CP	Accepted CP	%	Offered Respondent	Accepted Respondent	%	Mediations Held	%
Title VII	16,577	13,410	80.9	17,593	6,569	37.3	4,621	61.3
ADEA	4,294	3,489	81.3	4,618	1,594	34.5	1,104	14.6
ADA	6,756	5,614	83.1	7,090	2,620	37.0	1,819	24.1
Total	27,627	22,513	81.5	29,301	10,783	36.8	7,544	

	Resolved ADR	%	Achieved Benefit	%	Total $$	%	Average $$ per Achieved Benefit
Title VII	2,975	64.4	2,888	62.5	35,239,322.00	60.1	12,201.98
ADEA	711	64.4	660	59.8	11,131,876.00	19.0	16,866.48
ADA	1,144	62.9	1,105	60.7	12,282,217.00	20.9	11,115.13
Total	4,830	64.0	4,653	61.7	58,653,415.00		12,605.51

* Note: ADA totals include any charge received under ADA statute (including concurrent Title VII and ADEA charges); ADEA totals include any charge received under ADEA, except those concurrently filed under ADA; Title VII totals include any charge received under Title VII, except those concurrently filed under ADEA or ADA.

* per 01/29/2001 CDS report

* Mediations Held = Resolved + Impasses

Mediations—FY 2000

	Offered to CP	Accepted CP	%	Offered Respondent	Accepted Respondent	%	Mediations Held	%
Title VII	17,924	14,748	82.3	23,445	7,426	31.7	6,998	61.1
ADEA	4,666	3,892	83.4	6,133	1,850	30.2	1,807	15.8
ADA	6,735	5,728	85.0	8,650	2,753	31.8	2,646	23.1
Total	29,325	24,368	83.1	38,228	12,029	31.5	11,451	

	Resolved ADR	%	Achieved Benefit	%	Total $$	%	Average $$ per Achieved Benefit
Title VII	4,568	65.3	4,415	63.1	60,169,323.00	54.7	13,628.39
ADEA	1,155	63.9	1,113	61.6	23,427,951.00	21.3	21,049.37
ADA	1,719	65.0	1,668	63.0	26,335,707.00	24.0	15,788.79
Total	7,442	65.0	7,196	62.8	109,932,981.00		15,276.96

* Note: ADA totals include any charge received under ADA statute (including concurrent Title VII and ADEA charges); ADEA totals include any charge received under ADEA, except those concurrently filed under ADA; Title VII totals include any charge received under Title VII, except those concurrently filed under ADEA or ADA.

* per 01/29/2001 CDS report

* Mediations Held = Resolved + Impasses