WHO is seeking to use ADR?

WHY do they choose to do so?

By Lamont E. Stallworth, Ph.D. and Linda K. Stroh, Ph.D.

Litigation, like surgery, will sometimes be necessary. But it's the client, like the patient, who bears the risks and should be entitled to choose among the available options.

Professor Robert L. Cochran

As we approach the year 2000, there will be more females, members of racial minorities, individuals over the age of 40 and disabled employees in the workplace than ever before.[1] For employers, labor organizations and public policy makers, the term *diversity* must take on increasingly significant meaning.[2] Yet future scholars may look back on our time and say, as Charles Dickens did about the last decades of an earlier century, "It was the best of times, it was the worst of times."

Attendant with this dramatic demographic change in the workplace are numerous federal, state and local Equal Employment Opportunity (EEO) or anti-discrimination statutes and ordinances. These statutes include, but are not limited to, Title VII of the Civil Rights Act, as amended; the Age Discrimination in Employment Act; the Pregnancy Disability Act; the Americans with Disabilities Act; and the Civil Rights Act of 1991.[3] All represent good public policy. As a matter of public policy, our industrial society has recognized that sexism, racism and ageism shall not be used as a basis for depriving individuals of the privilege or the right to contract their labor.[4] Consequently, it is now essentially unlawful for an employer or labor organization to discriminate against individuals based on their race, sex, or other "immutable characteristics."[5]

In signing the various acts, the U.S. government entered into what may be referred to as the "Workplace Civil Rights Contract with the American Worker" and employer and labor organizations. The "Contract with the American Worker" makes two general and basic promises: (1) that it is unlawful to discriminate against managerial and non-managerial workers and (2) that the public justice system will provide a forum in which disputants, claimants, employers and labor organizations can submit their EEO disputes for fair and timely resolution or disposition.

Unfortunately, the "Contract with the American Worker" has not been honored. As one scholar has pointed out, the "transmission of civil rights law" in the workplace has not been effectuated.[6]

Specifically, in fiscal year 1993, the Equal Employment Opportunity Commission (EEOC) entertained 88,000 claims, 15,000 of which were filed under the Americans with Disabilities Act.[7] In fiscal year 1994, it has been reported that the EEOC entertained between 97,000 and 100,000 claims. Thus far in fiscal year 1995, 87,476 cases have been filed.[8]

State anti-discrimination agencies also are struggling to keep pace, because of an ever-increasing caseload, dwindling budgets and dwindling staffs. This situation has resulted in substantial delays in the time it takes for claims to be investigated and resolved. For example, it has been

The changing face of workforce composition has led to significant legislation: Title VII of the Civil Rights Act, as amended; the Age Discrimination in Employment Act; the Pregnancy Disability Act; the Americans with Disabilities Act; and others. "All represent good public policy," say the authors. These acts and statutes have not, however, "cleaned up" the workplace, not-so-mute testimony to which are the increasing numbers of EEOC and ADA claims. To keep pace with this rising tide of cases, many federal and state agencies have turned to alternative dispute resolution. This increasing use highlights the need to quantify data that facilitate the various processes used: specifically, what factors predict a disputant's willingness to use ADR, and why EEO disputants voluntarily choose ADR. Stallworth and Stroh examine these questions.

estimated that, under EEOC procedures, it takes an average of up to two years for the Commission to investigate most claims.[9] Under some state anti-discrimination agency procedures, it may typically take 22 months before an investigation is even commenced and three, four, or more years for a final investigatory determination. This common situation not only constitutes a breach of the "Contract with the American Worker" and a failure to transmit workplace civil rights laws, it also places undue psychological and economic stress and hardship on claimants.[10]

Similarly, this situation often places undue hardship on the employer, the organization and the alleged individual discriminator, particularly in sexual harassment cases.[11] It is not unusual for an employer to spend $100,000 or more to defend a charge.[12] In general, it can be concluded that neither claimants nor respondent employers and labor organizations are satisfied with the current state of EEO agency administrative process and litigation or with the public justice system on the federal, state, or local level.[13]

The Alternative: ADR

As the quotation by Robert Cochran cited at the beginning of this article points out, there is an alternative to the "surgery" attendant to the traditional or conventional EEO administrative and litigation process. This alternative has come to be termed alternative dispute resolution (ADR), primarily fact-finding, mediation and arbitration.[14]

Alternative dispute resolution processes may be preferred over the traditional process related to EEO litigation and the public justice system for several recognized reasons.[15] Generally, disputants who elect ADR perceive the process to be fair, timely and cost-effective and appreciate most the fact that they have input and/or control over who will be the third-party neutral and, in some instances, over the outcome of the process. The latter is particularly true when the disputants mutually select mediation.

Congress and the executive branch of the federal government have recognized the ability and, indeed, the practical necessity to promote the use of alternative dispute resolution processes to resolve EEO disputes arising under the Civil Rights Act of 1991 and the Americans with Disabilities Act. Both of these statutes incorporate provisions that state as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.[16]

Most recently, the EEOC has unequivocally announced its support of ADR as a matter of national policy and plans to implement primarily mediation programs in 1996.[17]

In addition, federal and state judiciaries are increasingly endorsing and promoting ADR by court decision[18] and by adopting court-annexed ADR programs.[19] The courts are even mandating participation in mediation and advisory arbitration.[20] The promotion of ADR is further supported under the Legal Reform Proposal as incorporated in the most recent Contract with America.[21]

Consequently, it is fair to state that general public policy favors and endorses alternative dispute resolution, specifically in the EEO area. Notwithstanding this fact, questions still exist as to (1) why EEO disputants voluntarily resort to fact-finding, mediation, or arbitration and (2) what factors predict a disputant's willingness to use ADR. The purpose of this article is to begin to answer these questions empirically.

Significance of Exploratory Study

The use of ADR processes such as fact-finding, mediation, and final and binding arbitration has proven to be effective and generally accepted under our traditional industrial relations system.[22] But, interestingly, there was little, if any, systematic empirical evidence at the time to support the Supreme Court's endorsement of arbitration (and other agreed-upon means) in the landmark *Steelworkers' Trilogy* (1960)[23] in which the court endorsed arbitration as a preferred means of resolving industrial disputes as a matter of national public policy.[24]

The traditional labor-management model or paradigm for resolving workplace disputes is not immediately transferable to the individual employee-employer model (the EEO dispute model) or paradigm.[25] Under the traditional model, labor and management are assumed to be concerned primarily with "institutional" or collective interests and rights.[26] This has been referred to as "traditional labor law" or labor relations.[27]

For employers, labor organizations and public policy makers, the term diversity must take on increasingly significant meaning.

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Unfortunately, the "Contract with the American Worker" has not been honored.

Under the EEO dispute model, which typically arises in an "individual employee-employer" relationship, there is no contract, except the broader, statutory-based "Workplace Civil Rights Contract with the American Worker" (*e.g.*, Title VII, etc.) inherently reflected in various federal and state anti-discrimination laws.

There is another distinction between the traditional labor-management model and the typical EEO dispute model. Specifically, the proximate employee-employer relationship is different. In the case of the traditional labor-management model, the claimant employee(s) usually has a representative available who can represent him or her under the non-discrimination and/or just-cause provision of the labor agreement. This creates an institutional dynamic between two entities, rather than between an employer and an individual employee. This institutional dynamic does not typically exist under the EEO dispute model. Indeed, the issue of "imbalance of power" and claimants' difficulty in securing legal representation has prompted such proposed legislation as the Employment Dispute Resolution Act.[28] It has also become generally recognized that unrepresented claimants do not fare well in the mediation and arbitration process.[29]

The labor-management model can also be distinguished from the EEO dispute model in terms of claimants' perception of the fairness of the grievance arbitration process, the timeliness for progressing grievances to arbitration, claimants' familiarity with the contractual dispute resolution process, and claimants' perception of the time exhausted between the date of filing a grievance and the final resolution of the dispute. Specifically, under the labor-management model, it generally can be said that grievances contractually must progress in a timely fashion and the claimants and even the employer-disputant(s) are more familiar and more comfortable with the process and less reluctant to seek redress under the contractual dispute resolution process. It may further be presumed that claimants generally perceive the contractual dispute resolution process and outcome to be fair.

These distinctions between the traditional labor-management model and the EEO dispute model serve as the basis for several significant questions and theoretical hypotheses that remain to be addressed as public policy is developing related to alternative methods for resolving statutory-based employment discrimination disputes.

Among the more important areas of inquiry related to the effectuation of this public policy is the willingness of disputants to seek fact-finding, mediation, or arbitration. The following hypotheses were posed and tested:

Hypothesis 1: Those respondents and claimants who perceive the EEO administrative and litigation process currently being used to resolve their employment disputes as most unfair will be more willing to submit their disputes to fact-finding, mediation, or arbitration than those who perceive the current public justice system (in this case, the Illinois Human Rights Commission) to be more fair.

Hypothesis 2: Those respondents and claimants whose cases have been filed with the initial investigatory agency (Illinois Department of Human Rights) for the least amount of time will be more willing to submit their disputes to fact-finding, mediation, and arbitration than those whose cases have been pending for a longer period of time, *i.e.*, disputants are more inclined to seek ADR at the early investigative stage.

Hypothesis 3: Those respondents and claimants who are more familiar with the term "ADR" and its processes of fact-finding, mediation and arbitration will be more willing to submit their disputes to fact-finding, mediation, or arbitration.

Hypothesis 4: Those respondents and claimants who are most interested in having their disputes resolved in a more timely fashion (*i.e.*, within six to nine months versus two years or more) will be more willing to submit their disputes to

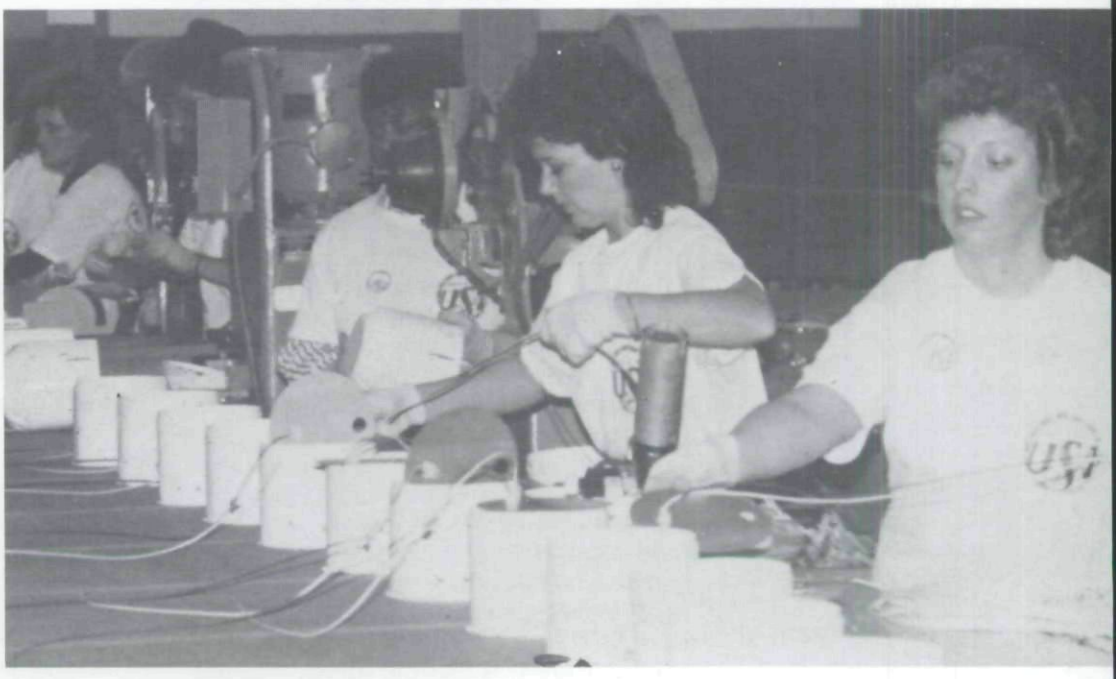
As a matter of public policy, it is unlawful for employers to discriminate against employees based on their race, sex or other immutable characteristics

fact-finding, mediation, or arbitration than disputants who are less interested in a timely resolution. Thus, the "degree of urgency" to resolve a dispute greatly determines a disputant's willingness to use alternative dispute resolution.

Hypothesis 5: Those respondents and claimants who believe that their disputes have taken longer to resolve than they expected are more willing to submit their disputes to alternative dispute resolution.

Hypothesis 6: Those respondents and claimants who have retained an attorney who is familiar with negotiations and other ADR processes will be more willing to submit their disputes to alternative dispute resolution.

The current literature does not explore these areas of inquiry. Consequently, the hypotheses posed and tested are based more on intuitive theoretical bases than on a body of previous empirical literature.



The use of arbitration and other ADR processes is generally accepted under the traditional industrial relations system, which includes workers such as those shown above.

Study, Scope, Design, and Research Method

The data collected for this seminal exploratory study were from a broader applied research project in which EEO disputants, who have disputes pending with the Illinois Human Rights Commission, were offered the alternative to use fact-finding, mediation, or final and binding arbitration. The applied research project was established and administered by the Center for Employment Dispute Resolution (CEDR), a not-for-profit public policy research organization.[30] The Illinois Human Rights Commission cooperated on the ADR project.

As part of the applied research project, survey questionnaires were mailed to disputants involved in some 3,000 cases pending at the Illinois Human Rights Commission as of 1993. Along with other questions, this survey asked the disputants several questions related to their willingness to submit their disputes to fact-finding, mediation, or final and binding arbitration, pursuant to the rules established by CEDR.[31]

The study was somewhat limited by the use of a two-page questionnaire incorporating single-item measures. Although some researchers have reservations regarding the use of single-item measures, they have often been found to be as good or better measures of interest than more complex methods.

The survey was distributed in two ways. In the situation of long-term cases, CEDR created a data bank of disputants and then mailed the survey instruments to them or their representatives. In the case of claims that were more recently docketed, the Commission mailed the survey to the disputants with other agency administrative documents. The survey cover letter assured disputants of confidentiality, and the survey was returned by prepaid mail directly to CEDR. During the time period for this study, the commission, an adjudicatory agency, had a case inventory of some 3,000 cases and six administrative law judges. It typically took three to five years from docketing to hearing to an administrative law judge decision.

One unavoidable and institutional limitation of the study is that the Commission is an adjudicatory agency. The cases it hears are submitted subsequent to being investigated for possible finding of "substantial evidence" or if claimants have elected to advance their uninvestigated claims from the Illinois Department of Human Rights (Department) to the Commission during a 300-day window period.[32]

It is not unusual for the Department to take 22 months to "commence" an

investigation and three, four, or more years to complete an investigation. Consequently, the researchers could not ascertain disputants' willingness to use ADR at the very early or initial filing stage. The researchers speculate that more disputants might be more willing to use ADR at this early stage than at the Commission stage, which often occurs four to six years later. It is surmised that by this late time, a number of claimants may have secured other employment and thus have a lessened sense of immediate economic and psychological urgency.[33] The experience of the Commission and of other enforcement agencies indicates, however, that an impending economic hardship, such as the loss of a home or the dissolution of a family, regularly causes claimants to write and call "pleading" for the resolution of their disputes.[34]

As stated earlier, another limitation of the study was that the survey was limited to single-measure items and did not inquire into other unique factors that might explain the decision process related to submitting a particular claim to ADR.[35] What we wanted to ascertain was merely what factors influence disputants' "willingness" to seek ADR.

Of the approximately 3,000 disputants surveyed, 109 employers and 102 claimants (n = 211) responded to the survey instrument. Of the claimant sample, 69% was employed in the private sector and 31% in the public sector. Of the disputes considered, 30% involved race discrimination; 10% involved sex discrimination; 7% involved age discrimination; 6% were sexual harassment claims, and 3% were disability claims. (See Table 1).

The claimants who responded were an average of 44 years of age (range 25 to 80); 45% were male and 55% were female. Fifty-one percent were married, 5% widowed, 16% divorced, and 28% single or never married. Fifty-five percent of the claimants were African-Americans or black, 8% were Hispanic, 33% were white, 1% were Asian, and 4% reported that they were "other."

Almost a third (31%) of the claimants had some college education; 27% had a high school or technical school education; and 7% had only a primary school education.

The dependent variable for this study was willingness to submit one's dispute to an alternative dispute resolution process, namely, fact-finding, mediation, or final and binding arbitration. This measure for "willingness" was a single-item stating, "I wish to submit my case to the ADR process." Respondent choices were "(1) Yes," and "(2) No." (See Table 2).

While the answer was not used as a dependent variable in this study, respondents were also asked whether they would like further information about ADR.

All independent variables were single-item measures assessing the following:

Perceptions of Fairness. Perceptions of fairness were assessed by asking, "Which of the following best describes your perception of fairness of the process currently being used to resolve this case?"

The term diversity takes on an increasingly significant meaning in the workplace as more immigrant workers (pictured here), minorities, women and individuals over the age of 40 join the workforce.

Response choices were based on a five-point scale ranging from "very fair" to "very unfair."

Date filed. The date a case was filed with the Illinois Human Rights Commission was determined with an open-ended question.

Familiarity with ADR. Respondents and claimants, and/or their representatives, were asked how familiar they were with ADR. Response choices were "familiar," "somewhat familiar," and "not familiar."

Interest in Mediation. Claimants were asked how interested they would be in using mediation if they knew their cases would be resolved within six to nine months, using a "trained third party neutral." Response choices were based on a five-point scale ranging from "very interested" to "not very interested."

Interest in Final and Binding Arbitration. Claimants were asked how interested they would be in using final and binding arbitration if they knew their cases could be resolved within six to nine months. Response choices were based on a five-point scale ranging from "very interested" to "not very interested."

Perception of Excessive Time Delay. To determine whether the process was perceived to be taking longer than expected, the survey asked respondents to "Please circle the number that best describes your feelings. Do you feel that this complaint is taking longer to resolve than you expected?" Response choices were based on a five-point scale ranging from "much longer" to "much less."

Attorney Representation. Claimants were asked whether they were represented by an attorney. Response choices were "Yes" and "No."

Means, standard deviations and correlation analysis were performed to provide descriptive statistics for the sample. Given that the dependent variable is a dichotomous variable (*i.e.*, "Yes" or "No"), logit analysis was used to determine predictors of a disputant's willingness to submit his or her dispute to ADR.

Perceptions of Fairness

The Model Chi-Square noted in Table 3 shows that perceptions of fairness is a predictor of disputants' willingness to submit their cases to the ADR process ($X2 = .37$, $p \leq .05$). Disputants in the sample who believed the current process to be most unfair were the most willing to submit their cases to alternative dispute resolution. This finding supports Hypothesis 1.

The Model Chi-Square with "date filed" as the predictor was also significant ($X2 - .26$, $p \leq .05$). The less time a case is in the current administrative process of the Commission, the more likely disputants are to submit their cases to an alternative dispute process, showing support for Hypothesis 2. This phenomenon may be explained by the fact that there is a greater "sense of urgency" to resolve a dispute when a statutory right has been involved and where the "exigency" or immediacy of an adverse action such as discharge prompts the disputants to seek resolution without further considerable expenditures for attorneys or loss of home, deterioration of family, and other non-economic costs.[36]

Table 1: Demographic Characteristics of the Sample

Characteristic	*Mean or Percent*
Age	14
Gender	
Male	45%
Female	55%
Average # of Children	2
Race	
Black	55%
Hispanic	8%
White	33%
Asian	1%
Other	3%
Type of Charge	
Race	30%
Sex	10%
Age	7%
Sex Harassment	6%
Religion	1%
National Origin	3%
Marital Status	1%
Physical Disability	3%
AIDS	3%
Mental	6%
Other (combination of above)	30%
Education	
Primary School	7%
Some H.S.	13%
H.S. Diploma	18%
Tech after H.S.	9%
Some College	31%
Bachelor's Degree	9%
Some Graduate School	4.5%
Graduate School	4.5%
Other	4%

Some familiarity with ADR processes did not predict disputants' willingness to submit their cases to an alternative dispute process ($X2 = .44$, $p = .46$). This fails to support Hypothesis 3. The lack of significance for this variable might be a function of lack of variance on the measure. None of the respondents classified themselves as "familiar" with ADR, 77% classified themselves as "somewhat familiar," and 23% were "not familiar at all." It can be inferred from this finding that educating the public about the ADR process through courses and conferences

Congress and the executive branch have recognized the ability and, indeed, the practical necessity to promote the use of ADR processes to resolve EEO disputes . . . Most recently, the EEOC has unequivocally announced its support of ADR as a matter of national policy . . .

and even public service announcements might enhance their willingness to use alternative dispute processes.

The Model Chi-Square with "interested in using mediation or arbitration if they knew they could settle their disputes in six to nine months" was also a significant predictor (X2 = -.81, -.51; $p \leq -.01$). Disputants in the sample who sought or desired to resolve their disputes within six to nine months using a "Trained Third Party Neutral" were most interested in using an alternative dispute resolution process to do so, showing support for Hypothesis 4.

Perceptions of the length of time the process should take (X2 = -.12, $p \leq .58$) or having an attorney (X2 = .47, $p \leq .40$) did not predict disputants' willingness to submit their cases to an ADR process. This fails to support Hypotheses 6 and 7. These findings, once again, may be a function of the limited variability. Most respondents (73%) perceived the current process as taking longer than they expected.

Table 2: Means, Standard Deviations and Correlations of Dependent and Independent Variables

Variables	*M*	*SD*	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*
1. Willingness to submit[a]	1.49	.50								
2. Perceptions of fairness[b]	2.46	1.11	.08							
3. Date filed[c]	5.01	1.44	.08	–.15*						
4. Familiar ADR[d]	1.23	.42	–.08	.00	–.07					
5. Settle case 6–9[e] months (mediation)	3.28	1.57	–.59**	.00	.07	.12*				
6. Settle case 6–9[e] months (arbitr)	2.94	1.54	–.53**	–.01	.00	.18**	.68**			
7. Perceptions of time[e]	4.17	.94	–.15*	–.31**	.30**	.18**	.28**	.27**		
8. Have attorney[g]	1.19	.39	–.18**	–.22**	.18**	.17**	.23**	.23**	.22**	

*Note: n=211. *means significant at .05. **means significant at .01. [a]high=will not submit to ADR. [b]high=very fair. [c]highest=1986; lowest 1994. [d]high=familiar, low=not familiar. [e]high=very interested. [f]high=taking much longer. [g]high=no.*

In summary, the Model Chi-Square showed support for Hypotheses 1, 2, and 4. Those perceiving the current EEO administrative process as most unfair; those who had filed most recently; and those most interested in settling their disputes in a six-to-nine-month period using a "Trained Third Party Neutral" were most willing to submit their cases to ADR.

Conclusion

The authors recognize the methodological limitations of the study. Caution should therefore be taken before drawing any broad generalizations from the findings. Nonetheless, this study confirms several intuitively- and experientially-based hypotheses related to disputants' willingness to submit their disputes to ADR.

Disputants are most willing to use ADR when it is available early in the process. This is particularly the case when the disputants perceive the EEO administrative process as being unfair and when there is a promise or expectation that the dispute will be resolved within six to nine months. This willingness to seek ADR is predictable particularly if a sense of urgency exists either when the charge is initially filed; when the dispute is scheduled for hearing or trial; or before discovery proceedings. This is supported by the frequent phenomenon of disputants settling disputes either at the "courthouse steps," during the "eleventh hour," or before making a substantial investment in attorney fees and discovery costs. At these stages, both parties appear to have a greater sense of "urgency."

From a public policy perspective, this finding suggests that public policy-makers should consider investing in ADR efforts at three stages: (1) at the early charge stage, (2) at the prediscovery stage, and (3) at the trial court or hearing stage. From an administrative efficiency point of view, it would be more cost-effective to resolve disputes at the early charge stage. Consequently, perhaps this is the stage when the greatest and most rigorous ADR efforts should be made. Certainly, the earlier a dispute is resolved, the lesser the economic and psychological burden will be on the disputants, particularly the claimants.

Another significant finding from this study is which party is more willing to seek ADR. The study reveals that respondents and claimants have a nearly equal desire to seek ADR. From a practical point of view, a more problematic aspect of the ADR pilot project was matching or "brokering" cases so that both disputants would agree to ADR. In fact, in some 200 cases, one party expressed a willingness to use ADR and the other side would not agree. This phenomenon raises the public policy question as to whether, under such circumstances, the "non-affirming" disputant should be mandated or

required to participate in an alternative dispute resolution process, *i.e.*, mediation.

One of the major findings of this study is that approximately 90% of disputes submitted to mediation were successfully resolved. Thus, it is fair to conclude that mediation can be used as an effective tool in resolving EEO disputes. It works!

Unquestionably, as civil rights are expanded in the workplace and the workplace becomes more demographically diverse, there will be an increasingly urgent need to encourage disputants to resolve their disputes as early as possible. This exploratory study has attempted to identify the factors that might predict disputants' willingness to seek ADR. There is and will be a need to further examine and evaluate empirically this rapidly developing area and field of research to ascertain not merely the number of disputes that are resolved but what factors contribute to the effective resolution of such disputes. In pursuing such efforts, we should remain mindful of the broader and more significant non-discrimination issues related to the underlying public policy against discrimination and the quality of justice.[37]

■

Table 3: Predictors of Willingness to Submit Case to ADR*

Independent Variable	*Beta*	*S.E.*
Perceptions of fairness[b]	.37*	.18
Date filed[c]	.26*	.14
Familiar ADR[d]	.44	.59
Settle case 6–9[e] months (mediation)	–.81**	.16
Settle case 6–9[e] months (arbitration)	–.51**	.15
Perceptions of time[f]	.12	.22
Have attorney[g]	.47	.56
Model Chi Square	99.09**	
Degrees of Freedom	(7)	

*Note: n=211. *means significant at .05. **means significant at .01. [a]high=will not submit to ADR. [b]high=very fair. [c]highest=1986; lowest 1994. [d]high=familiar, low=not familiar. [e]high=very interested. [f]high=taking much longer. [g]high=no.*

ENDNOTES

[1] See, for example, Johnston and Packer, *Workforce 2000* (Hudson Institute, 1987).

[2] See, for example, Jamieson and O'Mara, *Managing Workforce 2000: Gaining the Diversity Advantage* (Jossey-Bass, 1991); Abraham & Flippo, *Managing a Changing Workforce* (Commerce Clearing House, 1991); and Cox, *Cultural Diversity in Organizations: Theory, Research and Practice* (Berrett-Koehler, 1993).

[3] See, for example, *U.S. Labor and Employment Laws* (BNA Books, 1989). Also see Hunt and Strongin, *The Law of the Workplace: Rights of Employers and Employees* (BNA Books, 1994).

[4] *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale Law Journal* 1245 (1965); "The New Property," 73 *Yale Law Journal* 733 (1963); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; *Boddie v. Connecticut*, 401 U.S. , at 378, 91 S.Ct., at 786; *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307; *Perry v. Sindermann*, 408 U.S. 593, at 602, 92 S.Ct. 2694, at 2705, 93 L.Ed.2d 570.

[5] A mutable characteristic, for example, would be the length of an individual's hair or style of clothing or dress, which can readily be changed. An immutable characteristic would be an individual's race, gender, religion, marital status, or sexual orientation, which cannot be readily changed and does not affect the individual's ability to perform a job. It is these immutable characteristics that are increasingly becoming protected under various workplace civil rights laws such as Title VII. See, generally, Roberta Achtenberg (ed.), National Lawyers Guild Lesbian-Gay Rights Committee, *Sexual Orientation and The Law* (Deerfield, Illinois: Clark, Boardman Callaghan, 1993). Also see Brian McNaught, *Gay Issues in the Workplace* (New York: St. Martin's Press, 1993).

[6] Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (University of Wisconsin Press, 1993). Also see Repa, *Your Rights in the Workplace* (2nd ed.) (Berkeley: Nolo Press, 1995).

[7] "Charges of Disability Discrimination Boost EEOC Intake by 22% in Fiscal 1993," *Daily Labor Report* (Jan. 13, 1994) pp. AA1–2.

[8] Peter T. Kilborn, "A Family Spirals Downward in Waiting for Agency to Act, *New York Times* (February 11, 1995). And see Michael Arndt, "Overworked, Ineffective, EEOC Can't Keep Up," *Chicago Tribune* (February 12, 1995). Also see Kilborn, "Backlog of Cases Is Overwhelming Job-Bias Agency: Some Workers Giving Up," *New York Times* (Nov. 6, 1994).

[9] Also see quote of Alvin Plummer, executive director, Missouri Human Rights Commission, attributing the backlog to "political hypocrisy," such that legislatures pass laws creating new rights but then refuse to fund staff to enforce the laws. See "Concerns Raised about Trend toward Using Alternative Dispute Process for Bias Claims," *Daily Labor Report* (Oct. 31, 1994) pp. A7–8.

[10] See, for example, Kilborn, "A Family Spirals Downward in Waiting for Agency to Act," and Michael Arndt, "Overworked, Ineffective, EEOC Can't Keep Up," *supra*, note 8. For an excellent article examining the economic and noneconomic cost a litigant must consider before filing a suit, see Sandra Gleason, "The Probability of Redress: Seeking External Support," in *Outsiders on the Inside: Women in Organizations*, ed. Barbara L. Forisha and Barbara H. Goldman (Englewood Cliffs, NJ: Prentice-Hall, 1981) pp. 171–87. Also see Jonathan D. Casper, "Having Their Day in Court: Defendant Evaluation of the Fairness of Their Treatment," *Law and Society Review* 12 (Winter 1978) pp. 237–51 and Robert Coulson, "Satisfying the Demands of the

The dependent variable for this study was willingness to submit one's dispute to an alternative dispute resolution process . . .

Employee," *Labor Law Journal* 31 (1980) pp. 495–97.

[11] See, for example, Danforth, *Resurrection: The Confirmation of Clarence Thomas* (Viking Penguin, 1994). For a woman's perspective on sexual harassment, see, for example, Morris, *Bearing Witness: Sexual Harassment and Beyond—Everywoman's Story* (Little Brown, 1994), and McCann and McGinn, *Harassed: 100 Women Define Inappropriate Behavior in the Workplace* (Business One Irwin, 1992).

[12] See, for example, "Costs of Litigation, Gilmer Decision Encourages Alternative Dispute Resolution," *Daily Labor Report* (Dec. 18, 1991) pp. A8–9.

[13] Christovich and Stallworth, "The Equal Employment Opportunity Act and Its Administration: The Claimant's Perspective," in *Annual Proceedings of the 38th Annual Meetings of the Industrial Relations Research Association* (Industrial Relations Research Association, 1983). Also see Howard, *Death of Common Sense: How Law is Suffocating America* (New York: Random House, 1994).

[14] See Dauer, "The Growth of ADR," in *Manual of Dispute Resolution: ADR Law and Practice* (McGraw-Hill, 1994) pp. 2-1 to 2-6.

[15] See, for example, Allison and Stahlhut, "Arbitration and the ADA: A Budding Partnership," *Arbitration Journal* (Sept. 1993), and Costello, "The Mediation Alternative in Sex Harassment Cases," *Arbitration Journal* (March 1992). Also see Reder, "Mediation as a Settlement Tool for Employment Disputes," *Labor Law Journal* (Sept. 1992) pp. 602–607.

[16] Section 513 of the Americans with Disabilities Act contains a similar provision and language.

[17] See, for example, "EEOC Approves Plan for Voluntary ADR Programs," *World Arbitration and Mediation Report*, Vol. 6, No. 5 (May 1995) pp. 97 to 98.

[18] Boomer, "Making the Most of Court Ordered Mediation," *Dispute Resolution Journal* (March 1964) pp. 17 to 22. Also see Rogers and McEwen, "Mandates By Law To Use Mediation," *Mediation, Law, Policy and Practice* (Clark, Boardman and Callaghan, 1989).

[19] Cohn, "Attorneys Endorse Mandatory Arbitration," *Illinois Bar Journal* 82 No. 3 (March 1994) pp. 140 to 149.

[20] Boomer, *supra*, note 18; Rogers and McEwen, *supra*, note 18; Cohn, *id.*

[21] See Republican National Committee, *Contract with America* (Random House, 1994).

[22] Bureau of National Affairs, *Basic Patterns in Union Contracts*, (13th Edition) (1992).

[23] Hays, *Labor Arbitration: A Dissenting View* (Yale University Press, 1966), which repudiates the precepts established in the *Steelworkers' Trilogy*. For a dissenting view, see Wallen, "Arbitrators and Judges: Dispelling the Hays Haze," *California Management Review* 9 (April 1967) pp. 17–24.

[24] See Feller, "The Impact of External Law Upon Labor Arbitration," in *The Future of Labor Arbitration in America* (American Arbitration Association, 1976).

[25] See "Agency Is Committed to ADR, But Questions Remain, Miller Says," *Daily Labor Report* (Jan. 24, 1995) pp. A7–9. Also see "EEOC Takes First Steps Toward Offering ADR Option," *Daily Labor Report* (April 26, 1995) pp. AA-1, E-1 to E-2.

[26] See, however, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), n19, where the court recognized the possible lack of harmony of interest in a racial discrimination grievance dispute in which an African-American grievant expressed his concern that his union would not adequately represent him. See *Steele v. Louisville-Nashville Railroad*, 325 U.S. 483 (1944), a case establishing the principle of a union's duty of fair representation. Also see Geoghegan, *Which Side Are You On?: Trying To Be for Labor When It's Flat on Its Back* (Farrar, Straus, 1991).

[27] See Feller, *supra*, note 24, in which he defines traditional labor law as the legal and institutional relationship between an employer and a labor organization, where collective rights and interests are the focus. However, employee-employer relations law is concerned with the legal relationship between an individual employee and employer; individual rights and interests are the focus of this relationship, and a labor organization is not necessarily involved.

[28] See S. 2327, Employment Dispute Resolution Act of 1994. Senator John Danforth was the sponsor of this bill in the 103rd U.S. Congress.

[29] See, for example, Lewis Maltby, "Paradise Lost—How the *Gilmer* Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights," *New York Law School Journal of Human Rights*, Vol. XII, Part One (Fall 1994) pp. 1 to 29. And see Maslanka, "The Ultimate Objective: Mandatory Arbitration of All Nonunion Employment Disputes,'' 1994 SPIDR Conference (Dallas, Texas, October 27, 1994) (Audio tape—The Sound of Knowledge, 3725 Balboa Terrace, Suite C, San Diego, California 92117, 619-483-4300), wherein the management advocate admits that unrepresented claimants do not fare well in either mediation or arbitration; however, employers are not subjected to jury verdicts and damage awards.

[30] CEDR is a not-for-profit organization that was established to assist employers, labor organizations, government entities, and employees resolve workplace diversity disputes using ADR. See "CEDR and the Illinois Rights Commission," *World Arbitration and Mediation Report* 5 (April 1994). See also "Focus: Alternative Dispute Resolution," *Workforce Strategies*, Vol. 4, No. 10 (October 25, 1993) pp. WS 57, WS 60.

[31] Disputants electing ADR who were in the applied research project were required to pay an administrative filing fee and to share the cost of the third-party neutral's fee. Neither the Commission nor the state of Illinois provided financial subsidy for this project. The researchers do not believe the cost for ADR had an effect on the disputants' willingness to use ADR. The questions posed in the survey instrument related to the willingness to use ADR and other non cost-related factors.

[32] Ecker and Gonzalez, "Handling Discrimination Cases in Illinois: A Practical Guide," *Young Lawyers Section, Chicago Bar Association Record* (Feb. 1991) pp. 28 to 31.

[33] See, for example, Christovich and Stallworth, "The Equal Employment Opportunity Act and Its Administration." And see "Equal Employment Opportunity Commission Alternative Dispute Resolution (ADR) Pilot Program" (1994) (Unpublished report). Also see "EEOC Approves Plan for Voluntary ADR Program," *World Arbitration and Mediation Report* Vol. 6, No. 5 (May, 1995) pp. 97, 98.

[34] See Kilborn, "A Family Spirals Downward," *New York Times* (February 11, 1995); and Arndt, "Overworked, Ineffective EEOC Can't Keep Up," *Chicago Tribune* (February 12, 1995).

[35] See, for example, Cheryl Niro, "The Decision Tree: A Systematic Approach to Settlement Decisions," *Illinois Bar Journal* 82 (March 1994). Also see Sandra E. Gleason, "The Probability of Redress," in *The Search for Support: Surviving the Workplace*, chap. 12, and Donohue III and Siegelman, "The Changing Nature of Employment Discrimination Litigation," *Stanford Law Review* 43 (May 1991) p. 983.

[36] *Id.*

[37] Bush, "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments," *Denver University Law Review* 66 (1989). See also Brunet, "Questioning the Quality of Alternative Dispute Resolution," *Tulane Law Review* 62 (Nov. 1987), and Edwards, "Alternative Dispute Resolution: Panacea or Anathema," *Harvard Law Review* 99 (Jan. 1986). See, for example, Rogers and McEwen, "Mandates By Law to Use Mediation," in *Mediation: Law, Policy and Practice* (Clark, Boardman, Callaghan, 1989) pp. 43 to 59. Also see Rogers and McEwen, "Laws Defining 'Quality' and Determining When It Matters" in *Mediation: Law, Policy and Practice* (Deerfield, Illinois: Clark, Boardman, Callaghan, 1989) pp. 181 to 186.