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ARTICLE: PARTICIPANTS' SATISFACTION WITH EEO MEDIATION AND THE ISSUE OF LEGAL REPRESENTATION: AN EMPIRICAL INQUIRY

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SUMMARY:
... Hypotheses For the purposes of this particular article which primarily focuses upon the impact of attorney representation in mediation, the researchers formulated seventeen specific hypotheses: Hypothesis No. 1: That attorney-represented disputants would have a higher degree of satisfaction with the "mediation process" than would unrepresented or "self-represented" disputants. ... Hypothesis No. 6: That the "disputants' prior personal experience with voluntary mediation of any type" would positively influence and affect their degree of satisfaction with the mediation process; any mediated outcome; and the believed or perceived skills and abilities of the mediator Hypothesis No. 7: That the likelihood of an employer or charging party disputant, attorney represented or unrepresented, to use mediation to resolve any similar future workplace dispute would be substantially influenced by: their degree of satisfaction with the mediation process, any favorable mediated outcome, and satisfaction with the skills and abilities of the mediator. ... Hypothesis No. 7 predicted that the likelihood of disputants, attorney-represented or unrepresented, using mediation to resolve any similar future workplace dispute would be substantially influenced by their degree of satisfaction with: the mediation process, any favorable mediated outcome, and satisfaction with the skills and abilities of the mediator. ... Although no mediator or mediation provider can or should assure any disputant a "favorable mediated" outcome, this finding unequivocally underscores for ADR policy makers, mediation providers and mediators that the future of workplace civil rights mediation is largely dependent upon the disputants' continued satisfaction with mediation.

TEXT:
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I. Introduction

The use of private dispute resolution processes to resolve work-place disputes, including claims of discrimination, dates back to as early as World War II. [n1] These dispute resolution processes included mediation and final and binding labor arbitration. [n2] The use of such dispute resolution processes were due to government prompting and were mandated to

integrate the workforce in defense-related industries during World War II. [n3] The use of labor arbitration to **[*389]** resolve employment discrimination grievances in the union setting was commonplace and done without controversy during the post-Steelworkers Trilogy years [n4] up to the enactment of Title VII of the Civil Rights Act of 1964 and the Supreme Court's landmark decision in Alexander v. Gardner-Denver Co. [n5] Notwithstanding a controversy **[*390]** related to the arbitration of statutory-based grievances in the aftermath of Gardner-Denver, [n6] labor arbitration remained a viable mechanism for the resolution of discrimination grievances in the union setting. [n7]

There has been a dramatic increase in EEO litigation. [n8] The costs related to defending these actions are considerable. [n9] There has been a good deal of attention paid to the EEOC's and state enforcement agencies' increasing case inventories, or backlog. [n10] Consequently, there has been greater focus on trying to find fairer and more cost and time efficient ways to resolve EEO claims. Congress has enacted specific provisions which encouraged the use of alternative dispute resolution (ADR). The Civil Rights Act of 1991 provides, "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by this title." [n11] The ADR provisions of the Americans with Disabilities Act are comparable. [n12]

In Gilmer v. Interstate/Johnson Lane Corp., [n13] the Supreme Court held that a claim under the Age Discrimination in Employment Act (ADEA) [n14] was subject to compulsory arbitration pursuant to a contract entered into at the time of employment. The plaintiff in Gilmer was required as part of his employment as a broker to register with several stock exchanges. A rule of one of the exchanges required the arbitration of any controversy between the employee and his employer arising out of termination of employment. After his **[*391]** discharge the plaintiff filed an ADEA charge with the EEOC and subsequently brought suit against his former employer. The employer, relying on the arbitration agreement and upon the Federal Arbitration Act (FAA), [n15] moved to compel arbitration of the ADEA claim. The district court denied the motion on the ground that Congress had intended in the ADEA to protect claimants from the waiver of a judicial forum. The Supreme Court disagreed.

The Supreme Court held that the FAA was applicable to statutory discrimination claims and that plaintiff had failed to demonstrate that Congress intended to preclude arbitration of claims made under the ADEA; nothing in the text or legislative history of the Act precluded arbitration, and arbitration was not inherently inconsistent with the statutory framework and purposes of the ADEA. "By agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum." [n16] The Court emphasized that "so long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." [n17]

Although Gilmer concerned enforcement of an arbitration provision found in a securities exchange registration statement, in Circuit City Stores, Inc. v. Adams, [n18] the Court extended its holding to individual employment contracts. Gilmer and Circuit City have touched off a debate over the propriety of employers mandating that employees enter into private arbitration agreements as a condition of employment; the controversy continues to date. [n19] Indeed, legislation is regularly proposed to reverse Gilmer. [n20] The Supreme Court's most **[*392]** recent decision in EEOC v. Waffle House, Inc., [n21] recognizes the independent statutory nature and independent authority of the EEOC to enforce our federal anti-discrimination laws, notwith-standing the existence of or the involvement of a mandated private agreement to arbitrate. [n22]

II. The Preference for Mediation

The debate over the propriety of mandated private agreements to arbitrate in all likelihood will rage into the foreseeable future. However, the EEOC and a number of state EEO enforcement agencies have adopted as a matter of policy the use of mediation to resolve EEO charges. [n23] In addition, a number of private professional organizations, such as the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution), have encouraged the use of interest-based processes, including mediation, to resolve workplace disputes. [n24] Consequently, it is fair to say

that the use of voluntary mediation to resolve EEO disputes has met with less opposition than has mandated arbitration. In light of EEO mediation's status as more acceptable than mandated arbitration, an empirical examination of the degree of satisfaction of voluntary EEO mediation participants will assist policy makers and practitioners in designing better and more acceptable EEO mediation programs. Issues addressed include whether EEO disputants should be provided **[*393]** with attorney representation or technical assistance, [n25] and whether EEO disputants should be allowed to select their mediators versus having an EEO enforcement agency or mediation provider or service appoint an EEO mediator. These are just two of the important areas which this study examines.

III. Dilemmas and Challenges in Mediation

Workplace civil rights laws have been considered to be of the highest importance. [n26] The reality, however, is that many, if not most, worker-complainants do not have attorney representation in their pursuit of their workplace civil rights claims. It has been estimated that 95 percent of the time, workers cannot obtain attorney representation for their workplace disputes. [n27]

Although raised in another context, a number of noted scholars and observers have raised serious concerns about the fairness and potential negative impact which mediation may have on women, racial minorities and disabled workers. [n28] One study examining the effects of race and gender on mediation and the adjudication of cases is the Albuquerque, New Mexico's small claims court mediation program. [n29] This program was called the Metrocourt Mediation **[*394]** Project. Professor Michele Hermann found that "an ethnic-minority plaintiff could be predicted to receive eighteen cents on the dollar less than a white plaintiff in mediation, while an ethnic-minority respondent could be predicted to pay twenty cents on the dollar more." [n30] "The negative economic outcomes, however, were not replicated when the data were analyzed for gender." [n31]

Of most interest, however, was Professor Hermann's finding that "despite their disparately poorer outcomes, ethnic-minority disputants were somewhat more likely to express satisfaction with mediation than were white disputants. Female disputants, on the other hand, were more likely to express satisfaction with adjudication." [n32] White female respondents who had the most favorable objective outcomes in mediation reported the lowest level of satisfaction. [n33]

Compared to other mediation participants and respondents, Professor Hermann found that "white women were less likely to see the mediation process as fair and unbiased. Women of color, on the other hand, reported the highest level of satisfaction with mediation, despite their tendency to fare the worst in objective outcomes as either claimants or respondents. [n34]

In sum, Professor Hermann concluded that "disputants of color fare significantly worse in mediation than do white participants." [n35] The findings of Professor Hermann raise important fundamental fairness and policy questions about whether the traditional mediation process is appropriate to resolve EEO disputes involving ethnic minorities as well as members of other groups who are traditionally disempowered in American society.

The New Mexico small claims court mediation study did not involve workplace civil rights matters or the issue of attorney representation. However, the New Mexico small claims court mediation study has particular implications for the fundamental fairness and propriety of using mediation in the resolution of workplace civil rights disputes, particularly where traditionally economically disadvantaged disputants do not have attorney representation. This is the underlying concern of the author- **[*395]** researchers and one focus of the instant study. Specifically, the authors pose the question "what impact does attorney representation have on the mediation of workplace civil rights disputes?"

IV. The Study

This study examines empirically the effects of attorney re-presentation on the degree of satisfaction of EEO mediation participants, individuals who are also termed human rights disputants. These individuals are referred to as "surveyed

respondents." This terminology should not be confused with "respondent-employers." The issue of EEO mediation participants' satisfaction with mediation takes on even more significance when one considers that many EEO complainants are women, racial minorities and disabled workers. In our society, members of these demographic groups have historically received lower wages and have less wealth; therefore, they find it even more difficult to obtain competent attorney representation.

This study assesses the experiences of individual disputants who have utilized the services of Midland Mediation and Settlement Services, located in Topeka, Kansas. Midland Mediation and Settlement Services contracts with the Kansas Human Rights Commission to serve as the primary provider of mediators to assist **[*396]** complainants and respondents in the mediation of human rights disputes. [n36] Specifically, the researchers access levels of satisfaction with the mediation process and any related mediated outcomes, participants' opinions on the effectiveness of different types of mediation styles, and the effectiveness of different types of mediation styles, depending on the stage of the dispute (i.e., charge filing stage, preliminary investigation conference, formal investigation stage, public hearing stage, and state or federal court stage). In addition, **[*397]** the researchers included questions on the impact of attorney representation, i.e., if the disputants were represented by an attorney at the mediation, did the participants believe that attorney representation had a positive impact on the outcome of the dispute.

Specific questions pertaining to the case were also included, such as the amount of time it took from the initial contact with the mediation program until the conclusion of the dispute. Seven questions addressing the skills and abilities of the appointed mediator were included. These questions were used to assess the respondents' satisfaction with the appointed mediator in their particular case. A comprehensive series of questions dealing with possible mandated or legislated mediation were included to ascertain the support for mandated or directed mediation by the surveyed disputants.

Finally, the researchers included a series of demographic questions, such as the participants' age, gender, race, and disability status. The demographic data were statistically correlated to a number of variables, including those related to degrees of satisfaction.

A. Research Design and Methodology

1. Description of Sample

A comprehensive survey designed specifically for this empirical investigation was mailed to 298 individual human rights disputants who had voluntarily utilized the services of Midland Mediation and Settlement Services. This included charging parties, their attorneys, respondents and their attorneys. Twenty-three surveys were returned to the researchers, labeled "unavailable" or "moved, no forwarding address available." As such, the researchers had 275 valid addressees. Of these, forty-seven individuals completed the survey, yielding a response rate of 17 percent. [n37]

While it is true that there was a relatively small number of respondents, two key factors should be kept in mind. First, as a percentage of the total valid surveys mailed (i.e., 275), the response rate (n=47) is fairly high at 17 percent. Second, this survey included nearly 100 detailed and comprehensive questions, thus allowing the **[*398]** researchers to make inferences about the respondents' opinions of their experiences with the voluntary EEO mediation program. Twenty-four participants were female and twenty-three were male. The average age of the surveyed-respondents was 46 years old. Eighty percent of the participants identified themselves as white, while the remainder (each at 6.5 percent) classified themselves as Black or African American, Native American or Hispanic/Latino. (See Table 1). Four of the surveyed participants identified themselves as having a disability (as per the Americans with Disabilities Act of 1990), while forty noted that they did not have a disability. Three individuals did not respond to this question.

TABLE 1

GENDER: Females=24 Males=23

RACE		
	African-American/Black	3
	Caucasian/White	37
	Hispanic/Latino/Latina	3
	Native American	47
AVERAGE AGE:		
ANNUAL INCOME LEVEL (INDIVIDUAL OR BUSINESS INCOME):		
	Less than $ 20,000	6
	$ 20,000-$ 35,999	7
	$ 36,000 - $ 40,999	4
	$ 41,000 - $ 55,999	3
	$ 56,000 - $ 70,000	5
	More than $ 70,000	16

Twelve individuals identified themselves as the charging party in the dispute, eight of whom had attorney representation in their cases, while four were either not represented, or represented themselves, i.e. self-representation. Thirteen individuals surveyed identified themselves as the respondents. Four individuals who completed the survey were attorneys for a charging party, while sixteen were attorneys for a respondent. It should be noted that the individuals who completed the survey were not matched, i.e., both **[*399]** respondents and attorneys for respondents completed the survey. However, this does not mean that the sixteen attorneys for respondents responding to the study had represented any or all of the thirteen respondents. In other words, the attorneys and the two parties (i.e., charging party and respondent) taking part in the study may or may not have been involved in the same case. However, since the researchers primary purpose of the study was to compare opinions and satisfaction scores of all parties involved, this provided valuable information about the impact and viability of such mediation programs. The researchers are hopeful that future studies will compare and contrast opinions of attorneys and plaintiffs involved in the same dispute.

In terms of the nature or basis of the specific human rights or EEO dispute, many of the surveyed participants indicated more than one category. Sixteen individuals indicated "race-related," ten individuals indicated "sexual harassment," two indicated "national origin," six included gender-related, four indicated ADEA claims, and thirty-three indicated "other." (See Table 2).

TABLE 2

Human Rights Dispute Category	
1. Race-related	16
2. Sexual Harassment	10
3. National Origin	02
4. Gender-Related	06
5. ADEA claims	04
6. Others*	33

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2. Measures

The survey instrument used in this study was specifically designed to investigate the questions noted above. Participants were asked to respond to additional questions, using a 5-point Likert type scale with appropriate anchors, i.e.1=strongly disagree, 3=neither agree nor disagree, 5=strongly agree. All responses on this survey (as reported in the Results Section below) are based on this scale. Thus, the closer the number is to 5, the higher the respondents' overall agreement with the question.

B. Hypotheses

For the purposes of this particular article which primarily focuses upon the impact of attorney representation in mediation, the researchers formulated seventeen specific hypotheses:

Hypothesis No. 1: That attorney-represented disputants would have a higher degree of satisfaction with the "mediation process" than would unrepresented or "self-represented" disputants.

Hypothesis No. 2: That attorney-represented disputants would have a higher degree of satisfaction with the "mediated outcome" than would any unrepresented or "self-represented" disputants.

Hypothesis No. 3: That attorney-represented disputants would generally have a higher degree of satisfaction with seven detailed aspects of mediation than would unrepresented or "self-represented" disputants.

Hypothesis No. 4: That attorney-represented disputants would have a higher degree of satisfaction related to "skills and abilities of the mediators" than would unrepresented or "self-represented" disputants.

Hypothesis No. 5: That attorney-represented disputants would "prefer to retain and select their own mediator" rather than use an appointed mediator.

Hypothesis No. 6: That the "disputants' prior personal experience with voluntary mediation of any type" would positively influence and affect their degree of satisfaction with the mediation process; any mediated outcome; and the believed or perceived skills **[*401]** and abilities of the mediator [n38]

Hypothesis No. 7: That the likelihood of an employer or charging party disputant, attorney represented or unrepresented, to use mediation to resolve any similar future workplace dispute would be substantially influenced by: their degree of satisfaction with the mediation process, any favorable mediated outcome, and satisfaction with the skills and abilities of the mediator.

Hypothesis No. 8: That the "early and timely use of mediation" will have a positive influence on the employer or charging party disputant's: degree of satisfaction with the mediation process, any mediated outcome, the believed or perceived skills and abilities of the mediator, and whether the disputant would agree to participate in a future mediation involving a similar dispute. [n39]

Hypothesis No. 9: That the disputant's income level would have a reverse influence on the disputant's degree of satisfaction with: the mediation process, any mediated outcome, and perceived skills and abilities of the mediator, i.e., the lower the disputant's income, the greater degree of satisfaction.

Hypothesis No. 10: That the demographic group to which the disputant belongs will affect his/her degree of satisfaction with the mediation process, any mediated outcome, and the perceived skills and abilities of the mediator.

Hypothesis No. 11: That the demographic group membership of the mediator will have an influence on the disputant's degree of satisfaction with the process, any mediated outcome, and the **[*402]** perceived skills and abilities of the mediator. Specifically, disputants will prefer to use mediators of their own demographic group.

Hypothesis No. 12: In general, attorney-represented disputants will believe that being represented by an attorney would have a significant impact, on the five key issues listed below, and their opinions on this will be much stronger than the unrepresented disputants:

1. Bringing resolution to a dispute in human rights cases.

2. Bringing closure to mediation cases where the employer has a lawyer but the charging party does not have a lawyer.

3. On the disputant's monetary outcome.

4. On the disputant's non-monetary outcome.

5. Whether a non-lawyer trained in mediation advocacy can be as effective as a trained lawyer.

Hypothesis No. 13: That attorney-represented and unrepresented disputants will rate the suitability or effectiveness of evaluative mediation versus facilitative mediation at differential levels.

Hypothesis No. 14: That attorney-represented charging parties will have a higher degree of satisfaction with the "mediation process" than will unrepresented or "self-represented" charging parties.

Hypothesis No. 15: That attorney-represented charging parties will have a higher degree of satisfaction with the mediated outcome than will any unrepresented or self-represented charging parties.

Hypothesis No. 16: That attorney-represented charging parties will have a higher degree of satisfaction related to skills and abilities of the mediators than will unrepresented charging parties.

Hypothesis No. 17: That attorney-represented charging parties will prefer to retain and select their own mediator rather than use an appointed mediator.

C. Results

1. Degrees of Satisfaction

Hypothesis No. 1 predicted that attorney-represented disputants would have a higher degree of satisfaction with the "mediation process" than would unrepresented or self-represented disputants. Results showed that attorney-represented disputants reported a slightly higher degree of satisfaction (mean=3.51, sd=1.27) than unrepresented disputants (mean=3.46; sd=1.44), thus offering support **[*403]** for the researchers' hypothesis.

Hypothesis No. 2 predicted that attorney-represented disputants would have a higher degree of satisfaction with the "mediated outcome" than would unrepresented or self-represented disputants. Results showed that attorney-represented disputants had a slightly lower reported satisfaction level (mean=3.24; sd=1.46) than un-represented disputants

(mean=3.27; sd=1.49). As such, this hypothesis was not supported.

Hypothesis No. 3 predicted that attorney-represented disputants would report a higher degree of satisfaction with the seven detailed aspects of mediation (See Table 3) than would unrepresented or self-represented disputants. Results showed that attorney-represented disputants actually reported lower levels of satisfaction (mean=3.41, sd=0.99) than unrepresented disputants (mean=3.97, sd=0.99), thus not offering support for this hypothesis.

TABLE 3

SATISFACTION WITH MEDIATION

MEDIATION DIMENSION OPINION	SURVEYED RESPONDENTS/DISPUTANT'S	
	Attorney Respresented	Unrepresented
1. Amount of information provided about the human rights mediation program	3.62(0.98)	3.91(1.30)
2. Opportunity to present their side of the dispute	3.64(1.19)	4.09(1.14)
3. Level of participation in the mediation	3.76(1.06)	4.18(1.17)
4. Time between initial contact with mediation contact with mediation program to end of process	3.83(1.07)	3.82(1.08)
5. Outcome of the dispute	3.24(1.46)	3.27(1.49)
6. Fairness of the mediation	3.55(1.35)	3.55(1.21)
7. Overall mediation process	3.52(1.27)	3.46(1.44)

Note: These questions were posed to the respondents on a 5-point scale, with 1=very dissatisfied, 3=neutral, and 5=very satisfied. The numbers presented **[*404]** here are means of the responses, with the standard deviations presented in parentheses. Thus, the closer the means are to 5, the more satisfied the respondents overall, the closer the numbers are to 1, the more dissatisfied they were with each of these dimensions.

Hupothesis No. 4 predicted that attorney-represented disputants would have a higher degree of satisfaction related to skills and abilities of mediators than would unrepresented or self-represented disputants. Results showed, once again, that attorney-represented disputants reported much lower levels of satisfaction (mean=3.59, sd=1.11) with mediators' skills and abilities than unrepresented disputants (mean=4.29; sd=1.08). As such, this hypothesis was not supported.

Hypothesis No. 5 predicted that attorney-represented disputants would prefer to retain and select their own mediator rather than use a mediator appointed by an ADR organization or mediation service. Among disputants with attorney representation, eleven reported that they would prefer to retain their own mediator, while twelve indicated they would not do so. However, among those without attorney representation, all eleven said that they would not like to select their own mediators, thus offering very strong support for this hypothesis.

Hypothesis No. 6 predicted that the disputants' prior personal experience with voluntary mediation of any type would positively affect their degree of satisfaction with: the mediation process, any mediated outcome, and perceived skills and abilities of the mediator. Results showed that those who had a fair amount of or substantial experience with voluntary mediation had a much more positive view of these three factors than those who had none or very limited experience. For the question on mediation outcome, disputants with experience in any type of mediation reported a satisfaction level of 3.70 (sd=1.26) versus 3.20 (sd=1.51) for those who had limited or no experience. For the question on mediation process, disputants with experience in mediation reported a satisfaction level of 3.85 (sd=1.23) versus 3.45 (sd=1.47) for those who had limited or no experience. Finally, in terms of the mediators' skills and abilities, disputants with experience in mediation reported a satisfaction level of 4.10 (sd=1.17) versus 3.75 (sd=1.45) for those who had limited or no experience. As such, this hypothesis was supported.

Hypothesis No. 7 predicted that the likelihood of disputants, **[*405]** attorney-represented or unrepresented, using mediation to resolve any similar future workplace dispute would be substantially influenced by their degree of satisfaction with: the mediation process, any favorable mediated outcome, and satisfaction with the skills and abilities of the mediator. Results showed significant correlations [n40] between surveyed disputants' satisfaction with the three variables and the likelihood that they would use voluntary mediation programs. For the mediation process, this correlation was r=0.57 (p<.01), for mediation outcome, this correlation was r=0.60 (p<.01) and for satisfaction with mediator's skills and abilities, this correlation was r=0.62 (p<01).

Hypothesis No. 8 predicted that the early and timely use of mediation will have a positive influence on: the disputant's degree of satisfaction with the mediation process, any mediated outcome, perceived skills and abilities of the mediator, and whether the disputant would agree to participate in a future mediation involving a similar dispute. Results offered very strong support for this hypothesis. Disputants who believed that their mediation was done in a timely fashion (i.e., at the appropriate time) reported much higher levels of satisfaction with the outcome (mean=3.55, sd=1.35); the mediation process (mean=3.84, sd=1.20); and the mediator's skills and abilities (mean=4.08, sd=1.17). On the other hand, those disputants who were of the opinion that the timing of their mediation was inappropriate reported much lower levels of satisfaction with the outcome (mean=2.67, sd=1.63), the mediation process (mean=3.00, sd=1.26) and the mediator's skills and abilities (mean=3.00, sd=1.67). Further, those who believed that the timing of their mediation was "appropriate" were much more likely to want to use voluntary mediation in a future workplace civil rights dispute (mean=4.16; sd=1.10) than those who were of the opinion that the timing of their mediation was inappropriate (mean=3.00; sd=1.27).

Hypothesis No. 9 predicted that the disputant's income level would have a reverse influence on: the disputant's degree of satisfaction with the mediation process, any mediated outcome, and the mediator's skills and abilities. Specifically, the lower the **[*406]** disputant's income, the greater the degree of satisfaction. However, in the study, this hypothesis was not supported. The researchers found no significant pattern or correlations between disputants' income level and their satisfaction with the mediation process (r=.08; n.s.); any mediated outcome (r=.15; n.s.), or their opinion or perception of the mediator's skills and abilities (r=.21; n.s.).

Hypothesis No. 10 predicted that the demographic group to which the disputant belongs will influence his/her degree of satisfaction with the mediation process, any mediated outcome, or the mediator's skills and abilities. To test this hypothesis, the researchers measured the individuals' responses based on three demographic categories: age, gender and race. There were no significant negative correlations for all three categories of satisfaction variables with age. In other words, the researchers found that as age increased in the sample, individuals were less satisfied with mediated outcomes (r= -0.33, p<.05); mediation process (r= -0.53; p<.01); and the mediator's skills and abilities (r= -0.43; p<.01). The researchers found that females in the sample expressed higher satisfaction levels for all three variables than males. For mediated outcomes, females reported mean=3.33 (sd=1.49) while males reported mean=3.26 (sd=1.45). For the mediation process, females expressed satisfaction at mean=3.70 (sd=1.40) while male satisfaction with the process was mean=3.43 (sd=1.27). Finally, in terms of mediator skills and abilities, females reported a satisfaction level of mean=4.08 (sd=0.97) while males reported a mean of only 3.65 (sd=1.53).

The last demographic category examined was race. Since the race mix in the sample was skewed (37 Whites, 3 Blacks, 3 Hispanics/Latinos, and 3 Native Americans), the researchers combined the responses of the three minority groups. Results showed that white disputants were significantly more satisfied with all three measures (mediated outcome mean=3.49, sd=1.35; mediation process mean=3.68, sd=1.29; the mediator's skills and abilities mean=3.95, sd=1.27) than minority disputants (mediated outcome mean=2.33, sd=1.58; mediation process mean=3.00, sd=1.41; mediator's skills and abilities mean=3.55, sd=1.42).

In Hypothesis No. 11, the researchers hypothesized that the demographic group membership of the mediator will have an effect on the disputant's opinion of whether the mediator's race has any impact on the settlement of the dispute. In this case, minority disputants agreed more strongly (mean=3.13; sd=1.13) than whites **[*407]** disputants (mean=2.46; sd=1.04) that the race of the mediator does make a difference. It should be noted here that 43 of the 46 respondents noted that the mediator in their case was white.

Hypothesis No. 12 predicted that, compared to non-represented disputants, disputants who had attorney representation were significantly more likely to agree that attorney representation had a strong impact on five key outcomes, listed below (see Table 4):

1. Bringing resolution to a dispute in human rights cases.

2. Bringing closure to mediation cases where the employer has an attorney but the charging party does not have an attorney.

3. On the disputant's monetary outcome.

4. On the disputant's non-monetary outcome.

5. Whether a non-attorney trained in mediation advocacy can be as effective as a trained attorney.

TABLE 4

	IMPACT OF ATTORNEY REPRESENTATION	
QUESTION	SURVEY	
OPINION	RESPONDENT	DISPUTANT
	ATTORNEY REPRESENTED	UNREPRESENTED
1. Impact of both parties having attorneys, on Resolution of the dispute	3.82(1.06)	2.50(0.97)
2. Employer having an		

attorney, but not the employee	2.62(1.06)	2.70(1.06)
3. Impact of having an attorney on disputant's monetary outcome	3.79(0.99)	3.10(1.29)
4. Impact of having an attorney on disputant's non-menetary outcome	3.52(0.94)	3.40(1.07)
5. Can a non-attorney, trained in mediation advocacy be as effective as a trained attorney	3.00(1.22)	3.55(1.13)

Note: These questions were posed to the respondents on a 5-point scale, with **[*408]** 1=strongly disagree, 3=neutral, and 5=strongly agree. The numbers presented here are means to the responses, with the standard deviations presented in parentheses. Thus, the closer the means are to 5, the stronger the respondents' agreement with the statement; the closer the numbers are to 1, the stronger the respondents' disagreement with these questions.

For point 1, attorney-represented disputants indicated much higher agreement (mean=3.82; sd=1.06) that an attorney can help bring resolution than unrepresented disputants (mean=2.50; sd=0.97).

For point 2, attorney-represented disputants indicated slightly lower expectation (mean=2.62; sd=1.06) in a situation where the employer has an attorney and the charging party does not have an attorney, than unrepresented disputants (mean=2.70; sd=1.06). In other words, unrepresented disputants believed (slightly more than represented disputants) that they could reach resolution even in situations where they were not represented by an attorney. This is in keeping with the fact that in this case, they were not represented.

For point 3, attorney-represented disputants indicated much higher agreement (mean=3.79; sd=0.99) that an attorney can impact the disputant's monetary outcome than unrepresented disputants (mean=3.10; sd=1.29).

For point 4, attorney-represented disputants indicated slightly higher agreement (mean=3.52; sd=0.94) that an attorney can impact a disputant's non-monetary outcomes than unrepresented disputants (mean=3.40; sd=1.07).

Finally, for point 5, attorney-represented disputants indicated much less agreement (mean=3.00; sd=1.22) that a trained non-attorney can be as effective as an attorney. (mean=3.55; sd=1.13).

Overall, it is clear from this study that respondent disputants who were represented in their cases have a much more positive opinion of the impact of an attorney on the process and the outcomes of mediation, than disputants who were not represented by an attorney, or were self-represented.

Hypothesis No. 13 predicted that attorney-represented and unrepresented disputants would rate the suitability or effectiveness of evaluative mediation versus facilitative mediation at differential levels. Results showed that attorney-represented disputants were of the opinion that evaluative mediation (mean= 3.73, sd=0.87) was much more suitable than facilitative mediation (mean = 3.17, sd=1.31). For unrepresented disputants, the researchers found the **[*409]** same pattern, with this group rating evaluative mediation at 4.18 (sd=1.17) and facilitative mediation at 3.20 (sd=1.75). It should be noted, however, that unrepresented disputants in the study rated both types of mediation higher

than did disputants with attorney representation.

Hypothesis No. 14 predicted that attorney-represented charging parties would have a higher degree of satisfaction with the mediation process than would unrepresented charging parties. Results showed that attorney-represented charging parties were actually less satisfied with the process (mean=2.38, sd=1.51) than unrepresented charging parties (mean=2.75, sd=1.71).

Hypothesis No. 15 predicted that attorney-represented charging parties would have a higher degree of satisfaction with the mediated outcome than would any unrepresented or self-represented charging parties. As in the question above, results showed that attorney represented charging parties were actually less satisfied with the overall mediation outcome (mean=3.25, sd=1.67) than unrepresented charging parties (mean=3.50, sd=1.71).

Hypothesis, No. 16 predicted that attorney-represented charging parties would have a higher degree of satisfaction related to skills and abilities of the mediators than would unrepresented or self-represented charging parties. However, once again, the results showed that attorney represented charging parties were actually less satisfied with the mediator (mean=3.38, sd=1.30) than unrepresented charging parties (mean=4.00, sd=2.00).

Hypothesis No. 17, predicted that attorney-represented charging parties would prefer to retain and select their own mediator rather than use an appointed mediator. However, results showed that unrepresented charging parties were more likely to want to select their own mediator (mean=3.75, sd=1.89) than attorney-represented charging parties (mean=3.63, sd=1.19).

D. Discussion

As stated earlier, the underlying assumption or hypothesis for this study was that the disputants who had attorney representation in mediation would generally have a more positive opinion and higher degree of satisfaction with voluntary EEO or workplace human rights mediation than would unrepresented or self-represented disputants. The above-detailed results, for the most part, support this hypothesis. Recognizing the various limitations of this study which include: the **[*410]** absence of minority mediators, that no actual monetary figures related to any mediated outcome were disclosed, and the relatively small number of charging parties who had attorney representation (sixteen survey respondents were represented by attorneys versus only four charging parties), several of this study's findings are noteworthy, particularly in light of the New Mexico small claims mediation study. These findings are presented in their order of statistical significance and relative support of the hypotheses of the researchers.

1. Key Findings

The literature is replete with support and encouragement for the use of mediation, particularly in workplace civil rights disputes. [n41] Accordingly, the researchers were interested in ascertaining what general factors might be predictors of (1) disputants' satisfaction with the mediation process and outcome, and (2) what factors would predict disputants' possible future use of EEO mediation. Hypotheses Nos. 6 and 7 were intended to address these two important questions. In brief, these two predictors were: (1) the disputants' satisfaction with prior mediation, specifically satisfaction with the process, the outcome, and the mediators' abilities, and (2) the likelihood that they would use mediation in the future depending on their past experience with mediation.

2. Comment on Hypotheses

The mixed support received by the hypotheses (e.g., hypotheses 3 and 4, were contrary to our predictions, attorney-represented disputants actually had a lower level of satisfaction than unrepresented disputants) can probably best be explained by the participation in the study by individuals who were participating in mediation for the first time, and those who were repeat players. In this connection, it should be mentioned, that in testing hypotheses 3 and 4, the researchers subjected their results to statistical significance tests (t-tests) to see if the means were different. However,

the t-tests were not significant, and as such, are not reported. This is most likely an artifact of the small numbers of individuals in the different **[*411]** categories who took part in this study, which reduced the statistical power of the study. However, as a first step towards understanding voluntary EEO mediation, the instant results do provide a direction and a pattern of results. The researchers are hopeful that these results provide 'food for thought' for those in-charge of designing and administering EEO mediation programs, and that future research will study these and related questions in greater depth.

3. Favorable Mediated Outcome

As might reasonably be expected, the disputants' degree of satisfaction with the mediation process, favorable mediated outcome, and satisfaction with the skills and abilities of the mediator were significant predictors of the disputants' future use of mediation. Although no mediator or mediation provider can or should assure any disputant a "favorable mediated" outcome, this finding unequivocally underscores for ADR policy makers, mediation providers and mediators that the future of workplace civil rights mediation is largely dependent upon the disputants' continued satisfaction with mediation. This should come as no surprise.

4. Appropriate Timing

The early and timely use of mediation also appeared as a very significant factor in determining disputants' degree of satisfaction with the mediation process (mean=3.84, sd=1.20), any mediated outcome (mean=3.55, sd=1.35) and the mediator's skills and abilities (mean=4.08, sd=1.17) (Hypothesis No. 8). Timing of mediation also appeared to be a significant factor in influencing whether disputants would agree to participate in a future mediation involving a similar dispute.

As the saying goes, "timing is everything;" however, in mediation, particularly in workplace civil rights disputes, determining the "appropriate time" to make mediation available is particularly difficult. In many EEO disputes, one disputant is often willing to participate in mediation early on, while the opposing party is either not yet willing to participate in mediation [n42] or may never be willing to participate. This creates a substantial challenge for the mediation provider in "brokering" a case [n43] and has prompted some scholars to **[*412]** suggest that the law should be employed to increase the early mediation of disputes. [n44] Consequently, the ability to offer the early use of mediation remains easier said than successfully done.

5. Effective Mediation Styles

With the growing use of mediation in workplace disputes and the increasing involvement of attorney advocates in mediation, there has been considerable discussion concerning effective mediation styles. It has been suggested that there may be thirteen different mediation styles. [n45] For the purposes of this study, the researchers asked the disputants which of two mediation styles, evaluative versus facilitative mediation, [n46] they believed to be more effective in resolving workplace civil rights disputes. The researchers hypothesized that attorney represented disputants would be more likely than unrepresented disputants to regard evaluative mediation as more effective (Hypothesis No. 13). As predicted, the results revealed that attorney represented disputants were of the opinion that evaluative mediation was much more suitable or effective than facilitative mediation (mean=3.73, sd=0.87, and mean=3.17, sd=1.31, respectively). Interestingly, a similar pattern was found with unrepresented disputants' preferring evaluative mediation over facilitative mediation (mean=4.18, sd=1.17, and mean=3.20, sd=1.75, respectively).

A number of reasons probably explain this phenomenon, including the likelihood that at the EEO administrative enforcement agency stage of the dispute, disputants are seeking some type of "judgment" and/or an economic value for the case to enable settlement. It is suggested here that if mediation were offered at the formal pre-charge level, many disputes would be resolved without monetary damages and still with a high degree of satisfaction. [n47]

[*413]

6. Represented Charging Parties' Perceptions and Opinions

The researchers posed four hypotheses concerning the represented charging parties' degree of satisfaction with voluntary EEO mediation. An analysis of the data did not support these hypotheses. The four hypotheses were as follows:

Hypothesis No. 14 predicted that attorney-represented charging parties would have a higher degree of satisfaction with the "voluntary EEO mediation process" than would unrepresented or self-represented charging parties. Results showed that attorney represented charging parties were actually less satisfied with the outcome (mean=2.38, sd=1.51) than unrepresented charging parties (mean=2.75, sd=1.71).

Hypothesis No. 15 predicted that attorney-represented charging parties would have a higher degree of satisfaction with the "mediated outcome" than would unrepresented or self-represented charging parties. As in the question above, results showed that attorney-represented charging parties were actually less satisfied with the overall mediation process (mean=3.25, sd=1.67) than unrepresented charging parties (mean=3.50, sd=1.71).

Hypothesis No. 16 predicted that attorney-represented charging parties would have a higher degree of satisfaction with the skills and abilities of the mediators than would unrepresented or self-represented charging parties. However, once again, the results showed that attorney-represented charging parties were actually less satisfied with the mediator (mean=3.38, sd=1.30) than unrepresented charging parties (mean=4.00, sd=2.00).

Hypothesis No. 17 predicted that attorney-represented charging parties would prefer to retain and select their own mediator rather than use an appointed mediator. However, results showed that unrepresented charging parties were more likely to want to select their own mediator (mean=3.75, sd=1.89) than attorney represented charging parties (mean=3.63, sd=1.19).

There are a number of plausible explanations for these results. Another recent study by the researchers found that there is often a conflict or tension between charging parties and their attorney representatives. [n48] There are often "trust" and "control" issues between the plaintiff and his or her attorney. This tension manifests **[*414]** itself in many ways, including: deciding whether to settle, the amount of any monetary settlement, and even the perceived skills and neutrality of the EEO mediator. The researchers suggest that unrepresented charging parties may have a greater feeling of control over the mediation process than attorney-represented charging parties whose control is lessened or at least tempered by the presence and active participation of their attorneys. This attorney-client interaction may have a positive effect on perceptions and opinions of the charging party. It may also have a negative effect. The researchers suggest that the presence of an attorney representative creates a screen through which the charging party experiences the EEO mediation process. This may explain the unexpected outcomes related to Hypothesis Nos. 14, 15 and 16.

The results in Hypothesis No.17 may be more reasonably explained by the unrepresented charging party being more likely to have a higher degree of distrust of the mediation process. This may be due to the lack of prior experience with the process and indeed with the legal process. Consequently, the researchers suggest that the unrepresented charging parties feel more comfortable maintaining the option to select a mediator. The element of disputants' trust and control over the process and any settlement outcome is a crucial factor in predicting the various degrees of satisfaction with the EEO mediation process. This holds true whether the disputants are attorney-represented or self-represented.

7. Impact of Demographics: Age, Gender and Race

One of the issues which is increasingly surfacing in the workplace dispute resolution area is the potential influence of the demographic background of the mediator. [n49] It is beyond the scope of this study to discuss the propriety of considering the race or gender of a workplace mediator. However, this is a real and practical factor in the selection of mediators and labor and employment arbitrators. Consequently, the researchers attempted to ascertain the effect of the demographic background of the mediator (age, gender and race) on the disputants and the resolution of a dispute

(Hypothesis No. 11). Specifically, the disputants were asked did the demographic background of the mediator have an effect on the settlement of the dispute. The researchers did not specifically ask what role demographics played in **[*415]** the selection of the mediator.

A very significant finding of this study was that the surveyed minority disputants agreed more strongly (mean=3.13, sd=1.13) than the surveyed white disputants (mean=2.46, sd=1.04) that the race of the mediator made a difference. Setting aside the possible effect of the phenomenon of "socially desirable responses," [n50] one cannot ignore the responses of the surveyed minority group disputants. There are many reasons why some minority group disputants might be of this opinion; however, in some instances, minority disputants may prefer a white mediator because they may feel as though they are being "manipulated" when the mediator is a member of the same demographic group. This is a "Gordian Knot" which cannot be untied here. However, the researchers strongly believe that as our public justice system continues to be effectively privatized, it is imperative that policy makers, courts, ADR providers and users, and the various bar associations and civil rights organizations ensure the integration and the actual utilization of racial minorities and women as workplace neutrals. Absent the fulfillment of this moral and legal obligation, the developing workplace civil rights dispute resolution movement may face greater judicial and congressional scrutiny.

8. Lesser Supported Hypotheses

There were a number of other hypotheses which were supported by the data but not to the degree contemplated by the researchers. In Hypothesis No. 1, attorney-represented disputants indicated a slightly higher degree of satisfaction with the mediation process than did unrepresented disputants (mean=3.51, sd=1.27 versus mean=3.46, sd=1.44).

In general, the researchers' assumption that attorney-represented disputants would have a more positive view and higher degree of satisfaction about mediation held true. There were several questions posed to the surveyed disputants. Of these hypotheses, it **[*416]** appears that only four hypotheses (Hypotheses Nos. 2, 3, 4 and 9) were not supported by the data. Specifically, an analysis of the data for Hypothesis No. 2 did not support the proposition that attorney-represented disputants had a higher degree of satisfaction related to any mediated outcome (mean =3.24; sd=1.46) than unrepresented disputants (mean=3.27; sd=1.49). Similarly, results for Hypothesis 3 revealed that unrepresented disputants were slightly more satisfied, overall, than represented disputants, contrary to the hypothesis of the researchers.

In regard to Hypothesis No. 4, attorney-represented disputants did not have a higher degree of satisfaction related to the skills and abilities of the mediator. This may be attributed to the possibility that attorney-represented disputants are less dependent upon the mediator and rely more upon the skills and abilities of their retained attorney-mediation advocates. It is also possible that attorney-mediation advocates may be more critical of the mediator than their clients. Under the Midland Mediation and Settlement Services program, disputants do not select their mediator, i.e., mediators are appointed. This may influence the "acceptability" of the mediator and affect an attorney-represented disputant's view of the mediator's skills and abilities. This may be supported by the finding that eleven attorney-represented disputants reported that they would prefer to select their own mediator, while twelve said they would not. This finding supports Hypothesis No. 5 and suggests that consideration should be given to affording disputants a greater degree of choice in selecting a mediator rather than appointing mediators.

The other satisfaction hypothesis not supported by the data is Hypothesis No. 9, related to the disputant's income level. It was hypothesized, based on the New Mexico Small Claims Mediation Study, that lower income disputants would have a higher combined degree of satisfaction with the mediation process, any mediated outcome, and the mediator's skills and abilities. The researchers hypothesized that disputants having a lower income level would view mediation as a more economical and effective "voice mechanism" over which they have control versus more costly and often cost prohibitive litigation. This was just not the case. The researchers found no significant correlation between individual disputants' income level and their satisfaction with the mediation process, any related mediated outcome or their opinion of the mediator's skills and abilities.

[*417] This is an important finding and suggests, on first blush, a general or universal satisfaction with voluntary EEO mediation, not-withstanding the disputants' economic status. This is particularly important, given that many workplace civil rights disputants are racial minorities, women and disabled individuals, three demographic groups who historically have less income and wealth in our society. A cautionary note is in order. Further analysis is needed on this point, focusing solely on the individual charging parties' income level and similar degree of satisfaction measures.

V. Conclusion

The purpose of this study was to explore empirically what impact having attorney representation has on various aspects of voluntary EEO or human rights mediation. The researchers generally concluded that attorney-represented disputants did not have a more positive view and higher degree of satisfaction about voluntary EEO mediation. Interestingly, however, the researchers found that attorney-represented charging parties have a lower degree of satisfaction with the mediation process than unrepresented charging parties. Perhaps this has to do with a sense of loss of control over the process. To ameliorate this concern, charging parties should probably have a greater say in the choice of mediator. There were a number of significant results based on this study, including: disputants, attorney-represented and unrepresented, prefer to have some choice in the selection of their mediator; the disputant's income level did not affect their degree of satisfaction with the mediation; the early and/or appropriate timing of offering mediation is a critical factor influencing the disputants' degree of satisfaction with voluntary EEO mediation; both attorney-represented and self-represented disputants at the EEO enforcement agency stage prefer evaluative mediation over facilitative mediation; and minority disputants, as opposed to non-minority disputants, are of the opinion that the race of the mediator is an important factor and prefer having an individual of their own race or ethnicity serving as their mediator.

Although the researchers acknowledge that the sample size of this study was limited, and some of their hypotheses were not supported statistically, it is clear that the issue of attorney representation is important to all parties in workplace disputes. The fact that attorney-represented charging parties were less satisfied with the mediated outcomes perhaps points to the need for a better **[*418]** process as it relates to making representation accessible to the parties. As noted earlier, elements of trust and a sense of control over the process are key factors from the charging party's perspective. On this score, charging parties in mediation may have a degree of satisfaction if they are provided "technical assistance" versus having an attorney who also has a vested economic stake in the mediated outcome. These findings have significant implications for policy makers, ADR providers and the actual users of ADR in designing and administrating EEO mediation programs. It is within this context that the researchers offer the results of this study.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCopyright LawOwnership InterestsWorks Made for Hire

FOOTNOTES:

n1. See, e.g., Lamont E. **Stallworth,** The Arbitration of Discrimination Grievances: An Examination of the Arbitration of Sex and Race-Based Discrimination Grievances Since World War II (1980) (unpublished Ph.D. dissertation, Cornell University) (on file with the Cornell University ILR Library).

n2. See Nat'l War Labor Bd., U.S. Dep't of Labor, Termination Report (1947); Edwin Witte, Wartime Handling of Labor Disputes, 25 Harv. Bus. Rev. 169 (1947).

n3. At the outset of World War II, the executive branch of the government adopted the phrase, "an arsenal of democracy," to describe a national defense program which demanded the complete utilization of the country's manpower. Recognizing that discrimination against workers based on race, creed, color, or national origin was antithetical to the national war effort, the President enacted Executive Order 8802 on June 25, 1941;

Whereas it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders ... . I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries without discrimination because of race, color, creed, or national origin ...

Exec. Order 8802, 3 C.F.R. 957 (1938-43).

Executive Order 8802 was amplified by Executive Order 9346 on May 27, 1943, which pronounced that it was the duty of all employers and all labor organizations "to eliminate discrimination in regard to hire, tenure, terms or conditions of employment, or union membership because of race, creed, color or national origin." Exec. Order 9346, 3 C.F.R. 1280 (1938-1943). To carry out this objective of eliminating racial discrimination in employment, the Fair Employment Practices Committee was established.

Each President since 1940 has issued Executive Orders prohibiting discrimination by government contractors. See Herbert Hill, Black Labor and the American Legal System 178 n.11 (Univ. of Wisc. Press ed. 1985) (1977). After the end of World War II, many northern and western states adopted fair employment practices acts, to be enforced by administrative agencies. They were largely ineffectual. See Arnold Rose, The Negro in America 124 (1964); Arthur Earl Bonfield, The Origin and Development of American Fair Employment Legislation, 52 Iowa L. Rev. 1043 (1967); Alfred Blumrosen, Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study, 19 Rutgers L. Rev. 187 (1965); Herbert Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations, 14 Buffalo L. Rev. 22 (1964). In addition the Supreme Court in Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944), in effect attached a prohibition of racial discrimination onto the Railway Labor Act.

n4. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

n5. 415 U.S. 36 (1974). In Gardner-Denver, the Supreme Court held that a discharged employee whose grievance had been submitted to arbitration pursuant to a collective bargaining agreement was not foreclosed from bringing a Title VII action based on the conduct that was the subject of the grievance. The court noted that the employee's contractual rights under the collective bargaining agreement were distinct from his statutory Title VII rights and that the arbitrator's role was to "effectuate the intent of the parties [as expressed in the collective bargaining agreement]," not to enforce public laws. Id. at 53. The Court also stressed that "federal courts have been assigned plenary powers to secure compliance with Title VII," id. at 45, and that "there is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." Id. at 47. Although most courts read Gardner-Denver to mean that employees could not be compelled through employment contracts to submit statutory discrimination claims to binding arbitration, thus waiving a judicial forum, the Supreme Court disagreed, at least outside the collective bargaining context. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

In Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998), the Supreme Court distinguished arbitration clauses in collective bargaining agreements from those contained in individual employment contracts but avoided the central problem - whether a union may bargain away the rights of members to litigate statutory civil rights claims in court. Id. at 76-77. Justice Scalia, writing for a unanimous Court, recognized the "tension" between Gardner-Denver and Gilmer but concluded that it was unnecessary to decide whether Gilmer had so undermined Gardner-Denver that a union could waive employees' right to a judicial forum on statutory causes of action through a bargained-for arbitration clause. Id. In American labor law there is a presumption of arbitrability under a collective bargaining agreement. That presumption is based on the conclusion that arbitrators chosen by the parties are in a better position than the courts to interpret the terms

of a collective bargaining agreement. Id. at 78. Wright's case, however, concerned not the application of the collective bargaining agreement but the construction of a federal statute, and that is not a question which arbitrators are in a better position than courts to answer. The presumption of arbitrability thus extends only to issues of contract interpretation. Unions and employers might bargain for arbitration of all claims of employees covered by the contract, including statutory claims, but any such waiver of employees' ordinary rights would have to be "clear and unmistakable." The Court continued:

Whether or not Gardner-Denver's seemingly absolute prohibition of union waiver of employees' federal forum rights survives Gilmer, Gardner-Denver at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a collective bargaining agreement. The collective bargaining agreement in this case does not meet that standard. Its arbitration clause is very general, providing for arbitration of "matters under dispute," which could be understood to mean matters in dispute under the contract ... The Fourth Circuit relied upon the fact that the equivalently broad arbitration clause in Gilmer - applying to "any dispute, claim or controversy" - was held to embrace federal statutory claims. But Gilmer involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees - and hence the "clear and unmistakable" standard was not applicable.

Id. at 80-81. Because the collective bargaining agreement did not contain a clear and unmistakable waiver of Wright's right to a federal forum for his ADA claim, the decision of the Fourth Circuit was vacated and the case remanded so that Wright could pursue his cause of action.

n6. See, e.g., David Feller, Arbitration: The Days of Its Glory are Numbered, 2 Indus. Rel. L.J. 97 (1977).

n7. See, e.g., Michele M. Hoyman & Lamont E. **Stallworth,** Arbitrating Discrimination Grievances in the Wake of Gardner-Denver, 106 Monthly Lab. Rev., Oct. 1983, at 3.

n8. See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 985-1014 (1991); Michael J. Sniffen, Work-Related Bias Lawsuits Soared During 90's, Chi. Sun-Times, Jan.17, 2000, at 21.

n9. See Wayne F. Cascio, Costing Human Resources: The Financial Impact of Behavior in Organizations 83-105 (4th ed. 2000).

n10. See Michael Arndt, Overworked, Ineffective, EEOC Can't Keep Up, Chi. Trib., Feb.12, 1995, at 1; Paul A. Driscoll, Rights System Here Called a "Disaster," Chi. Daily L. Bull., Nov. 16, 1993, at 1; Glen Johnson, Bias-Fighting Agencies Struggle With Rapid Rise In Complaints, Chi. Daily L. Bull., July 5, 1994, at 1; Peter T. Kilborn, Backlog of Cases Is Overwhelming Job-Bias Agency: Some Workers Giving Up, N.Y. Times , Nov. 26, 1994, at A1.

n11. 42 U.S.C. 1981 (2000).

n12. 42 U.S.C. 12117(a) (2000).

n13. 500 U.S. 20 (1991).

n14. 29 U.S.C. 621-33 (2000).

n15. 9 U.S.C. 1-16 (2000).

n16. Gilmer, 500 U.S. at 26.

n17. Id. at 28.

n18. 532 U.S. 105 (2001).

n19. See, e.g. Joseph D. Garrison, The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More Than A Waiver of A Worker's Rights, 52 Disp. Resol. J., Fall, 1997, at 15; Michael Z. Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 Rutgers L.J. 399 (2000); Martin J. Oppenheimer & Cameron Johnstone, A Management Perspective: Mandatory Arbitration Agreements Are An Effective Alternative to Employment Litigation, 52 Disp. Resol. J., Fall, 1997, at 19; David Sherwyn et al., In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water and Constructing a New Sink in the Process, 2 U. Pa. J. Lab. & Empl. L. 73 (1999).

n20. See, e.g., Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong. (2001); Civil Rights Procedures Protection Act of 2001, S. 163, 107th Cong. (2001).

n21. 534 U.S. 279 (2002).

n22. In Waffle House, the Court addressed the effect of private mandatory arbitration agreements on the EEOC's right to enforce the various non-discrimination laws. Id. at 282, 287. The Court held that private agreements to arbitrate employment disputes have no effect on the EEOC. Id. at 298-99. The Court stated that under the plain language of Title VII, the EEOC unambiguously has the right to obtain both broad injunctive relief and victim-specific monetary relief. Id. at 286-88. Nothing in Title VII suggests "that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available." Id. at 288.

The Court next examined the FAA and observed that, although the FAA ensures the enforceability of private agreements to arbitrate, only parties to such agreements are bound. The FAA does not purport to place any restrictions on non-parties, like the EEOC. Therefore, arbitration agreements do no restrict the EEOC's choice of forum and, consequently, its right to sue in court for any remedy authorized under Title VII. Id. at 289.

n23. See Illinois Human Rights Commission and CEDR Offer ADR For Job Bias Cases, 5 World Arbitration & Mediation Rep., Apr., 1994, at 76; Arnold M. Zack & Michael T. Duffy, ADR and Employment Discrimination: A Massachusetts Agency Leads The Way, 51 Disp. Resol. J., Oct., 1996, at 28; but see Diane E. Lewis, Lawyers Group Urges Boycott of MCAD Arbitration Program, Boston Globe, May 17, 1998, at 44.

n24. See SPIDR, Guidelines For The Design Of Integrated Conflict Management Systems Within Organizations (Aug. 2, 2000), available at <www.spidr.org> or <www.crenet.org> (last visited Nov. 24, 2002).

n25. The issue of worker representation in mediation has been the concern of a number of professional organizations. See SPIDR Panel Tackles Issue of Unrepresented Claimant, Individual Empl. Rts. (BNA), Sept. 20, 1995, at 3. In addition, at least one member of congress has recognized the problem of worker representation and proposed legislation to address it. See Employment Dispute Resolution Act of 1994, S. 2327, 103d Cong. (1994); Danforth Introduces Mediation Bill, Daily Lab. Rep. (BNA), July 29, 1994, at A-20.

n26. See, e.g., Fogerty v. Fantasy, Inc., 510 U.S. 517, 523 (1994) (Title VII is a policy "Congress considered of the highest priority"); Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 759 (1989); United States v. Paradise, 480 U.S. 149, 167 (1987); Guardians Ass'n v. Civil Service Comm'n of City of New York, 463 U.S. 582, 600 (1983); Consolidated Foods Corp. v. Unger. 456 U.S. 1002, 1003 (1982) (Blackman, J., concurring); New York Gaslight Club, Inc., et al. v. Carey, 447 U.S. 54, 63 (1980); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 418-19 (1978); Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 66 (1975); Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 719 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

n27. See Lewis Maltby, Paradise Lost - How the Gilmer Court Lost The Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y. L. Sch. J. Hum. Rts. 1 (1994); Lamont E. **Stallworth,** Finding A Place for Non-Lawyer Representation in Mediation, 4 Disp. Resol. Mag., Winter 1997, at 19.

n28. See, e.g. Michele Hermann et al., The Metrocourt Project Final Report (1993); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991);. Michele Hermann, New Mexico Research Examines Impact of Gender and Ethnicity In Mediation, Disp. Resol. Mag., Fall 1994, at 10; Gary LaFree & Christine Rack, The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 L. & Soc. Rev. 767 (1996).

n29. See Hermann, supra note 28.

n30. Id. at 10.

n31. Id.; see also Hermann et.al., supra note 28, at 97.

n32. Hermann, supra note 28, at 10; see also Hermann et al., supra note 28 at 115-16.

n33. Hermann et al., supra note 28 at 116.

n34. Hermann, supra note 28, at 10.

n35. Id at 10-11.

n36. The employment mediation activities of Midland Mediation and Settlement Services are summarized below:

[SEE TABLES IN ORIGINAL]

Source: Testimony of Wayne A. White, Kansas Legal Services, Inc. Hearing before the Senate Ways and Means Subcommitte on Human Rights Commission, February 8, 2000, Chairman, Senator Larry Salmons.

n37. Notwithstanding the relatively small number of disputants who responded to the survey, the researchers are of the opinion that the substantial number of questions posed contributes to the robustness of study; therefore some generalizations may be made from this study. See Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences (Patricia Cohen et al. eds., 3d ed. 2002).

n38. The question used to obtain the relevant data was as follows:

Did you have any prior personal experience with the voluntary mediation of any type of dispute?

1	2	3	4	5
None	Hardly Any	Some	A Fair Amount	Substantial
X				

n39. The question used to obtain this data was:

Was the timing (e.g., number of days) of your mediation effective for it to contribute positively to the resolution of your human rights dispute? (If you check no, then also check which stage would have been most effective).

A. Yes, the timing of my mediation was appropriate. (Describe when your dispute settled - Refer to the list "a to e" below)

B. No, the mediation could have been more effective if it were held at ONE of the following stages: Please, also, check one of the following:

a. Prior to a formal charge being filed with the KHRC

b. Via an internal dispute resolution system, e.g., grievance procedure

c. After a formal charge has been filed with the KHRC

d. After a full investigation that shows probably cause

e. Prior to a court determination

f. After a trial court determination

n40. Correlation is a statistical technique that establishes the degree to which two variables co-vary. In other words, what is the probability that as one variable increases (or occurs), the other will also increase (or occur). A positive correlation (as in the above three cases) means that the direction of variance is the same, meaning that as one increases, the other will also increase. A negative correlation would imply that as one variable increases, the other variable would decrease, or move in the opposite direction.

n41. See, e.g., Donald B. Reder, Mediation as a Settlement Tool for Employment Disputes, 43 Lab. L.J. 602 (1992); Carol A. Wittenberg et al., Employment Disputes, in Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators 441 (Dwight Golan, ed.1996); Lamont E. **Stallworth** & Carolyn Hernandez, Labor Arbitration and Alternative Methods of Resolving Employment Discrimination Disputes, Workplace Topics, July 1992.

n42. See Cheryl Niro, The Decision Tree: A Systematic Approach to Settlement Decisions, 82 Ill. B.J. 154 (1994).

n43. See, e.g., Lamont E. **Stallworth** & Linda K. Stroh, Who is Seeking to Use ADR? Why Do They Chose to Do So, 51 Disp. Resol. J., Jan.-Mar. 1996, at 30; Arup Varma & Lamont E. **Stallworth,** Barriers To Mediation, 55 Disp. Resol. J., Feb. 2000, at 32.

n44. See Nancy Rogers & Craig McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. Disp. Resol. 831 (1998).

n45. For a discussion of various mediation styles, see Deborah M. Kolb, The Mediators, ch. 2 (1985); James J. Alfini, Trashing, Bashing and Hashing it Out: Is This the End of Good Mediation?, 19 Fla. St. U. L. Rev. 47 (1991).

n46. For a discussion of evaluative and facilitative mediation see John W. Cooley, The Mediator's Handbook: Advanced Practice Guide for Civil Litigation 1.2.2-1.2.4 (2000).

n47. For discussion of the effectiveness of early mediation, see Aimee Gourlay & Jenelle Soderquist, Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes, 21 Hamline L. Rev. 216 (1998); Mickey Meece, The Very Model of Conciliation, N.Y. Times, Sept. 6, 2000, at C1.

n48. Varma & **Stallworth,** supra note 43.

n49. See, Lamont **Stallworth** & Martin H. Malin, Workforce Diversity: A Continuing Challenge for ADR, Disp. Res. J., June 1994, at 27, 32-33.

n50. Social desirability (s.d.) is generally viewed as the tendency on the part of individuals to present themselves in a favorable light, regardless of their "true feelings" about an issue or topic. This tendency is presumed to be problematic, not only because of its potential to bias the answers of the respondents, but also because it may either mask relationships between two or more variables or produce "spurious" relationships that don't really exist. See, e.g., Daniel C. Ganster et al., Social Desirability Response Effects: Three Alternative Models, 26 Acad. Mgmt. J. 321 (1983); Wilfred J. Zerbe & Delroy L. Paulhus, Socially Desirable Responding In Organizational Behavior: A Reconception, 12 Acad. of Mgmt. Rev. 250 (1987).